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30 Cal.App.2d 673

STEINER et al. v. VIRDEN PACKING CO. et al.

Civ. 10825.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1939.

Fraud ⚷43

Limitation of actions ⚷179(2)

In action for making false representations inducing purchase of stock, complaint which did not allege when or by whom representations were made, but from which it appeared that representations were made 15 years prior to suit, although falsity was allegedly not discovered until 2 years prior to suit, was demurrable for uncertainty and insufficiency of allegations seeking to avoid bar of limitations.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Alfred Steiner and others against the Virden Packing Company and others to recover damages for alleged fraud. Judgment for defendants, and plaintiffs appeal.

Affirmed.

J. Maxwell Peyser, of San Francisco, for appellants.

Leander L. James, of San Francisco, for respondents.

SPENCE, Justice.

In this action, forty-seven stockholders of the Virden Packing Company sought to recover damages from the corporation and numerous other defendants for alleged fraud in the making of certain representations to said plaintiffs as an inducement to the purchase of their stock. The demurrer of the defendants to the second amended complaint was sustained with leave to amend. Plaintiffs declined to amend and judgment was entered in favor of defendants. Plaintiffs appeal from said judgment.

The action was filed in 1935. The complaint contained forty-seven separate counts, each count embracing the alleged cause of action of one of the forty-seven plaintiffs. There is no direct allegation in the complaint showing when or by whom any of the alleged representations were made to any of the plaintiffs. Plaintiffs sought to avoid the bar of the statute of limitations and in their allegations with respect thereto, it appears that the alleged representations were made before 1920, being at least fifteen years prior to the commencement of the action. It was alleged that the falsity of the alleged representations was not discovered until 1933. Each plaintiff further alleged that "plaintiff is unable to state at this time the particular person or persons by whom said representations were made".

The alleged representations were "that meat packing plants * * * had been erected, maintained and operated * * * or that the same would be erected, maintained and operated" at Sacramento, Dixon, Los Angeles and other points and that the company "was in a position to pay and would pay a dividend immediately and was in a position to continue to pay such dividends for long periods of time". It was alleged that all of said representations were false and untrue.

Defendants interposed a demurrer, both general and special. In addition to the claim that neither the second amended complaint nor any count thereof stated a cause of action, the demurrer pointed out numerous uncertainties in the allegations of the complaint including uncertainties in the allegations by which plaintiffs sought to avoid the bar of the statute of limitations. Defendants also claimed misjoinder of parties and of causes of action and pleaded the bar of the statute of limitations.

Plaintiffs contend that the trial court erred in sustaining the demurrer but we find no merit in this contention. If it be assumed that the allegations of the complaint were sufficient to state a cause of action, the trial court was nevertheless wholly justified in sustaining the demurrer with leave to amend because of the uncertainties in the complaint which were attacked by said demurrer. Furthermore, it appears that the allegations by which plaintiffs sought to avoid the bar of the statute of limitations were insufficient. Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Collins v. Texas Co., 123 Cal. App. 60, 10 P.2d 773. When the nature of the alleged representations is considered, it is at once apparent that their falsity could have been discovered without delay by the exercise of the slightest diligence on the part of plaintiffs. We know of no facts which would have excused a delay of thirteen years in the discovery of the falsity of said representations but at any rate we are satisfied that plaintiffs pleaded no facts sufficient for that purpose.

In view of the conclusions we have reached, it is unnecessary to discuss the alleged misjoinder of parties and of causes of action.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

30 Cal.App.2d 635

OLSEN v. BOARD OF SUP'RS OF SAN LUIS OBISPO COUNTY et al. (Scott et al., Interveners).

Civ. 12114.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1939.

1. Appeal and error 🔑458(1)

A writ of supersedeas should issue if it appears that it is necessary to protect the rights of an appellant but it should not issue if it appears that appellant is not entitled to the relief denied by the judgment from which appeal has been taken.

2. Prohibition 🔑6(2)

Superior court did not err in refusing to prohibit county board of supervisors from canvassing returns of election on question of incorporation of territory as a city, since the board in canvassing election returns exercises a ministerial and not a judicial function. Code Civ.Proc. §§ 1068, 1102.

3. Appeal and error 🔑458(1)

A writ of "supersedeas" is an order for the stay of proceedings pending an appeal, and is limited to restraining action upon the judgment from which the appeal is taken.

[Ed. Note.—For other definitions of "Supersedeas," see Words & Phrases.]

4. Appeal and error 🔑485(2)

When a writ of supersedeas is issued, it prevents the parties from using the process of the trial court to enforce the judgment appealed from.

5. Appeal and error 🔑458(2)

Where trial court dismissed complaint seeking a writ prohibiting county board of supervisors from canvassing election returns, on appeal from judgment of dismissal appellate court could not grant writ of supersedeas.

6. Prohibition 🔑31

Where proceedings to prohibit county board of supervisors from canvassing returns of election on question of incorporation of territory as a city were dismissed by judgment, the court was without authority to order supervisors to proceed with the canvass, but provision so directing was mere surplusage.

7. Municipal corporations 🔑12(8)

County board of supervisors is under statutory duty to canvass returns of election on question of incorporation of territory as a city.

Proceeding by Martin Olsen against the Board of Supervisors of the County of San Luis Obispo and others, wherein Fred Scott and another intervened. The original petitioner Olsen dismissed his petition. From a judgment dissolving writ of certiorari and dismissing the petition in intervention, the interveners appeal and apply for a writ of supersedeas.

Writ of supersedeas denied.

Albert Nelson, of San Luis Obispo, for petitioner.

W. J. Minville, of San Luis Obispo, for respondents.

WOOD, Justice.

An election was held on October 18, 1938, for the purpose of determining whether certain territory in the county of San Luis Obispo should be incorporated as a city of the sixth class under the name of "City of Pismo Beach". The election board transmitted to the county clerk the returns showing that 205 votes were cast for the incorporation and 198 votes were cast against the incorporation. A petition was filed in the superior court by Martin Olsen on October 24, 1938, in which it was alleged, among other irregularities charged, that 22 votes were cast by persons not entitled to vote in the election. Thereafter the petitioners herein, Fred Scott and Ida J. New, filed a petition in intervention in which similar allegations were made and in which they asked that writs of certiorari and prohibition be issued against the Board of Supervisors, that the election be declared void and that the supervisors be restrained from canvassing the returns of the election. The original petitioner, Olsen, dismissed his petition. The superior court on October 24, 1938, issued a writ of certiorari and temporarily restrained the supervisors from taking further proceedings. The court later sustained a demurrer to the petition without leave to amend and on December 15, 1938, rendered a judgment dissolving the writ which had been issued and dismissed the petition in intervention. The interveners filed notice of appeal on December 16, 1938.

[1] A writ of supersedeas should issue if it appears that it is necessary to protect the rights of an appellant but it should not issue if it appears that the appellant is not entitled to the relief denied by the judgment from which an appeal has been taken. O'Brien v. Municipal Court, 140 Cal.App. 362, 35 P.2d 395. In this proceeding petitioners seek to prohibit action by a board not exercising judicial functions. The question whether the remedy sought be called a writ of review or a writ of prohibition is of no consequence. In section 1068 of the Code of Civil Procedure it is provided: "A writ of review may be granted by any court, except a municipal, police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction * * *." In section 1102 of the Code of Civil Procedure it is provided: "It [writ of prohibition] arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction * * *."

[2] The board of supervisors in canvassing election returns exercises a ministerial and not a judicial function. People ex rel. Hicks v. Stewart, 132 Cal. 283, 64 P. 285. The superior court did not err in refusing the petitioners the writs sought. Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; Hawley v. Clark, 17 Cal.App.2d 546, 62 P.2d 613.

[3-5] In applying for a writ of supersedeas petitioners in effect ask this court to issue an injunction against the Board of Supervisors. This we may not do. A writ of supersedeas is an order for the stay of proceedings pending an appeal and is limited to restraining action upon the judgment from which the appeal is taken. When issued it prevents the parties from using the process of the trial court to enforce the judgment. Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 P. 123. Since the trial court dismissed the complaint in intervention there is no judgment of the superior court to be enforced.

[6, 7] In its judgment of December 15 the trial court not only dissolved the writs theretofore issued and dismissed the complaint in intervention, but also added: "That said Board of Supervisors be, and the same is hereby directed to immediately proceed to canvass the vote cast at the election held for the incorporation of Pismo Beach on the 18th day of October, 1938, in the manner provided by law and declare the result of said election." Since the proceedings were dismissed by the judgment, the court was without authority to order the supervisors to proceed with the canvass. However, the language just quoted was mere surplusage. The duty to canvass the election returns is a duty enjoined upon the supervisors by law.

The writ issued by this court on December 17, 1938, is discharged. The petition for a writ of supersedeas is denied.

We concur: CRAIL, P. J.; McCOMB, J.

30 Cal.App.2d 684

MORRIS v. GIBSON, County Treasurer (RECLAMATION DIST. NO. 108 et al., Interveners).

Civ. 5742.

District Court of Appeal, Third District, California.

Jan. 26, 1939.

As Modified Feb. 7 and 11, 1939.

Rehearing Denied March 9, 1939.

Hearing Denied by Supreme Court April 6, 1939.

1. Drains 🔑18

Levees and flood control 🔑34

In proceeding to determine how rentals from lands acquired by reclamation district because of delinquencies should be applied, evidence *held* not to establish that district was insolvent so as to require application of such moneys to pay all bonds ratably, rather than in order of maturity. Pol.Code, §§ 3466a, 3897d; § 3480, as amended by St. 1923, p. 598, and St.1931, p. 762; St.1915, p. 526, § 7.

2. **Drains ⇐18**
Levees and flood control ⇐34
A reclamation district should not lightly be declared insolvent, so as to require application of district's funds ratably toward payment of all bonds, without bringing before the court all principals vitally concerned, including the landowner, the district, and the creditor.

3. **Drains ⇐18**
Levees and flood control ⇐34
A purchaser of reclamation district bonds who deliberately selects bonds of late maturity in preference to bonds of earlier maturity should not be permitted to alter his position without good reason.

4. **Drains ⇐18**
Levees and flood control ⇐34
Lands acquired by reclamation district because of delinquency in paying assessments may be sold for their fair market value, and hence market value may be considered in determining whether district is insolvent. Pol.Code, § 3480, as amended by St.1923, p. 598, and St.1931, p. 762.

5. **Drains ⇐88**
Levees and flood control ⇐28
In the absence of constitutional limitations, the legislature may provide for disposition of tax deeded lands acquired by reclamation district in any way deemed to be in the public interest, including sale free of liens. St.1915, p. 526, § 7.

6. **Drains ⇐18**
Levees and flood control ⇐34
Temporary financial embarrassment of a reclamation district did not justify departure from ordinary method of retiring warrants so as to require application of rentals of lands acquired by the district ratably toward the payment of all bonds, matured or unmatured. Pol.Code, §§ 3466a, 3897d; § 3480, as amended by St.1923, p. 598, and St. 1931, p. 762; St.1915, p. 526, § 7.

7. **Drains ⇐18**
Levees and flood control ⇐34
In determining whether moneys of a reclamation district should be applied ratably toward the payment of all bonds, the effect of such a policy upon the holders of all bonds is not controlling, but may be considered.

8. **Drains ⇐18**
Levees and flood control ⇐34
Proceeds of crops, received as rental for lands acquired by reclamation district by virtue of delinquencies, may be used to pay bond obligations in the order of their maturity, notwithstanding that such proceeds accrue at uncertain dates.

9. **Drains ⇐83**
Levees and flood control ⇐25
The power to levy a supplemental assessment at the end of a bond period, if original assessment is insufficient, is an asset of a reclamation district, as respects determination of district's insolvency, notwithstanding rule that assessments cannot be levied in excess of value of benefits. Pol. Code, § 3480.

10. **Drains ⇐18**
Levees and flood control ⇐34
In proceeding to determine whether rentals of lands acquired by reclamation district because of delinquencies should be applied ratably to payment of all bonds, evidence *held* not to establish that district had reached the limit of its assessable values, so as to preclude subsequent levy of supplemental assessment. Pol.Code, § 3480.

Original proceeding by Mary E. Morris, petitioner, against California Gibson, as Treasurer of Colusa County, for a decree determining how moneys of Reclamation District No. 108 should be applied wherein the District and others intervened.

Judgment in accordance with opinion.

For prior opinion, see 65 P.2d 956; rehearing granted in 66 P.2d 704.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Athearn, Chandler & Farmer, Milton T. Farmer, and Edward G. Chandler, all of San Francisco, for interveners Cooper et al.

Ralph W. Rutledge, of Colusa, and Arthur C. Huston, of Woodland, for respondent.

Thomas Rutledge, of Colusa, A. C. Huston, of Woodland, and Horace B. Wulff, of Sacramento, for interveners reclamation Dist. No. 108 et al.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This case was taken over upon a petition for rehearing. In a former opinion (Cal.App., 65 P.2d 956) a writ of mandate was issued directing California Gibson, as treasurer of Colusa county, to make certain payments upon bonds issued by Reclamation District No. 108, and secured by assessment No. 5 of that district.

In that opinion the conclusion was reached that the district was insolvent and could not pay its obligations as they accrued, and the treasurer was directed to distribute to all bondholders and claimants of the district, proratedly rather than in order of maturity, a sum of approximately $141,000 which had accrued to the district as rentals and proceeds from 1935 and 1936 crops from lands that had passed into the ownership of the district.

The petition for rehearing was granted for the purpose primarily of having an accounting in order that it might be determined definitely whether the bond fund of the district was or was not insolvent. 66 P.2d 704. Such an accounting was had; the report of the accountant and referee has been filed; the cause has been fully argued, supplemental briefs filed, and the matter is again ready for consideration.

Two groups of bondholders are involved in this controversy. Petitioner, Mary E. Morris, as a holder of bonds of the district in excess of $300,000, contends the district is insolvent and that the accumulated securities will not pay the bonds in full, and therefore all bondholders should be treated equally, and the funds on deposit paid pro rata to bondholders, irrespective of bond maturity.

The interveners, a committee of bondholders, representing bonds in excess of $600,000, contend that the funds on deposit in the bond fund should be used to pay the bonds of the district in the order of their maturity. The district and its trustees are not legally interested as to the order of payment but are vitally concerned as to whether or not the district shall be determined to be insolvent.

To properly understand this controversy, we quote from our former opinion, 65 P.2d 956, 957:

"At all the times mentioned in the proceedings in this cause, Reclamation District No. 108 was, and now is, a regularly organized and existing reclamation district under the laws of the State of California. The lands embraced within the exterior boundaries of the district aggregate approximately 60,000 acres.

"On December 8, 1923, there was levied upon the lands lying within the exterior boundaries of said district an assessment in the sum of $3,407,800.69, known as 'Assessment No. 5.' Thereafter, proceedings were had under the provisions of section 3480 of the Political Code, providing for the issuance of bonds upon the unpaid portion of said assessment which amounted to the sum of $3,142,000. On January 1, 1925, bonds were issued in the sum of $2,542,000, and on January 1, 1927, a further issue of bonds was made in the sum of $600,000, making a total of the bonds issued by said district of the sum of $3,142,000. The bond issues were secured by assessment No. 5. The bonds so issued began to mature on January 1, 1935, and on the 1st of January thereafter, until and including January 1, 1943, each of said series of bonds being in the total sum of $350,000, save and except the last maturing series, which was in the sum of only $342,000. Interest on said bonds was provided to be paid semiannually, to wit, on July 1st and January 1st of each year; the interest being represented by coupons in the sum of $30 each.

"The petitioner alleges that she is the holder of bonds of said district based upon assessment No. 5, in the sum of over $300,000. The petitioner further alleges that she is the owner of unpaid matured coupons in the sum of $69,750. The petitioner further sets forth that under the provisions of section 3480 of the Political Code, bonds have been employed by landowners in the discharge of said assessment in the sum of $1,378,000, and in buying lands at delinquent sales in the sum of $225,000, leaving the amount of said bonds unpaid in the approximate sum of $1,539,000.

"It further appears from the pleadings in this cause that under and by virtue of defaults in payment of installment calls based upon assessment No. 5, 20,020 acres have passed from the original owners into the ownership of the district; that approximately 20,000 acres have been eliminated from the burden of assessment No. 5 by reason of the employment of bonds, as heretofore stated, in the discharge of the assessment. That there now remains within the district lands paying assessment calls, an acreage of less than 20,000 estimated in some portions of the pleadings as being only 17,500 acres.

"It further appears from the records in this cause that there are unpaid state and county taxes and other assessments, in a sum exceeding $200,000.

"At the date of the submission of this cause it appears from the allegations of the petition that there were unpaid and matured bonds as follows, to wit:

"January 1, 1935	$170,000
January 1, 1936	228,000
January 1, 1937	196,000

"The pleadings submitted by the interveners differ from the figures just set forth in the sum of $4,000. Unpaid interest coupons on said bonds are alleged as follows:

"January 1, 1935	$54,442
July 1, 1935	49,342
January 1, 1936	49,342
July 1, 1936	42,500

"The amount of interest falling due January 1, 1937, does not appear. The total of the five installment calls made by the district is the sum of $932,088.55, upon which it is alleged only the sum of $29,613.18 has been paid. That thereafter total redemptions amounted to the sum of $87,875.97. The deficiency in the yield from the calls referred to is alleged by the petitioner to be the sum of $814,583.21. The accuracy of this calculation we have not verified, but the figures which we have set forth show that the deficiency is considerably in excess of half a million dollars.

"It is further set forth that the rentals or profits of the lands that had passed into the ownership of the district for the crop years of 1935 and 1936, yielded the sum of $141,000. Whether this sum includes all of the yield of crops for the year 1936, does not definitely appear, but it does represent the amount of money that was in the hands of the respondent, California Gibson, available for payment upon the obligations of the district, including, also, bonds and coupons.

"The complaints in intervention admit that the amount of money collected upon the respective calls of installments has been insufficient to pay the respective coupons and bond maturities, and likewise, that the moneys received for redemption of lands that have gone delinquent; also, that the amount of moneys received on account of rentals of the lands owned by the district added to the amount received upon the calls does not create a fund sufficient to discharge maturing bonds and coupons; and by way of defense it is further set forth that the moneys received from rentals should be applied to the payment of the earliest maturing coupons and bonds. The principal and interest of coupons maturing January 1, 1935, is fixed at the sum of $167,000, and total moneys received as rentals for the years 1935 and 1936, as heretofore stated herein, out of which sum it appears that the respondent, prior to the issuance of the alternative writ herein, had paid out on account of matured coupons and bonds a sum in excess of $100,000.

"Based upon what we have heretofore said, the petitioner contends that the bond fund of Reclamation District No. 108 is hopelessly insolvent. As against the position taken by the petitioner, it is insisted by the interveners that the value of the lands in the district is adequate to discharge all of the indebtedness heretofore mentioned; that approximately 50 per cent of the original issue of bonds has been retired, as herein set forth, in the use thereof by landowners in discharging the assessment.

"It is further argued that the provisions of the reclamation law of this state provide for supplemental assessments in the event that the original assessment upon which the lands are issued proved insufficient to fully discharge the same; that the installment calls are being paid on practically one-third of the indebtedness; and that other liens are being discharged by the use of bonds of the district, greatly to the advantage of the district.

"It is also further stated by the intervening district that by the profits realized from the leasing of the lands belonging to the district, and the eventual sale thereof, it is hoped and believed that the indebtedness of the district will eventually be fully paid."

Since the filing of our original opinion we have had the aid of a comprehensive report of the referee, Mr. Charles Lumbard, a certified public accountant, who has audited and examined all of the books and records of California Gibson, County Treasurer of Colusa County and the Trustee of the Bond Fund of Reclamation District 108; the books and records of district 108, and has also conducted oral examinations as to values of lands of the district, and other pertinent matters. These examinations were taken before a stenographic reporter and have been transcribed and are filed in this court as a part of the records of this proceeding.

The report itself is too long to be here set forth in detail, but the summary as submitted by the referee will indicate briefly his findings as to the financial condition of the district:

"(a) The amount of the bonds of Reclamation District No. 108 issued and based upon Assessment No. 5 of said District outstanding on the 30th. day of June, 1937, the sum of.......	$1,615,201.95
"(b) The amount of said bonds and coupons thereof in default, June 30th, 1937.	
Bonds	422,000.00
Coupons	281,250.00
"(c) The number of acres of land assessed under Assessment No. 5:	
	Acres
(1) which paid said assessment in full	24,405.024
(2) which are still paying the assessment as called..............	1,329.281
(3) which are redeeming delinquencies within the one year period	5,461.83
(4) which are owned by California Gibson, as Trustee of the Bond Fund of Trustee of Reclamation District No. 108.................	23,049.93
(5) which are owned by Reclamation District No. 108............	712.20
"(d) The amount of the assessment outstanding and unpaid (including interest and penalties) against the lands owned by the County Treasurer as Trustee after applying all credits from crop rentals, etc., June 30, 1937..............................	$1,910,555.75
"(e) The amount of money on deposit, which can be applied to the payment of bonds and/or coupons, and the amount of money to become available during the year 1937 by way of crops:	
(1) In the Bond Fund in the County Treasury........................	263,310.74
(2) In the hands of the District.....	14,204.01
(3) Due on crops sold, 1936 and prior years	14,456.61
(4) Estimated value of 1937 crops..	99,231.27
(5) Additional credit 1936 and prior years crops	1,589.38
(6) Additional credit 1937 crops....	19,279.25
"(f) Statement of resources and obligations show total resources..........	3,357,482.28
Total obligations	2,618,297.53
Leaving surplus of..................	739,184.75
"(g) The probable value per acre of all lands owned by the District or which may hereafter be owned by the District	112.50

"(h) The probable ability of the District through its Board of Trustees to dispose of the lands is evidenced by testimony taken at the hearing held February 15, 1938, in which the following points were brought out.

(1) All lands in District are built up by overflow from the Sacramento River, the lower and rear part being sandy clay and the river front loam mixed with overflow and very productive.

(2) Irrigation water is taken from the Sacramento River with ample supply at all times; during high water gravity flow is used and during low water 5 pumping plants are used with the result substantially all lands can be irrigated with ample water at approximately 50c per acre foot, a cost as low or lower than any other system in California, being classed "A1" by the Federal Land Bank Engineering Division.

(3) Lands are adaptable to the growing of fruits, vegetables, grain and rice.

(4) Rentals by the District have been chiefly on a crop basis and and run for terms of one or two years (if summer fallowing is desirable, one year, if not, two years) and the price being paid is:

(a) Grain: 1/3 to District and 2/3 to tenant. Tenant paying all expenses.

(b) Rice: 1/3 to District and 2/3 to tenant. Tenant paying all expenses.

(5) The District has experienced no difficulty in renting the defaulted lands and applications to rent have exceeded the supply of land, the policy of the trustees being to lease the lands to former owners or to tenants of former owners.

(6) Conditions generally in the District have improved during the past five years, particularly since the late spring of 1936 when the Trustees placed the operation of the District on a cash basis, having no maintenance indebtedness in the form of outstanding warrants at the present time.

(7) The condition of the District is reflected in the market value of the bonds; at present they range from 60 cents to one dollar, while in 1931 they fell as low as 15 cents on the dollar."

[1] This information contained in the report of the referee has changed our view as to the insolvency of the District, and we are of the opinion that this court should not at this time so hold.

[2] In the first place such a conclusion should not be lightly assumed. Here we have a controversy between two groups of bondholders, one contending that the money in the bond fund be used to pay bonds in the order of their maturity, the other group contending the district is insolvent, and the funds should be paid proratedly to the holders of the bonds irrespective of maturities; and in order to do that we are asked to declare the district insolvent. Surely the presentation of a matter so important to the landowners of the district should be so presented as to bring before the court all the principals vitally concerned,—the landowner, the district and the creditor. The trend of modern legislation, as indicated in the enactment of moratoria and other protective barriers between the lender and the borrower, indicate an equal interest and concern, on the part of the state, in the well-being of the landowner and farmer as well as of the investor and the bondholder. However, we need not rest our reasoning upon that ground. As long as the security for the bonds are adequate the bondholders must receive payments in accordance with their contract, one of the terms of which fixes the respective priorities of payment.

[3] A purchaser of bonds may and probably often does deliberately select bonds of late maturity in preference to bonds maturing at an earlier date, and having made that selection he should not be permitted without good reason, to now alter his position.

Under the provisions of section 3480 of the Political Code as it stood in 1923, St. 1923, p. 598, it was provided:

"* * * Any parcel of land bid in and purchased by a treasurer as aforesaid, as trustee of the bond fund of the district, may be sold and conveyed by him or his successor in office at any time after the expiration of said redemption period of one year, at public or private sale and with or without notice to any person paying him the amount for which said parcel was bid in by said treasurer at delinquent sale, with interest thereon at the rate of seven per cent per annum, compounded yearly, from the date of said delinquent sale, and also the amount of all subsequent installments then delinquent, with accrued interest and penalties thereon."

In 1931, St.1931, p. 762, this section was amended providing for a method of sale as set out in section 3466a of the Political Code. This latter section stipulated that "no parcel [of land] shall be sold for an amount less than the fair market value thereof as such value shall be ascertained by the board of trustees".

The constitutionality of this method of sale as applied to bonds issued prior to the date of the amendment was considered in Rivers Farm Company of California v. California Gibson, 4 Cal.App.2d 731, 42 P.2d 95. This court, speaking through Mr. Justice Plummer, said in regard to that matter [page 105]:

"As said in the opinion just referred to [State v. Board of Commissioners, etc. 89 Mont. 37, 296 P. 1] it is fair to assume that no purchaser could or can be found who is willing to pay more than the fair market price of the land offered for sale. If that is true, then no infringement would occur against any contractual rights. Such a sale, bringing the land back into the taxing column, would enhance rather than militate against the interest of the bondholders as well as the interest of the general public, and also every person interested in the financial condition of the district, no matter what the capacity. * * * As is said in the case of City of Beatrice v. Wright, 72 Neb. 689, 101 N.W. 1039, 1043: ' "To say that such property cannot be sold for what it is worth in the markets, even though for a less sum than the assessments against it, is to defeat the very object of taxation, and lead to results the Constitution itself sought to avoid. Unless the property can be sold for its market value the result would be to exempt the property from all taxation for all time. This, of course, is an absurd result, and any construction leading thereto would be clearly inadmissible." * * * The above decisions are based upon constitutional provisions substantially the same as that of our own, above mentioned.' "

This conclusion was approved by the Supreme Court in Morris v. Poundstone et al., 9 Cal.2d 485, 71 P.2d 262.

[4] It would therefore appear that the several parcels, the title to which is vested in the treasurer, can now be sold at any time for their fair market value, at least

as far as the law is concerned, thus making available land appraised at $2,325,000 for bond reduction. This value was found by the referee from the testimony of three disinterested qualified experts on the values of lands in district 108, who appraised these lands so owned by the district at $112.50 per acre, or a total valuation of slightly in excess of $2,325,000.

One of the financial loads upon district 108, as to which petitioner claims the referee failed to emphasize, is the overlying indebtedness of Knights Landing Drainage District and West Side Levee District. If, however, assessments are called by these two districts, and the same not paid until the lands of district 108 are sold, then the purchaser of the lands of district 108 will take title free of the liens of those bodies.

Statutes of 1915, chapter 361, page 516, creating Sacramento West Side Levee District, provided that upon the sale of delinquent properties the deed conveys said property "free of all liens and encumbrances, excepting state, county and municipal taxes, and the liens of assessments now levied or which may hereafter be levied by any of the reclamation districts situate within said levee district * * *". Section 7, p. 526. So, also, in the creation of the Knights Landing Drainage District. Stats.1913, chap. 99, p. 109. This also insures that if assessments are called by the levee and drainage districts before the lands of district 108 are sold, that the proceeds from the sale of the reclamation district lands will go in their entirety into the bond fund of the reclamation district.

[5] In South San Joaquin Irrigation District v. Neumiller, 2 Cal.2d 485, 42 P.2d 64, it is held, one possessing a right of redemption does not have such a vested right in the method or conditions adopted by the statute for the disposition of its tax deeded lands as will prevent the state from changing the terms of sale after it has received title. The legislature, in the absence of constitutional limitations, may dispose of tax deeded lands in any way deemed to be in the public interest. Here the title has passed to the trustee, free and clear of liens of the levee and drainage district.

A further fact appearing in the record is that the trustees are now operating upon a cash basis.

[6] We do not believe that the temporary embarrassment of district 108 justifies a departure from the ordinary and usual method of retiring its warrants.

[7] In considering this problem we may also consider the effect upon the holders of all bonds that the application of the policy sought by petitioner would have, and while such effect is not controlling it is worthy of consideration. If the holder of an obligation not yet due may receive payment on account while the holder of a past due obligation is refused payment in full then a great many actions would have to be filed to prevent obligations being outlawed under the four-year statute, thereby penalizing the holders thereof for attorney fees, court costs and interest charges, while the holders of the unmatured bonds would be receiving a part of their principal and also collecting interest as evidenced by coupons on principal which would be paid in part prior to maturity of the coupons. That is not equitable to the landowner nor the holders of past due paper.

All the land which has passed to the district still belongs to the district. If the crop proceeds can retire some of the matured bonds, no security has been lost to petitioner, but on the other hand obligations prior to hers have been diminished, and she still can look to the original security unimpaired.

Inasmuch also as the bonds of district 108 are superior to Sacramento West Side Levee District and Knights Landing Ridge Drainage District, the proceeds from the sale of these lands would go in their entirety into the bond fund. The only claim of equal standing with the bond charges would be the lien of state and county taxes, which, under an agreement between the proper authorities (sec. 3897d, Pol. Code) have been discharged it is asserted at approximately twenty-five cents on the dollar, exclusive of penalties.

In view of the conditions here existing the principle declared in State v. Duncan, 334 Mo. 733, 68 S.W.2d 679, which case has been approved in Bank of Hawaii v. Gibson, 15 Cal.App.2d 407, 413, 59 P.2d 559, and in Kerr Glass Mfg. Co. v. San Buena-Ventura, 7 Cal.2d 701, 62 P.2d 583, are here applicable. There the Supreme Court of Missouri had before it a financial condition somewhat similar to the present situation, and was confronted by the same argument. It there held, however, that where a drainage or reclamation district is temporarily embarrassed but not permanently insolvent,—that is when given a reasonable time, it will discharge its obligation—the owners of matured bonds are entitled to share pro rata in the funds on hand while the owners of immature bonds must wait the maturity of their obligations. In that case it was admitted that there was $187,500 par value of bonds due and unpaid. The total issue was $630,000. An owner of certain matured bonds to the amount of $33,000 commenced an action to enforce payment in full of his bonds and interest. The court said, however, that notwithstanding the delinquency and temporary embarrassment of the reclamation district, since the pleading admitted that ultimately out of delinquent taxes, collections and future tax levies, the bonds and coupons would be paid in full, that the holders of overdue paper, and not unmatured paper, could participate pro rata in the disbursement of the moneys on hand. We quote: "If a drainage district be insolvent, as held in the Sturdivant Bank Case, supra, [334 Mo. 753] 68 S.W.2d 671, all outstanding bonds (those not due as well as those matured) must be taken into consideration in the apportionment of the fund. If the district is solvent there still must be apportionment, but it is limited to matured bonds and coupons because in that situation the statute pledges the fund on hand from time to time to the payment of matured (and after that next maturing) principal and interest. We understand this view to be in accord with the following decisions which we cited in the Sturdivant Bank Case, supra, and here refer to again: Rothschild v. Village of Calumet Park, 262 Ill.App. 96, 106; Thomas v. Patterson, 61 Colo. 547, 159 P. 34; Norris v. Montezuma Valley Irr. Dist. (D.C.) 240 F. 825; Norris v. Montezuma Valley Irr. Dist. (C.C.A.) 248 F. 369; Rohwer v. Gibson, 126 Cal.App. 707, 14 P.2d 1051." [Page 684.]

A review of these several Missouri decisions and an approval of the above rule of the Duncan Case is contained in Groner v. U. S. and Bliss v. U. S., 8 Cir., 73 F.2d 126. That ruling is also quoted and followed in Maloney v. Moore, 46 Ariz. 452, 52 P.2d 467, 472.

[8] Petitioner further argues that the crop moneys, because they accrue at uncertain dates, should not be used for the payment of bond obligations in the order of their maturity, but considering this question Mr. Justice Plummer quite specifically disposed of this contention in Cooper v. Gibson, 133 Cal.App. 532, 542, 24 P.2d 952, 956, saying: "As to the appropriation of the moneys received from the leasing or operation of lands, the titles to which have become vested in the district, it would appear that the money so received should be first applied to the payment of the interest due coincident with the period when the installment intended for the payment of such interest became delinquent. This would seem to be the intention of the Legislature by the language used in section 3480, supra, wherein the treasurer, in making his estimate of the amount necessary to pay interest and principal maturing on any date, is directed to credit such funds in the treasury to the payment of such interest and principal. In other words, the amount on hand so received is to be applied to the payment of the interest and principal falling due, to pay which the installment call is made and becomes a part of the fund available for such purpose."

It is apparently not the contention of petitioner that the district is today insolvent. Her apprehension is based upon past performance of landowners meeting their assessments and the withdrawal of lands from a tax revenue basis, by reason of its passing into the possession of the treasurer. She is also fearful that the mounting sums for penalties, interest, and delinquent state, county, drainage and levee districts will absorb all of the income, leaving an inadequate amount for debt reduction. She disregards the possible revenue from the sale of lands and the added benefits of getting the land back upon a tax paying basis. She disregards the possible future rentals from the lands belonging to the district, which has been shown by the report of the referee to have amounted to a very substantial sum over the past year. She seems to overlook the fact that the referee has determined a surplus of $739,000 exists.

[9, 10] In view of the evidence now before us we cannot say as a matter of law or fact that district 108 is insolvent. Furthermore, section 3480 of the Political Code authorizes the levying of a supplemental assessment to care for any unpaid principal or interest in the event the original assessment is found insufficient at the end of the bond period, in this case in 1943. This constitutes a further asset of the district, inuring to the benefit of petitioner. In considering this provision an asset we have not overlooked the principle that assessments of a reclamation district are levied according to the estimated value of

the benefits to accrue, and that when the collection of taxes has reached the value of the benefits conferred upon the lands in a district, there is then no legal provisions for the placing of additional burdens. Rohwer v. Gibson, 126 Cal.App. 707, 14 P.2d 1051. We cannot, in view of the testimony before us, now declare that district 108 has reached the limit of its assessable values. To so hold here would be purely speculative.

In examining the findings of the referee, petitioner claims that the referee's estimates of anticipated income are too high and that certain charges which should have been made were omitted. On the other hand, counsel for the district claims that the referee is too conservative, and that credits not considered should be included. As to those matters we do not know, but very probably the truth lies somewhere between these two contentions, and we are accepting the report of the referee as giving a fair statement of the actual conditions.

We do not believe we need say more. The various parties before the court are represented by able counsel and many points are raised, but the primary issue here is as to the apportionment of the moneys in the hands of the treasurer derived from crops produced upon lands taken over by the district. As to that we are of the opinion, as stated before, that the funds on deposit in the bond fund should be used to pay the bonds of the district, in the order of their maturity.

The peremptory writ is denied. Each party hereto, except respondent, to bear one-third of the costs. It is so ordered.

I concur: THOMPSON, J.

Modification of Opinion.

PER CURIAM.

The judgment of this court entered herein January 26, 1939, denying the peremptory writ is amended as follows:

The peremptory writ sought by Mary E. Morris, petitioner herein, is denied. Pursuant, however, to the prayer of interveners Frederick F. Cooper et al., it is ordered that a peremptory writ of mandate issue out of this court directed to the respondent county treasurer, as trustee of the bond fund of reclamation district 108 and of said district, requiring her as such trustee.

1. From the funds now on deposit in the special fund of the bond fund of reclamation district No. 108 created for the purpose of paying the principal of bonds of reclamation district No. 108 that matured on January 1, 1935, *to pay* the principal in full of all outstanding bonds of said maturity to the holders thereof;

2. From the funds now on deposit in the special fund of the bond fund of reclamation district No. 108 created for the purpose of paying all interest coupons that matured on January 1, 1935, *to pay* all said dated coupons now outstanding to the holders thereof in full;

3. From the funds now on deposit in the special fund of the bond fund of reclamation district No. 108 created for the purpose of paying all interest coupons that matured on July 1, 1935, *to pay* all said dated coupons now outstanding to the holders thereof in full;

4. *To create and maintain* a special fund for each delinquent maturity of said bond issue. Where both bonds and coupons mature on the same date but a single fund shall be created for such date, and in such fund such matured principal and interest obligations shall be treated on a parity;

5. To *deposit* in said respective funds the following moneys in the following manner, to-wit:

(a) All moneys collected upon the calls of instalments of said assessment securing said bond issue shall be deposited in the special fund created for the payment of the maturity of coupons or the maturity of coupons and bonds, as the case may be, for which the call was made, together with all moneys realized by way of purchase price of lands sold to third parties at delinquent assessment sales held to pay such delinquent instalments, and together also with all moneys realized through redemption by landowners of lands sold to the respondent at such delinquent assessment sales for the payment of such delinquent instalments;

(b) All moneys realized and received from rentals of the lands owned by the respondent, as such county treasurer and as such trustee for the bond fund of reclamation district No. 108 and for said district, shall be deposited in the special fund created for the payment of the first maturing delinquent coupons or bonds and coupons, as the case may be, in amount sufficient to satisfy the deficiency therein, and the surplus, if any then shall be deposited in the special fund created for the payment of the next maturing coupons or bonds and coupons, as the case may be, and so on until said funds are exhausted;

(c) All moneys realized from the sale of delinquent lands owned by respondent as such county treasurer and as such trustee shall be deposited in the special funds in the same manner as that above provided for the deposit of rental or crop moneys.

6. Whenever and as often as the sums in any of said special funds shall be sufficient to pay twenty-five per cent (25%) of the obligations for the payment of which said special funds are created, as aforesaid, the said county treasurer shall make distribution out of said fund to the holders of said obligations of said sum pro rata, endorsing said matured bond or coupon, as the case may be, with the date and amount of such payment.

Each party hereto, except respondent, to bear one-third of the costs; that is to say: one-third of the costs is hereby charged and assessed to Mary E. Morris, petitioner, one-third to intervener reclamation district 108 et al., and one-third to intervener Frederick F. Cooper et al.

30 Cal.App.2d 740

LAGUNA BEACH COUNTY WATER DIST. v. ORANGE COUNTY.

Civ. 2182.

District Court of Appeal, Fourth District, California.

Feb. 9, 1939.

Hearing Denied by Supreme Court April 10, 1939.

1. Taxation 🔑213, 217

Policy of California is to exempt from taxation property of the state and state agencies generally classified as public corporations. Const. art. 13, § 1, as amended in 1914.

2. Taxation 🔑217

The exemption from taxation of certain properties of districts recognized as state agencies exists because of express constitutional exclusion of property of the state from taxation, on theory that the public agencies are holding property by virtue of a trust in favor of the state and that property held by them is in effect "property of the state" within the constitutional exclusion of such property from taxation. Const. art. 13, § 1, as amended in 1914.

[Ed. Note.—For other definitions of "Property of the State," see Words & Phrases.]

3. Municipal corporations 🔑54

A "municipal corporation" is created under authority of state whereby a portion of the state and the inhabitants therein are organized into political entity that exercises legislative, executive and judicial powers. Const. art. 11, § 6 et seq.

[Ed. Note.—For other definitions of "Municipal Corporation," see Words & Phrases.]

4. Municipal corporations 🔑590

A city is organized to give its inhabitants certain powers of self-government and is granted broad police powers. Const. art. 11, § 11.

5. Drains 🔑13
Municipal corporations 🔑2
Taxation 🔑217
Waters and water courses 🔑224

Irrigation districts, drainage districts, utility districts, and other similar organizations are not "municipal corporations," but are "public agencies" exercising governmental functions, and, under theory that their properties are in effect properties of the state, they are not subject to taxation. Const. art. 11, § 6 et seq.; art. 13, § 1, as amended in 1914.

[Ed. Note.—For other definitions of "Public Agency," see Words & Phrases.]

6. Municipal corporations 🔑8

Districts organized under special legislative enactments cannot be "municipalities" in view of constitutional provision that corporations for municipal purposes shall not be created by special laws. Const. art. 11, § 6.

[Ed. Note.—For other definitions of "Municipality," see Words & Phrases.]

7. Counties 🔑190(1)
Waters and water courses 🔑183½

A county water district, having right of eminent domain and right of taxation but lacking broad legislative, executive, and judicial powers, was a "state agency" and not a "municipal corporation," and hence district's property lying outside the district was not subject to taxation by county. St.1913, p. 1049, as amended; Const. art. 13, § 1, as amended in 1914.

[Ed. Note.—For other definitions of "State Agency," see Words & Phrases.]

8. Taxation ⚿217

The term "municipal corporation," as used in constitutional amendment under which property of a municipal corporation located outside of the municipal corporation may be subject of taxation, is used in its technical sense. Const. art. 13, § 1, as amended in 1914.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by the Laguna Beach County Water District against the County of Orange to recover taxes paid under protest. A demurrer to the complaint was sustained without leave to amend, and from the judgment, the plaintiff appeals. Reversed.

Head, Wellington & Jacobs, of Santa Ana (M. B. Wellington, of Santa Ana, of counsel), for appellant.

C. F. Culver, M. I. Church, and Arvin B. Shaw, Jr., all of Los Angeles, amici curiæ, for appellant.

W. F. Menton, Dist. Atty., and Preston Turner, Deputy Dist. Atty., both of Santa Ana, for respondent.

MARKS, Justice.

Plaintiff is a county water district organized under an act of the legislature. Stats.1913, p. 1049, as amended. It owned land outside its boundaries and within the county of Orange. In 1936 the county assessor assessed this property for county taxation. Plaintiff paid the taxes under protest and brought this action to recover the money. A demurrer to the complaint was sustained without leave to amend and this appeal from the judgment followed.

The sole question involved here is whether or not the land in question is subject to taxation under the provisions of section 1, article 13, of the Constitution as amended in 1914. The pertinent provisions of that section are as follows: "All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. * * * And further provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; * * *."

Plaintiff maintains that it is a state agency endowed by the state with certain necessary sovereign powers; that it holds its property in trust for the state and that such property is expressly exempted from taxation as it is in effect property belonging to the state. Defendant maintains that plaintiff is a municipal corporation and that as such its land outside its boundaries is subject to taxation by the county. The precise question presented does not seem to have been decided in California.

[1, 2] It must be conceded that it has always been the policy of the law in California, since the adoption of the present Constitution, to exempt from taxation property of the state and state agencies generally classified as public corporations. It is also true that the property of municipalities, counties, and cities and counties, no matter where situated, were not taxed prior to the constitutional amendment of 1914, and that after the adoption of that amendment only certain properties outside of corporate boundaries could be taxed. This exemption from taxation of certain properties of districts recognized as state agencies was because of the express constitutional exclusion of the property of the state from taxation on the theory that these public agencies were holding property by virtue of a trust in favor of the state and that the properties held by them were in effect properties of the state within the meaning of the constitutional provision. See Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72; Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477,

66 P. 668; Argyle Dredging Co. v. Chambers, 40 Cal.App. 332, 181 P. 84.

It is apparent from what we have said that the decision of the question before us largely depends on the answer to the question—Is the plaintiff a municipal corporation? We can be assisted in answering this question by considering the status, powers, and functions of certain somewhat similar public agencies on the one hand and of municipal corporations on the other. We need not consider counties, and cities and counties, because it is admitted that plaintiff is neither a county, nor a city and county. Defendant virtually admits that unless it can be held that plaintiff is a municipal corporation its property in question here cannot be taxed by defendant and that the judgment must be reversed.

[3, 4] A municipal corporation is created under authority of the state whereby a portion of the state and the inhabitants therein is organized into a political entity that exercises legislative, executive and judicial powers. Sec. 6, art. 11, et seq., Const. A city is organized to give its inhabitants certain powers of self government and is granted broad police powers. Sec. 11, art. 11, Const.

On the other hand we have in California a considerable number of governmental agencies exercising, to a limited extent, powers of government, vested in them by the various legislative enactments from which they draw their right of existence and power of operation. The governmental powers most common to the majority of them are the right of eminent domain and the right of taxation. Few of them possess legislative powers except in a very limited extent, and only quasijudicial powers.

[5, 6] It is thoroughly settled that among such organizations, irrigation districts, drainage districts, utility districts, and other similar organizations, are not municipal corporations, but public agencies exercising governmental functions and that, under the theory that their properties are in effect properties of the state, they are not subject to taxation. See 85, 24 Cal.Jur. 102 and cases cited. It must also be true that districts organized under special legislative enactments cannot be municipalities for their legality has long been recognized (Argyle Dredging Co. v. Chambers, supra) and the Constitution provides (art. 11, sec. 6) that "corporations for municipal purposes shall not be created by special laws * * *."

It is true that none of these districts are identical in manner of organization and powers possessed. Nor are they precisely similar to county water districts. However, the right of eminent domain and the right of taxation is common to many of them, including county water districts.

While our courts have not ruled on the precise question before us there are several comments in cases which constitute expressions of judicial opinion on the nature of county water districts. The Supreme Court, in Coachella-Valley Water District v. Stevens, 206 Cal. 400, 274 P. 538, described a county water district as a governmental agency exercising governmental powers. In Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53, it was said that a county water district was a public corporation that may be called a quasimunicipal corporation. In Galt County Water District v. Evans, 10 Cal.App.2d 116, 51 P.2d 202, 203, county water districts were defined as "public corporations inferior in power and scope to a municipal corporation". In Sacramento M. U. District v. All Parties, etc., 6 Cal.2d 197, 57 P.2d 506, 508, the Supreme Court said: "County water districts are, by nature and organization, merely 'taxing districts', and therefore the Legislature has plenary control over matters pertaining to their organization and change of boundaries. In re Bonds of Orosi Public Utility District, 196 Cal. 43, 235 P. 1004."

Defendant cites and relies solely on Morrison v. Smith Bros., Inc., supra, as holding that a county water district is a municipal corporation.

We can find no such holding in the Morrison case. In the first place, no county water district was involved in that litigation and none was before the court. What appears in that decision concerning a county water district was said by way of argument and analogy. The Supreme Court did not hold that a county water district was a municipal corporation. In discussing the nature of such a district, and others, it quoted with approval from In re Orosi Public Utility District, 196 Cal. 43, as follows, at page 52, 235 P. 1004, at page 1008:

"The purposes for which the Orosi District was formed, the appellant contends, are not municipal, and a district formed for such purposes does not possess the essential characteristics of a municipal corporation. If the authorities cited by him were strictly in point, there would be an end to the controversy; but they are not. They deal with questions arising in connection with districts formed for the purpose of draining, irrigating, reclaiming, or otherwise directly benefiting the lands affected thereby. [Citing cases.] When related to that class of districts, the cases cited are clearly in point. The improvements contemplated by the acts under which they were formed cannot be considered 'municipal purposes'. * * * One of the distinguishing features of such districts is that they are created for the purpose, generally, of some special local improvement, and may exercise only such powers as may be conferred by the Legislature in the line of the object of their creation. They are merely special state organizations for state purposes, created to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. The other distinguishing feature is that the exactions which such districts may enforce in order to carry out their purposes are in the nature of assessments or taxes for local benefits, to be spread on the property in the districts in proportion to the peculiar advantage accruing to each parcel from the improvement. * * *

"Districts of the nature just discussed are not municipal corporations in the contemplation of the Constitution."

All that the Supreme Court held in the Morrison case was that a municipal utility district, when acting in a proprietary capacity, had the same liability for torts as a municipal corporation acting in like capacity.

[7] Because it lacks the broad legislative, executive and judicial powers of a municipal corporation, it seems clear that a county water district is not a municipal corporation as that term is technically used in the laws of this state. It follows that unless the people in adopting the 1914 amendment to section 1, article 13, of the Constitution intended to give it some other meaning, a county water district cannot come within the provisions of that section which permits the taxation of property of a municipality lying outside of its corporate limits. The Supreme Court had occasion to consider the definition of the term "municipal corporation" as used in the 1914 amendment to the Constitution in Turlock Irrigation District v. White, supra, where it was said: "It is apparent that the term 'municipal corporation' was thus presented to the people as synonymous with such corporations as Los Angeles and San Francisco; that is to say, as municipal corporations in the strict technical sense." [186 Cal. 183, 198 P. 1061.]

The court then proceeded to consider the effect of the amendment on irrigation, swamp land, drainage, levee and reclamation districts, and said: "The fact that the argument submitted to the voters indicated that the term 'municipal corporation' was used with technical accuracy requires that the rule relied upon by appellants be applied against them, rather than in favor of their contention, because the very nature of the subject, the context of the amendment, and the manner and reason for its presentation all require that it be construed in its technical sense, and, hence, it is within the exception of the rule of construction above stated. There are, however, other cogent reasons for concluding that an irrigation district is not included within the term 'municipal corporation' as used in the amendment. The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation, but a 'public corporation for municipal purposes.' Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 [see, also, Rose's U. S. Notes]. As to swamp land, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations. People v. Levee Dist. No. 6, 131 Cal. 30, 63 P. 676; People v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207; Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51, 32 P. 866; and Reclamation Dist. No. 70 v. Sherman, 11 Cal.App. 399, 105 P. 277. See, also, People v. Selma Irr. Dist., 98 Cal. 206, 208, 32 P. 1047, and cases there cited. The amendment in question must be considered to have been framed and submitted to the people with these decisions in mind, by which it was settled that such corporations were not 'municipal corporations.'"

[8] We have already concluded that a county water district does not fall within the technical definition of a municipal corporation. As the Supreme Court held that the term "municipal corporation" was used in the 1914 amendment to section 1 of article 13 of the Constitution in that technical sense, and no other, it follows that the property of plaintiff lying outside of its boundaries cannot be taxed under the provisions of that section. As there is no other authority for the taxation of such property by defendant it follows that its assessment and taxation by defendant cannot be supported.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

30 Cal.App.2d 639

HANNO et al. v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY et al.

Civ. 12084.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1939.

1. Receivers 🔑203

After receiver was appointed in action for accounting and property was placed in his hands, superior court was not deprived of its jurisdiction to hear and settle accounts of receiver by dismissal of action by plaintiffs.

2. Receivers 🔑204

The end of suit gives cause for discharge of receiver but does not, ipso facto, effect his discharge, which results only from order of court which appointed him so directing.

3. Receivers 🔑204

A "receiver," appointed by superior court to take charge of property involved in action pending before it, is an officer of the court and subject to court's orders in relation to such property until discharged by appointing court.

[Ed. Note.—For other definitions of "Receiver," see Words & Phrases.]

4. Prohibition 🔑5(3)

Prohibition *held* not to lie to restrain superior court from hearing and settling accounts of receiver who was appointed by court to take charge of property involved in action for accounting, notwithstanding original action had been dismissed by plaintiffs.

◆

Application by Oscar E. Hanno and Mrs. Harry Hauser for writ of prohibition to be directed to the Superior Court of California, in and for County of Santa Barbara, Atwell Westwick, one of Judges thereof, and James McCloskey, to restrain proceeding under an order appointing a receiver.

Alternative writ discharged and peremptory writ denied.

Fred A. Shaeffer, of Santa Maria, for petitioners.

T. H. Canfield, of Santa Barbara, for respondents.

WOOD, Justice.

An action was commenced in the Superior Court of Santa Barbara County on February 7, 1938, by the petitioners herein against Santa Ynez Mercury Corp., Ltd., and William Peters and Hans Peters in which it was alleged that the plaintiffs, petitioners herein, and the individual defendants therein named were the only directors of the corporation defendant. It was further alleged that dissension had arisen between the directors and it was sought to have an accounting of the transactions of the various parties, to have the property of the corporation, a mine, sold and the proceeds divided between the parties according to their respective interests. Upon the ex parte application of the plaintiffs in said action one James McCloskey was appointed receiver of and for the property of the corporation defendant. The receiver qualified and took charge of the property of the corporation. An answer was filed by the defendants in said action on July 30, 1938 in which the essential allegations of the complaint were denied and the defendants asked that the order of the superior court appointing the receiver be vacated and set aside, that the receiver be dismissed and that the costs and expenses of the receivership and damages occasioned thereby be assessed and taxed against the plaintiffs.

It is alleged in the present petition that thereafter the receiver for the corporation defendant filed a report and account and petition for allowance of fees and for instructions and that the court made an order setting the matter for hearing for October 28, 1938; that on the last mentioned date petitioners objected to the hearing by the court and in open court delivered to the county clerk a written request for dismissal of the action; that the court thereupon instructed the clerk not to file the dismissal. Petitioners further alleged that the matter was then set for hearing for November 30, 1938 and that unless restrained by this court the superior court "threatens to and intends to, and will entertain, pass upon, hear, try and decide motions and proceedings based upon the allegations and prayer of the complaint of plaintiffs herein, now pending in said Superior Court, and will hear and determine further petitions filed by the receiver, and will hear and determine the said cause on the 30th of November, 1938, when said matter is set for trial". The respondent court has filed a return to the alternative writ heretofore issued in which it is stated that "unless prohibited by the above entitled Court in the within proceedings, the said Superior Court of the State of California, in and for the County of Santa Barbara, will proceed to settle the accounts of the said receiver, direct the disposition of the assets in the hands of said receiver, and provide for the payment of the receivership costs and expenses".

[1-3] It is apparent that the only issue necessary for decision involves the question of the right of the superior court to settle the account of the receiver, to make disposition of the property in his hands and to provide for the payment of the expenses of the receivership. In Pacific Bank v. Madera Fruit & Land Co., 124 Cal. 525, 57 P. 462, a receiver was appointed at the request of the plaintiff upon the filing of the complaint. The receiver thereupon took charge of the property involved in the litigation. Before the issuance of summons or the appearance of the defendant the plaintiff filed written notice of dismissal and the clerk entered a judgment of dismissal. Thereafter the receiver filed his account and asked the court to settle the account and fix his compensation. The plaintiff thereupon made a special appearance and filed a motion to dismiss the account on the ground that the court had lost jurisdiction in the matter. The court denied the motion and its ruling was affirmed on appeal. The court quoted with approval from Beach on Receivers, section 796: "The end of the suit, its final adjudication, gives cause for the discharge of the receiver, but does not, ipso facto, effect his discharge, which results only from an order or decree of the court so directing. After the settlement of the suit the receiver must have time and opportunity to prepare and present his accounts, and for the adjustment of the details of the receivership. * * * The dismissal of the action does not discharge the receiver from accountability to the court which appointed him. He is an officer of the court and subject to its orders in relation to the property placed in his hands as receiver until discharged by the court".

[4] Manifestly, the respondent court does not intend to take any action in excess of its jurisdiction.

The alternative writ is discharged and a peremptory writ is denied.

We concur: CRAIL, P. J.; McCOMB, J.

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31 Cal.App.2d 18

PEDERSEN v. REYNOLDS et ux.

Civ. 5983.

District Court of Appeal, Third District, California.

Feb. 10, 1939.

1. Boundaries 🔑1

A boundary line is not unknown when descriptions in deed are certain and accurate and evidence is available from government monuments, field notes and fixed corners in immediate neighborhood from which to ascertain true line.

2. Boundaries 🔑48(2)

Building of fence along arbitrarily accepted line as mere accommodation to builder without mutual purpose to locate uncertain boundary line between coterminous owners does not establish line by acquiescence, and owner is not estopped from thereafter claiming title to true line.

3. Boundaries 🔑48(8)

Agreement between coterminous owners to establish uncertain boundary need not be expressed but may be inferred from conduct by acquiescence for statutory period, but conduct warranting inference must be clear and satisfactory.

4. Boundaries ⚷48(8)

An agreement between coterminous owners to establish uncertain boundary may not be inferred from mere permissive use of fence on owner's land for accommodation of adjoining owner.

5. Boundaries ⚷48(2)

Fence built as mere convenience to take advantage of natural barriers and save cost of additional fencing and not as compromise of dispute or uncertainty regarding true line did not establish title by acquiescence.

6. Adverse possession ⚷90

Payment by owner and predecessors in title of taxes on land described in deed which made no reference to disputed strip of land, without substantial evidence that disputed strip was included in general description of owner's land, would not permit owner to claim title to strip by adverse possession. Code Civ.Proc. § 325.

7. Quieting title ⚷10(1), 44(4)

In suit to quiet title to land, a litigant must prevail on strength of his own title, and satisfactory proof of title should be adduced.

8. Boundaries ⚷53

In suit to quiet title, where line established by survey was mere preliminary line, court could not quiet title in owner to land to such line as boundary.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action to quiet title by Henry Pedersen against John Reynolds and wife wherein defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Reversed in part with directions.

Irwin T. Quinn, of Euerka, for appellants.

Denver Sevier and Kenneth D. Sevier, both of Euerka, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment quieting title in plaintiff to 640 acres of grazing land in Humboldt county and determining that an old fence which was built in 1885 established the boundary line between their adjoining properties by acquiescence.

The controversy in this suit is over a strip of land 198 feet in width extending across the adjoining portions of the respective ranches of the parties to this action. The strip is about three-fourths of a mile in length and contains 18 acres of land. The properties are rough and hilly and have never been cultivated. They were used chiefly as cattle ranges. The plaintiff bought his 640-acre ranch in 1924 from Ralston Pool, who purchased it from his mother in 1913. Ralston's father, W. A. Pool, bought the place in 1881, and constructed an old irregular fence across a portion of the southern part thereof in 1885 for the purpose of enclosing his cattle.

The defendant Bertha Reynolds inherited from the estate of her mother the 160-acre tract of land adjoining plaintiff's property on the south. Her father, W. O. West, bought that ranch in 1883. They did not live on the premises. It was sometimes leased for grazing purposes. Mr. West lived elsewhere and visited the ranch only occasionally.

There was never any dispute over the boundary line between these two ranches until the fall of 1935, when the plaintiff purchased posts and wire with which to reconstruct a fence across the southern border of his 640-acre tract. Only portions of the old fence then remained. It never did extend along the entire southern border of the land. It was quite irregular. It did not follow a straight line. There were several gaps in the line of fence which had never been built. The plaintiff explained that the fence was built to enclose cattle and that a portion of the southern border of his land was marked by bluffs, slides and abrupt ridges which turned his cattle without the necessity of enclosing such portions with a fence. When the plaintiff started to build his fence in 1935, along the line of the old fence, the defendants objected to that plan, denying that the old fence marked the true dividing line between their properties. After much dispute regarding that subject, during a period of a month or two, the plaintiff and defendants agreed to employ a surveyor to locate the true line. They hired Mr. F. A. McKee, a licensed surveyor of Fortuna. With the aid of the plaintiff and Frank Pool, a son of plaintiff's predecessor in title, Mr. McKee spent two days trying to locate and run the southern line of plaintiff's property. Starting from a point agreed upon by the respective parties, which was a government corner of a neighbor's property located by a surveyor of recognized ability and reputation by the name of Herrick, Mr. McKee finally located the plaintiff's southern line at the approximate distance of 198 feet north of the old fence. Mr. McKee acknowledged that location to be a "preliminary line" only. He said it would require several days' time and would cost them considerable money to complete the survey satisfactorily. The plaintiff rejected the surveyor's location as the true boundary line between his property and that of the defendants. No further survey was made. The respective parties shared equally the cost of employing Mr. McKee. There was then no agreement between them fixing the boundary line. Several months later this suit to quiet title was commenced by the plaintiff.

The complaint alleges title to the 640-acre tract of land in Humboldt county, described as the N. ½ of the S. E. ¼ of section 20, and the N. W. ½ of the S. W. ¼ of section 21, T. 2 N. of R. 2 West, H. M., and asserts that "The southern boundary of said property runs along and follows an old fence that was built in or about the year 1885, by W. A. Pool and W. O. West". The defendants answered the complaint denying the last-quoted paragraph. They also filed a cross-complaint, alleging that they are the owners of 160 acres of land adjoining plaintiff's land upon the south. The defendants' land is described as the S. ½ of the S. E. ¼ of section 20, the S. W. ¼ of the S. W. ¼ of section 21, and the N. W. ¼ of the N. E. ¼ of section 29, T. 2 N. of R. 2 West, H. M., containing 160 acres, according to the official plat of said survey.

The court adopted findings favorable to the plaintiff with respect to the disputed strip of land. It was determined that the boundary line between the respective properties of the plaintiff and defendants was established by acquiescence along the line occupied by the old fence, "except for those portions of said 'old fence' which had been built off the straight line for convenience sake." The court adopted no finding with respect to adverse possession, nor does the judgment refer to that character of asserted title.

A decree was rendered quieting title in plaintiff to his 640-acre tract of land, bounded on the south by the line of the old fence. It was determined that the 198-foot strip of land in dispute was acquired by plaintiff by acquiescence. The decree provides in that regard:

"That the southern boundary of plaintiff's said property described above, runs along and follows an 'old fence' that was built on or about the year 1885 by W. A. Pool, except for those portions thereof which had been built off the straight line of said fence for convenience sake."

The decree also quiets title in defendants to their 160-acre tract of land above described. From that judgment the defendants have appealed.

It is asserted the findings and judgment are not supported by the evidence; that there is no substantial proof of the elements necessary to constitute the establishment of a boundary line between the lands of the plaintiff and defendants by acquiescence.

We are convinced the findings and decree to the effect that the boundary line between the lands of the plaintiff and defendants was established by acquiescence along the line of the old fence which was built by W. A. Pool in 1885, is not supported by the evidence. There is no proof of a disagreement or dispute over the boundary line between the former owners of the respective parcels of land. There is no evidence that Mr. West, the father of the defendant Mrs. Reynolds, who formerly owned the 160-acre tract, ever talked with Mr. Pool, the plaintiff's predecessor in title, about the location of the boundary line of their properties. There was no controversy about the line. There was apparently no uncertainty regarding the line. No effort was made by anyone to ascertain the true line. In 1885 the land was of small value. It was never cultivated. It was used chiefly for grazing stock. It was rough and rugged, containing ridges, bluffs and slides in the vicinity of the line in controversy. Mr. West lived in Ferndale and seldom visited his ranch. The record clearly indicates that Mr. Pool built the irregular, disconnected portions of fence without consulting Mr. West, as a mere temporary convenience to prevent his stock from straying to distant points. There is no evidence that Mr. West did not know exactly where his boundary line was located. The evidence refutes the assertion that Mr. Pool was uncertain regarding the location of his line. His son testified that he built the fence on a line with a government corner stake which was pointed out to him by the person from whom he purchased the land. Mr. Pool made no effort to locate a different line by inquiry, searching, surveying or otherwise. He accepted the government corner stake as evidence of the true line. He did not extend the fence across the southern boundary. It contained several gaps at points where steep bluffs, abrupt declivities and sharp ridges furnished natural barriers to turn the stock. The old fence was not built by agreement of the parties. The location of their boundary line was never disputed or questioned between them. Mr. West took no part in locating or building that fence. He did not object to it because it was an accommodation to his neighbor, and he expected it to be changed to the true line when he wanted to use the land. He knew the fence was not on the proper line, and told his son the true line was some distance north of the fence, explaining why he did not object to its being built and used in that temporary location. Moreover, the position of the fence was not a compromise on the part of Mr. Pool. He believed he was building it on the true line. There was no uncertainty regarding the correct location of that boundary line by either party. Their respective deeds accurately and clearly described their separate properties. A definite government corner from which a correct survey could be made was located and marked by a reputable surveyor, at the corner of the property of their neighbor, Smith, half a mile to the east. The field notes for those surveys were also available. Their boundary line could have been easily and accurately established. There is no proof to the contrary. There is therefore neither lawful reason nor valid excuse, under the circumstances of this case, for the parties to have acquiesced in locating an uncertain boundary line.

The only material evidence regarding the establishment of a boundary line between the properties of the plaintiff and defendants, upon which the respondents rely, is the following:

Frank Pool, a son of the plaintiff's predecessor in title, was twelve years of age at the time the fence was built. He testified that he helped his father construct that fence for the purpose of enclosing their cattle; that Mr. West, the owner of the adjoining 160-acre tract, did not assist in building the fence. The witness had not heard of any dispute over the division line between the properties of his father and Mr. West, nor with anyone else. He said that his father built the fence on a line with a government post, representing "the actual Government corner" which was shown to him by the man from whom he purchased the land; that he had never heard of Mr. West objecting to the location of the fence after it was built, and that they had paid all taxes on "the land described in those deeds".

Ralston Pool, another son of W. A. Pool, who was eight years of age when the fence was built, testified that he did not help build the fence, but that it was constructed "for the purpose of keeping the stock from going backwards and forwards"; that he had heard of no objection to the building of that fence, and that as far as he knew it was agreed to by both parties.

Mr. Harvey Dean, who lived near the Pool ranch and who worked for W. A. Pool for three years, testified that he knew the "Pool place up on the Wildcat"; that he helped build the fence in question. He testified to no dispute and to no conversation between Mr. Pool and Mr. West regarding the location of the boundary line between their respective properties. To the question, "Q. Did you ever hear any objection from them as to that being the division line between the two properties?" he replied, "Not that I know of".

The plaintiff, Mr. Pedersen, testified that he bought the land from the Pools in 1924; that he never talked with any of his predecessors in title about the location of the boundary line; that he made no investigation regarding that boundary; that no question regarding the boundary line ever arose until the fall of 1935, when he purchased wire and posts to replace the old fence along the same line it formerly extended; that the defendants then denied that the line of the old fence was the true boundary line, and after a dispute which lasted two months they agreed to hire a surveyor and divide the expense of running a true line; that they did employ Mr. McKee for that purpose and that the witness helped him survey the line, and also paid one-half of his fees; that McKee merely ran a preliminary line, which was 198 feet northerly from the old fence, and that the plaintiff therefore rejected that location as the true boundary line.

Ernest West, a son of W. O. West, who was about ten years of age when the fence was built, testified that there never was any dispute or controversy over the boundary line; that Mr. Pool built the fence himself for his own convenience to keep his stock from straying to other property; that he located the fence along that line because it required less fencing and cost less to enclose the range there for the reason that certain cliffs and bluffs helped form natural barriers; that his father had nothing to do with locating the fence, but did afterward tell the witness the boundary line was north of the old fence, and that Pool had constructed it at that place as a matter of convenience to save himself money in fencing. Mr. West said:

"Later on they told me * * * that fence wasn't on the line * * * and my father told me it was further north. * * * I can remember asking my father why Mr. Pool built the fence there, why he didn't build it on the line. Well, he says, that bluff over there saved a quite a bit of fencing * * * and consequently they put it down there, and the land involved at that time didn't make so much difference. * * * It was so far away from our house * * * it wasn't worth while to go up there and cultivate it. * * * Mr. Pool built most of the fence, and these fences were built to save him * * * all he could, and he built them where it was most convenient, and Mr. Pool at one time said, 'when we get around to it we will put the survey through and put them as near as we can on the line, but at this time it's all right, you don't care and I don't care, he says, so we will put the fence wherever it's most convenient'."

[1, 2] The foregoing evidence indicates that the old fence was built as a mere convenience to plaintiff's predecessor in title to take advantage of natural barriers and save the cost of additional fencing, and not as a compromise of a dispute or an uncertainty regarding the true line. It may not be said a boundary line is unknown when the descriptions in the deeds are certain and accurate and the evidence is readily available from government monuments, field notes and fixed corners in the immediate neighborhood, from which to ascertain the true line. When a fence is built along an arbitrarily accepted line as a mere accommodation or convenience to the builder thereof without any mutual purpose or understanding to thereby locate an uncertain boundary line between coterminous owners of land, the fence may not be said to establish the line by acquiescence and the owner is not estopped from thereafter claiming title to the true line.

In the case of Clapp v. Churchill, 164 Cal. 741, 130 P. 1061, 1062, the appellants sought to establish title by acquiescence to a strip of land 5 feet wide by 590 feet in length. A nonsuit was granted and that order was affirmed by the Supreme Court. It is there said:

"The case is one where plaintiffs to prevail must establish an uncertain boundary line, an agreement between the coterminous owners to fix that boundary line, and the fixing of that line by agreement, or must establish their title by adverse possession. * * *

"* * * This is substantially the testimony to support plaintiffs' case. It is silent upon several important matters. There is no word of testimony that the defendants, or any one of them, believed or declared their northern boundary line to be uncertain. There is no testimony about any agreement fixing the pomegranate hedge as the accepted boundary line because of such uncertainty, and the whole case of the plaintiffs resolves itself down to this: That plaintiffs did not know where the boundary line called for by their deed was, but supposed it to be the pomegranate hedge. There was no uncertainty even upon the face of their deed. * * * Plaintiffs exercised certain acts of dominion and control over the disputed strip. * * *

"But the doctrine of an agreed boundary line and its binding effect upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. When that uncertainty exists, or is believed by them to exist, they may amongst themselves by agreement fix the boundary line, and that agreement will bind all the consenting parties. Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement only when a formal agreement would itself have been made a binding contract. But a formal agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line."

The preceding language fits the present case exactly. The evidence shows without conflict that the predecessor in title of plaintiff built the disputed fence opposite a government stake which he assumed marked the true line. He was not uncertain about the location of that line. He thought he actually built the fence on the true line. On the contrary, Mr. West told his son, Ernest, that the fence was not on the proper line; that Mr. Pool built it there as a mere convenience to himself, and he said that the boundary was further north than the location of the fence. Mr. West was not uncertain regarding the location of that line. He knew the fence was not built along the real boundary. So neither party was uncertain about the matter.

In the Clapp Case, supra, it is further said that the evidence which will warrant a finding of title by acquiescence must disclose, "A valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line. But * * * this inference of a doubtful boundary will not prevail against the proved fact to the contrary, namely, that there was no question or doubt or dispute between both parties over the boundary."

[3-5] The foregoing essentials to title by acquiescence are elaborately covered by an excellent brief found in 69 A.L.R. 1431, note. It is true that an agreement between coterminous property owners to establish an uncertain boundary line need not necessarily be by express agreement, but may be inferred from the conduct of the parties by acquiescence therein for the statutory period of time. Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58; 1 Tiffany on Real Property, 2d Ed. 999, sec. 295. But the conduct of a party which will warrant such an inference must be clear and satisfactory. The mere permissive use of a fence on an owner's land for the accommodation of the adjoining property owner is not sufficient upon which to base such an inference. In this case both parties refuted by affirmative declarations and by their conduct that there ever was a dispute, an uncertainty or an agreement regarding the boundary line between their lands. Such a situation will not support a finding of title by acquiescence. 4 Thompson on Real Property, p. 196, sec. 3105, p. 212, sec. 3117.

It has been definitely held that acquiescence in the maintenance of a fence merely for the purpose of enclosing cattle, or for other convenience of the adjoining land owner, without an agreement that the fence shall become the boundary line between their lands does not constitute an estoppel which will prevent the real owner from subsequently claiming his property. Moniz v. Peterman, 220 Cal. 429, 435, 31 P.2d 353; Staniford v. Trombly, 181 Cal. 372, 186 P. 599; Grants Pass Land & Water Co. v. Brown, 168 Cal. 456, 143 P. 754. In 4 Thompson on Real Property, at page 197, section 3105, it is said:

"Where one owner merely permits an adjoining owner to construct a fence on an asserted boundary line, he is not estopped thereby from questioning the correctness of such line."

And at page 210, section 3115, of the last-mentioned text book, it is said:

"An agreement or acquiescence in a wrong boundary when the true boundary is known, or can be ascertained from the deed, is treated both in law and equity as a mistake, and neither party is estopped from claiming the true line."

Likewise, at page 212, section 3117, of the same authority, it is said:

"A fence between adjoining owners, placed by mistake on a line different from the true boundary line, does not estop the owner upon whose land the fence stands from claiming up to the true line."

All of the authorities cited in the briefs in this case may be readily reconciled with the foregoing principles determining title by acquiescence which must be present to constitute a binding location of a boundary line between coterminous property owners.

In the case of Price v. De Reyes, 161 Cal. 484, 119 P. 893, the judgment of the trial court was reversed because the record disclosed the fact that there was a definite uncertainty regarding the true line between the coterminous owners of land; that they actually agreed to a specific boundary line; that the agreement was followed by occupancy on the part of both owners up to the stipulated line, and that they thereafter constructed valuable improvements on their respective sides of the agreed line. The syllabus to that case correctly states the principle upon which the judgment was reversed, as follows:

"Where coterminous landowners, being uncertain of the true position of their common boundary line, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions."

There is nothing in that case in conflict with what we have previously said regarding title by acquiescence.

All of the other cases relied on by the respondent may be likewise reconciled. There is no substantial evidence in this case, nor are there reasonable inferences which may be drawn therefrom in support of the findings and judgment that plaintiff acquired title to the disputed strip of land by acquiescence.

[6] Nor is there any evidence that the plaintiff acquired title to that 198-foot strip of land by adverse possession. The trial court did not adopt a finding to that effect, nor does the judgment so determine. The evidence conclusively shows that the plaintiff and his predecessors in title merely paid taxes on the land described in their deeds, which make no reference to the disputed strip of land. Title by adverse possession may not be acquired in the absence of payment by the claimant and his predecessors in title of "all the taxes, state, county, or municipal, which have been levied and assessed upon such land". Sec. 325, Code Civ.Proc. It follows that the holders of the deeds which actually contain within their descriptions the disputed strip of land paid the taxes thereon. There is no substantial evidence it is included in the general description of plaintiff's 640-acre tract. Therefore he failed to establish title to that strip by adverse possession.

[7, 8] The appellants request this court to direct a judgment quieting title in them to their 160-acre tract of land to the line on their northerly boundary located by the surveyor, Mr. McKee, which includes the 198-foot strip of land in controversy. This we may not do for lack of satisfactory evidence. In a suit to quiet title to land, a litigant must prevail on the strength of his own title. Satisfactory proof of title should be adduced. Mr. McKee testified that the line which he believed to be the true boundary line between the tracts of land was merely a "preliminary line". He said it would require about five days' work to complete the survey. The court has quieted title in defendants to the land described in their cross-complaint. This assures them of title to their 160-acre tract of land wherever the true lines may be located.

The judgment, to the extent to which it purports to quiet title in plaintiff to his 640-acre tract of land bounded on the south by the old fence which was constructed in 1885, from which the defendants appeal, is reversed, and the court is directed to render judgment against the plaintiff to the effect that he take nothing by his action. The appellants may recover costs on appeal.

We concur: PULLEN, P. J.; TUTTLE, J.

30 Cal.App.2d 663

PEOPLE v. VAN.

Cr. 2022.

District Court of Appeal, First District, Division 2, California.

Feb. 6, 1939.

1. Criminal law 🔑93

The superior court has jurisdiction over conspiracies, the object of which is a felony or the object of which is neither a felony nor the commission of an act which is injurious to public health or morals or obstructs justice or the due administration of the laws. Pen.Code, § 182.

2. Criminal law 🔑94

The jurisdiction of the superior court over conspiracies, the object of which is the commission of an act which is injurious to public health or morals or obstructs justice or the due administration of the laws, depends on the extent of the punishment provided by law for the commission of such an act. Pen.Code, § 182.

3. Criminal law 🔑93

The crime of conspiracy to operate a lottery was a "misdemeanor," and the superior court was without jurisdiction of the offense. Pen.Code, §§ 182, 320.

[Ed. Note.—For other definitions of "Misdemeanor," see Words & Phrases.]

4. Criminal law 🔑94

The object of conspiracy to obtain money by false pretenses and by false promises with fraudulent intent not to perform such promises was neither a felony nor the commission of an act which is injurious to public health or morals or obstructs justice or the due administration of the laws, and hence the superior court had jurisdiction of the offense. Pen.Code, § 182.

5. Conspiracy ⚿47

Evidence *held* sufficient to support conviction for conspiracy to obtain money by false pretenses. Pen.Code, § 182.

6. Conspiracy ⚿43(5)

In prosecution for conspiracy to obtain money by false pretenses, the state need not allege that the crime of obtaining money by false pretenses had been actually committed. Pen.Code, § 182.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

J. Ferdinand Van was convicted for conspiracy to conduct a lottery and to obtain money by false pretenses and by false promises with fraudulent intent not to perform such promises, and he appeals.

Affirmed in part and reversed in part.

Walter H. Duane, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant Van and others were jointly charged with conspiracy in an indictment containing two counts. Defendant Van was convicted on both counts and he appeals from the judgment of conviction and the order denying his motion for a new trial.

Said defendant, together with other defendants, devised a scheme known as "The Great American Football Pool", under which they proposed to sell some three million tickets to the public at $1 per ticket. These tickets were designated by numbers and letters and the winners of weekly and final prizes were to be determined by said numbers and letters after making certain involved computations from the football scores of forty designated college football teams. The first grand prize of $100,000 and other large prizes were listed on the tickets and on the pamphlets which were printed and distributed in explanation of the scheme. In this pamphlet it was stated, "The Pool operates automatically, all tickets having an equal chance to win". After some of these tickets had been sold to the public, this prosecution was commenced.

The first count of the indictment charged that the defendant Van and others conspired "to set up, establish, operate and conduct a lottery in violation of section 320 of the Penal Code * * *". The second count of the indictment charged that defendant Van and others conspired "to obtain money by false pretenses and by false promises with fraudulent intent not to perform such promises" in violation of subdivsion 4 of section 182 of the Penal Code. The allegations of both counts were set forth in some detail and in each count it was alleged that various overt acts were done to affect the object of the conspiracy charged in said count.

The main contention of appellant on this appeal is that the superior court did not have jurisdiction of the offense charged in either count of the indictment. The discussion of this contention requires a consideration of the provisions of section 182 of the Penal Code which provides in substance that if two or more persons conspire to do any of the acts specified in any of the five numbered subdivisions of said section, such persons are punishable as provided in said section. Two paragraphs of said section deal with the subject of punishment. This court heretofore had occasion to consider these two paragraphs in Lesser v. Collins, 1 Cal.App.2d 161, 36 P.2d 411, and it was said on pages 163 and 164, 36 P.2d on page 412:

" 'The punishment prescribed in section 182 of the Penal Code for criminal conspiracy may be summarized as follows:

" 'First, where the object of the conspiracy is a felony, then the punishment is the same as is provided for that particular felony;

" 'Second, where the object of the conspiracy is to commit any act injurious to public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, then the punishment shall be in the same manner and to the same extent as is provided for the punishment of the commission of the respective act;

" 'Third, where the object of the conspiracy does not come within the abovenamed two classifications, then the punishment shall be by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

" 'This latter classification refers to such crimes as simple assault, petit theft, and like misdemeanors which are not included in the category of crimes understood to be or prescribed to be crimes which are injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws.' "

[1, 2] Said decision clearly indicates that the superior court has jurisdiction over those conspiracies falling within the first and third classes therein mentioned and that jurisdiction over conspiracies falling within the second class depends upon the extent of the punishment provided by law for the commission of the act which was the object of the conspiracy.

[3] With respect to the first count, appellant takes the position that the alleged object of the conspiracy was to operate a lottery; that said object was one injurious to public morals, being a violation of section 320 of the Penal Code which is found in title 9 of part 1 of the Penal Code, which title reads, "Crimes Against the Person and Against Public Decency and Good Morals"; that the conspiracy alleged in said first count therefore falls within the second class above mentioned; that the crime of operating a lottery is a misdemeanor under the terms of said section 320; that the crime of conspiracy to operate a lottery is therefore likewise a misdemeanor under the terms of said section 182 and the superior court had no jurisdiction of the offense charged in said first count. Respondent concedes that appellant's contention with respect to said first count should be sustained and we see no escape from that conclusion under the authority of Lesser v. Collins, supra.

[4] With respect to the second count, appellant takes the position that it likewise charged only the commission of a misdemeanor; that "the substantive offense would be that of petty theft" and therefore the superior court was without jurisdiction. Respondent expresses the view that appellant was "not charged with having conspired to commit the crime of theft" but "was charged with having conspired to obtain money from certain other persons by false pretenses and 'by false promises, with fraudulent intent not to perform such promises' as specifically prohibited by subdivision 4 of Penal Code, section 182". The false pretense or false promise consisted of the statement that all tickets had an equal chance to win. We find no merit in appellant's contention with respect to said second count. Appellant was charged in said count with the crime of conspiracy. The alleged object of said conspiracy was either to commit petty theft as claimed by appellant or to obtain money "by false promises with fraudulent intent not to perform said promises" as claimed by respondent. In either event, the conspiracy charged in said second count was one within the third class mentioned in Lesser v. Collins, supra, and the superior court therefore had jurisdiction. Appellant cites People v. Barnard, 63 Cal.App. 562, 219 P. 756, but we find nothing therein which is contrary to the views we have expressed.

[5, 6] Appellant also contends that the evidence was insufficient to support his conviction. We find no merit in this contention. It is based upon the theory that appellant was charged with the crime of theft and that it was therefore necessary for the prosecution to prove all the elements of obtaining money by false pretenses. This theory finds no support in the record. Appellant was charged with the crime of conspiracy and the evidence was ample to sustain his conviction of the offense charged. It was not necessary for the prosecution to allege or prove that the crime of theft had been actually accomplished. People v. Cory, 26 Cal.App. 735, 148 P. 532.

The judgment and order denying the motion for new trial are reversed in so far as said judgment and said order relate to the first count of the indictment. The judgment and order denying the motion for new trial are affirmed in so far as said judgment and said order relate to the second count of the indictment.

We concur: NOURSE, P. J.; STURTEVANT, J.

30 Cal.App.2d 747

RIVERSIDE COUNTY v. BROWN et al.

Civ. 2174.

District Court of Appeal, Fourth District, California.

Feb. 9, 1939.

1. Costs 🔑203

The use of attorney's name in body of cost bill was merely an identification of charges for services rendered by attorney, and was not a claim that attorney's fees be made payable to him.

2. Eminent domain 🔑265(3)

Determination of reasonable fee for attorney's services where condemnation proceeding is discontinued rests in trial judge's discretion. Code Civ.Proc. § 1255a.

3. Attorney and client 🔑140

When the trial court is informed of the extent and the nature of attorney's services, its own experience furnishes it with every element necessary to fix their value.

4. Eminent domain 🔑262(1)

An appellate court can interfere with trial court's decision as to what constitutes reasonable attorney's fees where condemnation proceeding is discontinued, only where there has been a plain and palpable abuse of discretion. Code Civ.Proc. § 1255a.

5. Appeal and error 🔑893(1)

Appellate court could not convert an appeal from an order retaxing costs into a trial de novo.

6. Eminent domain 🔑265(3)

Trial judge did not abuse discretion in fixing attorney's fees at $2,000 where condemnation proceeding was discontinued. Code Civ.Proc. § 1255a.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Riverside County against Arthur C. Brown and others. From an order retaxing costs, plaintiff appeals.

Affirmed.

See, also, 84 P.2d 161.

Earl Redwine, Dist. Atty., of Riverside, for appellant.

Miguel Estudillo, of Riverside, for respondents.

MARKS, Justice.

This is an appeal from an order retaxing costs. It presents the question of the propriety of the allowance of $500 for attorney's fees to each of three groups of defendants, the respondents here, in a condemnation action which had been discontinued as to them before trial.

The pertinent part of the memorandum of respondents' costs and disbursements is as follows:

"Memorandum of costs on Abandonment—Claimed by Defendants F. E. Newberry, Mary E. Smith, Cora F. Sieber, George M. Owen and Mittie C. Owen. . . .

"Attorney's Fees:

"Miguel Estudillo, as more specifically set out in the affidavit of said Miguel Estudillo hereunto attached and made a part hereof .... $2,000.00."

On the motion to retax, the trial court fixed the attorney's fees as follows:

F. E. Newberry, cost of legal service	$500.00
Cora F. Sieber and Mary E. Smith, legal service	500.00
George M. and Mittie C. Owen, legal service	500.00

[1] Plaintiff first questions the sufficiency of the memorandum, because, as is argued, it charged as costs $2,000, as attorney's fees, in favor of Miguel Estudillo and not in favor of the respondents.

We do not so construe the memorandum of costs as filed. As stated in the first portion of the cost bill, the costs were claimed by the respondents and included $2,000 attorney's fees which were payable by them to their attorney, Miguel Estudillo. The use of the attorney's name in the body of the cost bill was merely an identification of the charges for the services rendered by that attorney and was not a claim that the attorney's fees be made payable to him.

Plaintiff urges that the affidavits supporting the memorandum of costs were insufficient to justify the trial judge in allowing the attorney's fees, and that the allowance of $500 to each of the three groups of respondents was excessive.

The affidavit of Miguel Estudillo shows that he was employed as attorney for the respondents on January 4, 1937. The notice of discontinuance of the action as to these respondents was dated April 20, 1938. The attorney prepared a separate answer for each group of the respondents. He spent twenty days in investigating the facts and law of the cases, three of which he spent away from his office. He charged one hundred dollars a day for these services.

[2-4] Section 1255a of the Code of Civil Procedure provides that in cases of this kind where the action is discontinued the defendants shall be allowed a reasonable fee for the services of their attorney. What is a reasonable fee for such services is first committed to the sound discretion of the trial judge. An appellate court can only interfere with the decision of the trial court as to what constitutes reasonable attorney's fees where there has been a plain and palpable abuse of discretion. Freese v. Pennie, 110 Cal. 467, 42 P. 978; People v. Thompson, 5 Cal.App.2d 668, 43 P.2d 606; City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 25 P.2d 224.

It is well established in this state that, as held in Spencer v. Collins, 156 Cal. 298, 104 P. 320, 324, 20 Ann.Cas. 49: "The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value." See, also, People v. Thompson, supra; City of Los Angeles v. Los Angeles-Inyo Farms, Co., supra.

The trial judge had before him, in addition to the affidavits filed by the attorney for respondents, the pleadings in the case. He knew of the skill and experience of respondents' counsel, which is not questioned here. He was informed of the difficulty and importance of the case. He was informed of the reasonable value in Riverside county of such services rendered by an attorney of the skill and experience of Mr. Estudillo. His finding of the reasonable value of those services is supported by the foregoing facts and the trial court's estimate of their value. This constitutes evidence in the case which was not necessarily overcome by the affidavit filed by an attorney for plaintiff. That affidavit only created a conflict in the evidence which was resolved in favor of respondents by the trial judge.

[5, 6] "We are not at liberty to convert this appeal into a trial de novo." City of Los Angeles v. Los Angeles-Inyo Farms Co., supra [134 Cal.App. 268, 25 P.2d 227.] Under the facts before us we cannot hold that the attorney's fees fixed by the trial judge evidenced a breach of discretion on his part.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

CARPENTER, Insurance Com'r, v. GLENN-COLUSA IRR. DIST.*

Civ. 5979.

District Court of Appeal, Third District, California.

Feb. 6, 1939.

As Modified on Denial of Rehearing March 8, 1939.

Hearing Granted by Supreme Court April 7, 1939.

Waters and water courses ⟹230(8)

The holder of matured bonds and coupons of irrigation district, after presentation and refusal of payment thereof, was not entitled to money judgment against district, since no additional right or remedy was afforded. St.1919, p. 667, § 52.

◆

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as conservator of the Great Republic Life Insurance Company, against the Glenn-Colusa Irrigation District, on certain matured and unpaid bond interest coupons of the Williams Irrigation District. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. Coburn Cook, of Turlock, for appellant.

Hankins & Hankins, and P. J. Minasian, all of San Francisco, for respondent.

STEEL, Justice pro tem., delivered the opinion of the court.

This is an appeal from a judgment entered pursuant to an order sustaining a demurrer to the plaintiff's amended complaint without leave to amend.

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*For subsequent opinion see 94 P.2d 345.

The amended complaint contains two causes of action, both of which seek to recover a money judgment against the defendant upon certain matured and unpaid bond interest coupons of the Williams Irrigation District. The first cause of action is for the coupons maturing January 1, 1933, to July 1, 1936, inclusive, and the second cause, for coupons maturing January 1, 1927, to July 1, 1932, inclusive, in the aggregate sum of $18,000.

From the record it appears that the Glenn-Colusa Irrigation District was organized in 1920, and in the year 1924, was enlarged to include the Williams Irrigation District, the consolidation being effective June 16, 1924. All of the coupons which are the subject of this action matured subsequent to such consolidation.

It is alleged that the plaintiff, in his official capacity, is the owner and holder of said coupons; that they were presented to the treasurer of the defendant district for payment; that demand was made therefor, and payment was by said treasurer refused; and that said coupons bear interest at the rate of 7 per cent per annum from the date of presentation, under the provisions of section 52 of the California Irrigation District Act.

The question presented is whether the holder of matured bonds and coupons, after presentation and refusal of payment thereof, is entitled to a money judgment against the defendant district. This question appears definitely settled in the recent case of Moody v. Provident Irrigation District, 85 P.2d 128, 130, wherein the Supreme Court, adopting in substance the opinion of this court written by the late Mr. Justice Plummer, holds that the 1919 amendment of section 52, St.1919, p. 667, of the California Irrigation District Act, increasing the interest rate from 6 per cent to 7 per cent on matured bonds and coupons registered and not paid because of insufficiency of funds, constitutes a new agreement and tolls the statute of limitations until there is sufficient funds in the district treasury with which to pay the same, and notice thereof given. The court says: "It is clear that while it has been held in a number of cases prior to the amendment of section 52, supra, that a money judgment was proper to be entered against the district, and also necessary to prevent the bar of the statute after the lapse of four years, it is likewise clear that the entering of a money judgment against the district does not give to a bondholder any additional remedies in seeking to enforce payment on matured bonds and matured coupons. * * * The proceeding, being a purely idle act, and the entry of a money judgment by the trial court affording the plaintiff no additional rights or remedies, we think the court was correct in holding in substance that it should not be burdened with proceedings which would avail the plaintiff nothing."

It follows that the trial court properly sustained the demurrer herein, and that the judgment should be affirmed. It is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

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30 Cal.App.2d 675

SULLIVAN v. THOMPSON et al.

Civ. 11677.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1939.

1. Automobiles 🔑244(26)

Where automobile salesman while en route to employer's used-car lot on Sunday morning to keep an appointment with a customer drove automobile into rear end of parked automobile, evidence sustained finding that salesman was acting within "course and scope of employment" so as to render his employer liable for resulting injury to occupant of parked automobile.

[Ed. Note.—For other definitions of "Course of Employment" and "Scope of Employment," see Words & Phrases.]

2. Master and servant 🔑302(6)

Even when servant is combining his own business with that of his master, the master is liable for servant's negligence.

3. Damages 🔑46

In personal injury action by minor, in absence of evidence that medical and hospital expenses were incurred by minor or that he was responsible for payment thereof, minor could not recover for medical and hospital expenses.

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Personal injury action by Robert Hugh Sullivan by his guardian ad litem, Mary E. Sullivan, against Clifford T. Thompson and C. Standlee Martin. From a judgment for plaintiff, C. Standlee Martin appeals.

Affirmed.

Kenneth J. Murphy, of Los Angeles, for appellant.

Russell H. Pray, of Long Beach (Roy J. Brown, of Long Beach, of counsel), for respondent.

DORAN, Justice.

This is an appeal by defendant C. Standlee Martin from a judgment entered jointly against him and the defendant Clifford T. Thompson, in favor of plaintiff, a minor eight years of age, for damages resulting from an automobile accident which occurred in Long Beach, California.

Defendant Martin, an automobile dealer, is also the operator of a used-car business having two locations in Long Beach: one at 730 American avenue, and the other at Ocean and Atlantic avenues. Defendant Thompson was employed by Mr. Martin as a used-car salesman, his duties being wholly concerned with that phase of the business.

On Sunday, June 14, 1936, the day of the accident, Mr. Thompson was directed to report to the Ocean avenue lot for "floor duty" in the afternoon between the hours of 12:30 and 6 o'clock, in accordance with a schedule arranged by the used-car salesmanager. With regard to such schedule, Mr. Martin testified that the salesmen's hours on duty were not strictly confined to the time of such schedules.

It appears from the evidence that on the preceding Wednesday Thompson had negotiated with a Mr. Lee Montoya for the sale to the latter of a certain used Nash automobile. Montoya, who lived in San Pedro, agreed to return on Friday to consummate the sale but he failed to do so. On Friday afternoon Thompson drove to Montoya's residence in the Nash car and there had a conversation with Mrs. Montoya in which, according to her testimony, a further appointment was made by Thompson to meet Montoya from "eleven to eleven thirty, or twelve, around there", on the following Sunday at the American avenue lot in Long Beach.

On the Sunday in question Thompson left his home at approximately 11 o'clock in the morning in his own car, with the intention of keeping the appointment made with Montoya, and, while en route, drove his car into the rear of a parked automobile, from which collision the alleged damages resulted.

Appellant contends that the "finding of the trial court that the defendant Thompson was acting within the course and scope of his employment by the defendant and appellant Martin at the time of the accident and injury is without support in the evidence", and that finding No. IV on damages for medical expense is likewise without support in the evidence and is contrary to law.

With regard to the accident, the court found in substance that it was caused by defendant Thompson's negligence and that at the time thereof defendant Thompson was the agent of defendant Martin and was operating the automobile within the purpose and scope of his employment, with the knowledge and consent of defendant Martin.

[1, 2] That there was evidence to support the court's findings, there can be no question, as the above brief account of the evidence reveals. It should be noted that Thompson was scheduled to work at the Ocean avenue lot, but, at the time the accident occurred, was on his way to the American avenue lot to keep an appointment with a customer, namely, Montoya. Appellant's contention that the "going to work" rule governs is therefore unavailing, for it is evident that although in one sense Thompson was going to work, nevertheless he was at the same time on a mission for and in the interest of, and performing a service for, his employer. Even when the servant is combining his own business with that of his master the latter is held to be liable and in that connection it has been held that "* * * no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured". Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945, 946. See, also, Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 P. 25.

[3] Appellant's exception to finding No. IV is well founded. McManus v. Arnold Taxi Corp., 82 Cal.App. 215, 255 P. 755. It is therefore necessary to reduce the judgment in the amount of $1,915.15, the sum found by the court to have been in-

curred for medical and hospital bills. There is no evidence to support the finding that such expenses were incurred by the minor, or that such minor was responsible for the payment thereof.

It is ordered, therefore, that the judgment be reduced in the sum of $1,915.15 and, thus modified, it is affirmed.

We concur: YORK, P. J.; WHITE, J.

SCHILDWACHTER v. CITY OF COMPTON et al. *

Civ. 6044.

District Court of Appeal, Third District. California.

Feb. 6, 1939.

Hearing Granted by Supreme Court April 7, 1939.

1. Municipal corporations ⚷125

As home rule provisions of Compton city charter are not in conflict with Municipal Civil Service Act, such general law was properly adopted and incorporated in city's civil service ordinance by reference in section adopting and incorporating all general laws of state respecting civil service system and became controlling law of municipality on subject. Gen.Laws Supp.1935, Act 1401; Const. art. 11, §§ 6, 8, as amended in 1914.

2. Municipal corporations ⚷78

Where no special procedure touching municipal subject is outlined by city charter, state law controls. Const. art. 11, § 8, as amended in 1914.

3. Municipal corporations ⚷115

The Municipal Civil Service Act, specifically requiring two-thirds vote of city electorate to withdraw any department, appointive officer, or employee from operation of civil service system, impliedly prohibits repeal or withdrawal of whole civil service ordinance by less vote. Gen.Laws Supp.1935, Act 1401.

4. Municipal corporations ⚷78, 115

As Compton city charter contains no provision for repeal of city ordinances, general laws on such subject control, and such repeal, to be valid, must be in response to adoption of another ordinance by city council or people under initiative and referendum. Gen.Laws 1931, Act 3651.

5. Municipal corporations ⚷115

The term "proposition," as used in statute authorizing city council to submit proposition for repeal of ordinance to people without petition therefor, refers to ordinances previously enacted or approved by such body and thereupon submitted to electors as proposition. Gen.Laws 1931, Act 3651.

[Ed. Note.—For other definitions of "Proposition," see Words & Phrases.]

6. Municipal corporations ⚷115

A city council's submission of question of repealing civil service ordinance to people at special election as "proposition" was without legal effect, and council's resolution, declaring ordinance repealed as result of election, was null and void. Gen.Laws Supp. 1935, Acts 1401, 1402; Gen.Laws 1931, Act 3651; Const. art. 11, §§ 6, 8, as amended in 1914.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Harry B. Schildwachter against the City of Compton and others to annul a resolution of the council of defendant city, declaring the repeal of such city's civil service ordinance by majority vote on a proposition submitted to the city electorate. From a judgment and order sustaining defendants' demurrer to the complaint without leave to amend, plaintiff appeals.

Reversed, with directions.

A. N. Soliss, of Compton, for appellant.

Ralph K. Pierson, City Atty., of Compton, for respondents.

STEEL, Justice pro tem., delivered the opinion of the court.

The plaintiff has appealed from a judgment and order sustaining the defendants' demurrer to plaintiff's complaint without leave to amend.

The complaint seeks to have annulled a resolution of the city council of the City of Compton declaring the repeal of the civil service ordinance of said city as the result of a majority vote upon a proposition, not an ordinance, submitted to the electorate of said city.

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*For subsequent opinion see 94 P.2d 346.

On June 11, 1935, the city council of the City of Compton passed and adopted ordinance No. 368 providing a civil service system for said city. On July 9, 1935, the personnel of said council having been changed, a majority vote passed and adopted ordinance No. 369 repealing said civil service ordinance No. 368. Shortly thereafter a referendum petition and protest was filed against ordinance No. 369, the repealing ordinance, and in response thereto ordinance No. 375 was passed and adopted repealing ordinance No. 369, the repealing ordinance.

Thereafter, on October 31, 1935, ordinance No. 376 was passed and adopted, wherein it was attempted to amend said civil service ordinance No. 368. This likewise met with a referendum petition and protest, which resulted in said council passing and adopting another ordinance, No. 378, repealing such amending ordinance No. 376.

On December 3, 1935, a majority of said city council concluded to submit the repeal of said civil service ordinance No. 368, to a vote of the people, and accordingly called a special election for January 17, 1936, submitting the question as a proposition, and not as an ordinance, for the repeal thereof. The election resulted in a vote of 1404 for repeal and 1310 against repeal, and the council accordingly declared the civil service ordinance and system repealed.

The plaintiff contends, first: That it requires a two-thirds vote in any event to repeal such an ordinance, and, second: That the said city council was without jurisdiction or authority to submit a repeal of such ordinance to the electors.

In April, 1935, the legislature approved Act 1401, Gen.Laws Supp.1935 (Stats.1935, p. 380), generally known as the Municipal Civil Service Act of 1935, which by its terms provides that a two-thirds vote of the electors of a city is required to withdraw any department, appointive officer or employee from the operation of such system. Act 1402, approved May 2, 1935 (Stats.1935, p. 485), ratified all ordinances creating civil service commissions and validated all such municipal ordinances then in effect.

Plaintiff and appellant herein contends that by reason of said legislative enactments, ordinance No. 368 was duly ratified and validated, and that section 16 of said ordinance having by reference adopted and incorporated all general laws of the state as they then, or may thereafter exist, with reference to a civil service system, brought the civil service system of the City of Compton within and subject to the terms and provisions of said Acts 1401 and 1402.

The City of Compton operates under a freeholders' charter, and the only provision therein with reference to civil service is: "To provide for a Civil Service System subject to the terms of this charter in any or all departments of the City government, and thereupon all appointments shall be made subject to the rules of said Civil Service System."

The charter being silent as to the procedure for establishing such civil service system or providing for its operation thereunder, the language, "subject to the terms of this Charter", must, to be effective, refer to other terms and provisions of the charter. We find therein, after declaring the right of the city to make and enforce all laws and regulations with respect to its affairs, the following:

"Provided, also, that where the general laws of the State provide a procedure for the carrying out and enforcement of any rights or powers belonging to the City, said procedure shall control and be followed unless a different procedure shall have been provided in this Charter or by Ordinance."

[1, 2] In 1914 sections 6 and 8 of article 11 of the Constitution were amended by what is generally referred to as the "home rule" provisions, the effect of which was to afford cities and towns theretofore or thereafter organized under charters, the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to such charter restrictions.

We find no conflict in such home rule provisions of the charter here considered with the Municipal Civil Service Act of 1935, and therefore, upon adoption of the civil service ordinance, embodying section 16 thereof, the general law was properly adopted and incorporated therein by reference, and became the controlling law of the municipality upon the subject. "Where no special procedure is outlined touching a municipal subject, the state law always controls by force of the Constitution." Hyde v. Wilde, 51 Cal.App. 82, 196 P. 118, 121; Mitchell & Johnson v. Smith, 16 Cal.App.2d 119, 60 P.2d 509; art. 11, sec. 8, Const.

[3] We now pass to a consideration of the applicability of Municipal Civil Service Act of 1935 to the instant case as requiring a two-thirds vote to effect a repeal of the city civil service system. It is the contention of respondents that said act is not applicable for the "reason that no attempt is made in the instant case to withdraw anything from the operation of such System, but an entire repeal thereof has been effected". The Civil Service Act as hereinbefore mentioned, specifically requires a two-thirds vote of the electorate to withdraw any department, appointive officer or employee, and it must obviously follow that a repeal or withdrawal of the whole ordinance cannot be accomplished by a less vote. It is not a case of the "lesser" including the "greater", as argued by the respondents, but rather the converse is true. Also, the maxim that "one cannot do by indirection what he cannot do by direction", is particularly applicable.

Finally, it is the contention of the respondents that the proposition so submitted to the electors for the repeal of said ordinance was valid and in accordance with the Initiative and Referendum Act of 1911, St.1913, Ex.Sess., p. 131 (Act 3651, Deering's Gen.Laws 1931), which act, it is claimed, was incorporated by reference in said city charter. That part of the act authorizing the legislative body to submit a "proposition", reads as follows: "Submission by Legislative Body. The legislative body of the city or town may submit to the people, without a petition therefor, a proposition for the repeal of any adopted ordinance, or for amendments thereto, or for the enactment of any new ordinance, to be voted upon at any succeeding regular or special municipal election, and if such proposition so submitted receives a majority of the votes cast thereon at such election, such ordinance shall be repealed, amended or enacted accordingly."

It is conceded to be the law that a legislative body of a municipality cannot by resolution, order or motion, repeal an ordinance, but may do so only by another ordinance or enactment of equal dignity. McQuillan Municipal Corporations 969, sec. 885 (2d), and cases cited. In 18 California Jurisprudence 928, note 7, it is stated: "The mode for the repeal of an ordinance is generally specified by the charter. And it would seem that an ordinance may be repealed only by an enactment of equal dignity."

[4] The Compton city charter contains no provision as to the repeal of ordinances; consequently, the general laws on the subject will control, and therefore, such repeal, to have validity as a legislative enactment, must be in response to an adoption of another ordinance by such legislative body, or by the people under the initiative and referendum. Whitmore v. Carr, 2 Cal. App.2d 590, 38 P.2d 802.

[5] It is apparent, therefore, that the term "Proposition", as used therein, has reference to ordinances which, as we have already indicated, must first have been enacted or approved by the legislative body, and thereupon submitted to the electors as a proposition.

[6] We conclude that the method of submission adopted by the respondents was without legal effect, and it follows that the resolution declaring civil service ordinance No. 368 repealed as a result of such election, is null and void.

The judgment is reversed, with directions to the trial court to overrule the demurrer permitting the defendants to answer if so advised.

We concur: PULLEN, P. J.; THOMPSON, J.

30 Cal.App.2d 667

LEVER et al. v. SMITH et al.

Civ. 6039.

District Court of Appeal, Third District. California.

Feb. 6, 1939.

Hearing Granted by Supreme Court April 6, 1939.

1. Mines and minerals 🔑48, 55(2)

Ownership or title to oil and gas in place is a limited interest or estate in land in nature of "profit a prendre" and cannot be severed from land and conveyed by grant separate and apart therefrom.

[Ed. Note.—For other definitions of "Profit a Prendre," see Words & Phrases.]

2. Mines and minerals 🔑54(2)

Where vendor executed contract for sale of lot "subject to community oil and gas lease" on day before delivery to trustee of instrument, in which vendor had joined, purportedly conveying mineral rights for purpose of executing oil lease of several lots as a unit, purchasers, upon execution of contract, became equitable owners of lot and vendor retained only legal title as security for payment of purchase price until subsequent conveyance of legal title was made.

3. Mines and minerals ⚷79(1)

An instrument purportedly conveying mineral rights in trust for purpose of executing oil lease of several lots as a unit, directing trustee to pay royalties to record owners as of date of delivery of lease, and lease providing that royalties should be paid to owners in fee, were to be construed together so that royalties were to be paid to owners of fee and not to record owner who had contracted for sale of lot prior to delivery of trust instrument.

4. Deeds ⚷108, 109

A grant deed executed pursuant to contract for sale of lot took effect upon delivery and was presumed to have conveyed title in fee absolute. Civ.Code, §§ 1056, 1105.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Marie L. Lever and another against Fred B. Smith and others for a declaration of rights under an instrument designated as "Articles of Association," which provided for leasing of property as a unit for development of oil and gas. From a judgment in favor of the named plaintiff, defendants appeal.

Affirmed.

John H. Burke and J. Merrill Levy, both of Long Beach, for appellants.

Eugene Tincher and Carl E. Cameron, both of Long Beach, for respondents.

STEEL, Justice pro tem., delivered the opinion of the court.

The plaintiffs brought this action for a declaration of their rights under certain written instruments attached to the complaint as exhibits. They seek to have the plaintiff Marie L. Lever declared to be the owner in fee of a certain lot or parcel of land, and by reason thereof entitled to a proportional share or benefit in the income accruing under a community oil and gas lease covering this and other lots. Judgment was entered in favor of the plaintiffs, from which the defendants appeal.

The property covered by the lease comprises a city block divided into lots in the Signal Hill District, and owned by some eighteen or twenty different individuals. The lot here involved was originally owned by Hattie L. Smith, now deceased, and a predecessor in interest of plaintiff Marie L. Lever.

The following are the procedural steps giving rise to the existing controversy. In January, 1922, the owners of all lots in the block, including Hattie L. Smith, executed an instrument designated as "Articles of Association", the effect of which was to provide for the leasing of the property as a unit for development of oil and gas. On February 10, 1922, Hattie L. Smith entered into an agreement for the sale of her lot, subject to said community oil and gas lease, to Emma C. Osborne and George M. Tietjen, which agreement was recorded August 3, 1922. On the 11th day of February, 1922, pursuant to the general plan provided in said "Articles of Association", all of the persons signing said articles delivered to plaintiff Farmers and Merchants Trust Company of Long Beach, as trustee, grant deeds covering their respective lots or parcels of land, purporting to convey in trust the minerals under the various parcels together with instructions to the trustee relative to leasing the same. Thereafter, and on July 21, 1922, all of the said parties aforesaid, with the exception of Hattie L. Smith, executed and delivered to the plaintiff trustee additional instructions directing it to execute a form of lease thereunto attached in favor of a certain oil company as lessee. These instructions were also signed by Emma C. Osborne and George M. Tietjen as the owners of the lot here in question, and among the provisions thereof the following appears:

"You are further instructed that in making payments of bonus, royalties, and other amounts which may come into your hands as lessor in said lease, you shall pay all such amounts to the record owners of the various parcels as shown at the date of delivery of said lease, * * *."

In the lease which the plaintiff trustee was directed to execute appears the following:

"It is agreed that all of the royalties herein referred to shall belong to the owners in fee simple of the respective parcels of land herein described in that proportion which the acreage of their respective parcels bear to the total acreage of the lands described in this lease, * * *."

Pursuant to said instructions the aforesaid lease was executed and delivered on or about the 6th day of November, 1922. Subsequently, oil and gas was produced on said property, and royalties have been disbursed to the various owners of said lots, including plaintiff Marie L. Lever and her predecessors in interest, Emma C. Osborne and George M. Tietjen.

On or about September 1, 1922, Hattie L. Smith, pursuant to the terms of the contract dated February 10, 1922, made and executed to the said Emma C. Osborne and George M. Tietjen a grant deed conveying to them as joint tenants, the said lot. This deed was recorded on November 22, 1922. Upon the death of Emma C. Osborne in 1930, George M. Tietjen became the sole owner as the surviving joint tenant, and in 1934, sold and conveyed said lot to plaintiff Marie L. Lever.

It appears from the record that Hattie L. Smith died intestate in the year 1929, and that the defendant Fred B. Smith, a son, was appointed administrator of her estate in 1935. It further appears that no royalty payments were ever made to Hattie L. Smith, and that no demand or claim was made by her or by anyone on behalf of her estate until the institution of the instant action.

It is the contention of appellants herein that Hattie L. Smith by the deed which she executed and delivered February 11, 1922, to the plaintiff trustee Farmers and Merchants Trust Company divested herself of all right, title and interest in and to the oil and gas underlying said lot, and by reason thereof, the subsequent deed which she executed and delivered pursuant to the contract of sale could not include the minerals in question. Therefore, Hattie L. Smith and her estate are entitled to all of the income accruing pursuant to said lease. This contention is based upon the theory, as stated by appellants, that "the only question involved is whether a landowner can divide the fee by granting the mineral under said land to one person, and by granting the fee of said land to another person".

[1] The oil and gas in place doctrine has been the subject of consideration in numerous cases in this state. It is generally recognized that the ownership or title to oil and gas in place is a limited interest or estate in land in the nature of a profit a prendre, and cannot be severed from the land and conveyed by grant separate and apart therefrom. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871, and cases cited; Richfield Oil Co. v. Hercules Gas Co., 112 Cal.App. 431, 297 P. 73.

In the case of Callahan v. Martin, supra, the court in discussing the nature of an assignee's rights as a purchaser of an oil royalty interest from an owner of the fee, says:

"Some jurisdictions adhere to the theory that the owner of land has an estate in oil and gas beneath the surface in like manner as he has an estate in the surface; that oil and gas in place beneath the surface of land constitute a part of the land, and as such are real property, may be granted separate and apart from the surface, and when so granted vest in the assignee an estate in definite corporeal real property. * * * There are intimations of approval of the oil and gas in place doctrine in some of the decisions in this state. [Citing cases.] But other cases unequivocally declare that the owner of land does not have an absolute title to oil and gas in place as corporeal real property, but, rather, the exclusive right on his premises to drill for oil and gas, and to retain as his property all substances brought to the surface on his land. [Citing cases.] "Giving full weight to this statement of the nature of the landowner's rights in oil and gas, we are of the view that an operating lessee under a lease for a term of years, or for a term of years and so long as oil shall be produced in paying quantities, has an interest or estate in real property in the nature of a profit a prendre, which is an incorporeal hereditament, and that the assignee of a royalty interest in oil rights under an assignment by the landowner also has an interest or estate in real property in the nature of an incorporeal hereditament." [3 Cal.2d 110, 43 P.2d 791.]

In the instant case it will be observed that the contract of sale, which is the forerunner of the fee title acquired by the predecessors of plaintiff Marie L. Lever was executed and delivered February 10, 1922, at a time when the vendor enjoyed an absolute fee title, and that the agreement contained no reservations or restrictions relative to minerals, merely providing that the title to the lot was subject to the community oil and gas lease. The deed purporting to convey the minerals to the plaintiff trustee, while dated and acknowledged on February 1, 1922, was not delivered to and accepted by plaintiff trustee until February 11, 1922, or one day after the rights of the vendees under the contract had intervened. Thereafter, as heretofore recited, Hattie L. Smith by grant deed executed and delivered on September 1, 1922, pursuant to the terms of said contract, conveyed the lot in question to Osborne and Tietjen, the vendees thereunder. This deed, likewise by its terms, contained no reservations and purported to convey to the grantees a fee title absolute.

[2] It clearly follows, therefore, that upon the execution of the contract the vendees therein became the equitable owners of the property, the vendor Hattie L. Smith retaining only the bare legal title as security for the payment of the purchase price until a conveyance of the legal title was made. Orange Cove v. Sampson, 78 Cal.App. 334, 248 P. 526; Retsloff v. Smith, 79 Cal.App. 443, 249 P. 886.

[3, 4] Appellants direct attention to an apparent ambiguity in the two instruments delivered to the plaintiff trustee in that the instructions direct the trustee to pay the royalties to the record owners, as of the date of delivery of the lease, whereas the lease provides the royalties are to be paid to the owners in fee simple of the respective parcels or lots, the contention being that Hattie L. Smith was the record owner of the lot on the date of delivery of the lease, November 6, 1922, and continued as such until the recordation of her deed to Osborne and Tietjen on November 22, 1922. The two instruments refer to one and the same transaction and should be construed together, the obvious result of which is that the royalties were to be paid to the owners of the fee. The deed to the contract purchasers having been executed and delivered in the month of September, took effect upon delivery and is presumed to have conveyed title in fee absolute. Civ.Code, secs. 1056 and 1105.

In our opinion, the findings and judgment of the trial court declaring the plaintiff Marie L. Lever to be the owner of the fee title to said property, and as such, entitled to the pro rata portion of the rents and royalties accruing under said lease, is a correct declaration of the rights of the respective parties.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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30 Cal.App.2d 678

BRADNER v. WOODS.

Civ. 12054.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1939.

Hearing Denied by Supreme Court April 6, 1939.

1. Payment ⚿41(2)

Where merchandise was sold first to partnership and later to surviving partner alone, and no application of payments was directed by either debtor or creditor, payments which came from partnership assets were properly applied, in accordance with statute, to the partnership debt and payments which did not come from the partnership assets were properly applied first to the indebtedness for which the surviving partner was personally and solely liable. Civ.Code, § 1479, subd. 3.

2. Payment ⚿41(2)

Where merchandise was sold first to partnership and later to surviving partner alone, and no application was made by either debtor or creditor, payments from surviving partner were properly applied first to the payment of his individual indebtedness which was the more precarious. Civ.Code § 1479, subd. 3.

3. Executors and administrators ⚿227(1)

A creditor's claim against an estate is not a pleading and it need not set forth facts upon which it is based with the precision of a complaint and it is usually sufficient merely to show nature of claim and amount due thereon with sufficient information for representative to act upon it advisedly.

4. Executors and administrators ⚿227(2)

Where claim against estate of deceased partner for merchandise sold, set forth facts correctly with reference to the claim and payments made thereon, that there was attached to the claim a statement showing charges and credits at variance with the claim did not constitute an irrevocable admission of payment of the claim, since claimant was not required to attach any statement to the claim.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action on a rejected claim by B. J. Bradner as receiver in equity for the Lake

View Oil & Refining Company, substituted in lieu of Paul J. Hisey as receiver, against Lillie May Woods, as executrix of the estate of Charles Lewis Woods, also known as Charles L. Woods, also known as C. L. Woods, deceased. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Henry G. Bodkin, of Los Angeles (G. S. Silliman and Charles S. Gass, both of Los Angeles, of counsel), for appellant.

Bradner & Weil and Jerold E. Weil, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal by defendant, as executrix, from a judgment for the sum of $5,640.27 on a rejected claim against the estate.

For some time prior to the death of Charles Lewis Woods, the said Woods and a Mr. Rumbold were partners engaged in the business of buying and selling gasoline, stove oil and motor fuel. At the time of the death of Mr. Woods such partnership was indebted to the plaintiff in the sum of $25,173.31.

For a period of ten days thereafter Mr. Rumbold conducted the business and was personally and solely liable therefor. He bought merchandise from the plaintiff in the amount of $9,458.94, which merchandise was resold and the proceeds therefrom paid over to the plaintiff, amounting to $8,211.14, and there was also paid by Mr. Rumbold from other personal cash of his own the sum of $1,719.13. Both of the accounts were carried by the plaintiff under the name of Charles L. Woods and Company in one memorandum. At the time of payment, Mr. Rumbold did not direct the application to be made of any of the moneys paid, and the plaintiff did not apply any of said payments to any particular portion of the amounts due him, and no application of the payments had been made by any of the persons interested until they were made by the court. Rumbold became insolvent.

The plaintiff filed a claim against the estate of decedent for the sum of $5,640.27, alleging that that sum was due from the estate and attached to the claim a memorandum of both accounts as though they were one. The claim was rejected, and thereafter suit was brought thereon, the complaint alleging the indebtedness due at the time of Mr. Woods' death, and also the subsequent purchases made by Rumbold, alleging that said purchases had been paid for, and alleging also that $19,533.04 had been received to apply on the indebtedness owing at the time of Mr. Woods' death, and that the unpaid balance was $5,640.27. The defendant did not at any time ask for any bill of particulars or any further detailed information as to the charges or credit shown on the statement attached to the claim, nor with respect to the matters set forth in the claim.

It is the defendant's contention that the estate was not bound by the account of the surviving partner in making purchases after the death of Mr. Woods, and consequently the estate is not responsible for any portion of the merchandise purchased after Mr. Woods' death, which debits are a part of the memorandum attached to the claim; that the surviving partner was liable for purchases both before and after death; that he made payments both out of partnership and individual funds upon the general account; and that therefore it necessarily follows that no part of the amount of the credits appearing on the accounts subsequent to the death of Mr. Woods should be applied to the purchases made after his death, and that therefore the payments admitted by the verified claim to have been made after the death of Mr. Woods exceeded the $25,173.31, the amount owing at the date of his death.

The ledger account kept by the receiver, a copy of which was attached to the complaint, was not an account alone of Woods and Company, nor alone of Mr. Rumbold doing business himself as Woods and Company. It was merely a record of transactions arising out of merchandise sold first to Woods and Company and later to Rumbold alone.

[1] We have in this case a memorandum which was in fact a record of two accounts, one upon which Rumbold alone was liable. No application of the payments having been directed or made by either debtor or creditor, there was no error in the court's action in applying the payments which came from partnership assets to the partnership debt and the Rumbold payments, which did not come from the partnership assets, first to the indebtedness, for which Rumbold was personally and solely liable.

It is the contention of the defendant that the court was required under section 1479 of the Civil Code to apply the payments on the obligations earliest in date of maturity. Said section reads, in effect, that "if neither party makes an application of payments, the performance must be applied to the extinguishment of obligations in the following order: * * * 3. Of obligations earliest in date of maturity." If it is kept in mind that the memorandum attached to the claim contained two accounts, this is exactly what the trial court did. The court applied the funds which were received from Mr. Rumbold personally to the account for which Mr. Rumbold was solely liable, applying the payments to the obligation earliest in date of maturity; and the court followed the same rule with regard to the account of Woods and Company.

In the case of Murdock v. Clarke, 88 Cal. 384, 26 P. 601, the court discussed at length the rules governing the application of payments, and pointed out that section 1479 of the Civil Code was insufficient for all occasions, and actually decided the case in accordance with equitable principles. Among other things the court said on page 390, 26 P. on page 603: "* * * when neither party to the transaction makes any application of the payment, and there are different debts due from the debtor to the creditor, the law will make the application in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best protect and maintain the rights of both parties. [Citing cases.]" And again the court said, "In this state an attempt has been made for the guidance of courts in this matter, but the rules there prescribed are insufficient for all occasions, and do not embrace even the conditions of the present case." The situation which we have confronting us is one where there are two accounts—a joint indebtedness of two debtors on the one hand, and on the other an indebtedness of only one debtor.

In the case of Ohio Electric Car Co. v. Le Sage, 198 Cal. 705, at page 712, 247 P. 190, at page 193, the court said: "* * * but, where the obligations are not the same, or where one obligation is secured better than another, the application may rightly be made on the obligation the security for which is the most precarious (California Nat. Bank v. Ginty, 108 Cal. [148], 153, 41 P. 38; Murdock v. Clarke, supra). In the early case of Field v. Holland, 10 U.S. (6 Cranch) 8, 28, 3 L.Ed. 136 [see, also, Rose's U. S. Notes], Chief Justice Marshall, in applying the rule where the power of application devolves upon the court, stated: 'It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious.'"

[2] The evidence shows that of the payments made after Mr. Woods' death a total of $9,930.27 was from money and property of Mr. Rumbold personally. Such payments should therefore be applied first to the payment of the $9,458.94 individual indebtedness of Mr. Rumbold which was the more precarious.

[3, 4] Finally, the defendant contends that if said applications of the payments are made, then there is a fatal variance between the claim presented and the judgment rendered such as to render erroneous the judgment awarded the plaintiff. To maintain this contention the defendant argues that because attached to the claim there was a statement showing both charges and credits subsequent to Mr. Woods' death, that all the charges subsequent to Mr. Woods' death can be and must be eliminated, but that all the credit shown subsequent to Mr. Woods' death must be allowed to stand as credits to the account owing by the partnership. We see no merit in this contention. The code nowhere prescribes the precise form of a claim against the estate of a decedent. The creditor's claim against an estate is in no sense of the word a pleading, and nothing requires that it should set forth the facts upon which it is based with the precision and detail of a complaint. The usual claim shows merely the nature of the claim and the amount due thereon, but, of course, it should afford the representative sufficient information to act upon it advisedly. 11a Cal.Jur. 739 et seq. Such a claim was filed. The complaint set forth the facts correctly. It was not necessary to the sufficiency of the claim in this case that the statement attached thereto should have been attached at all. The plaintiff was not guilty of any irrevocable admissions of payment by filing the copy of the accounts attached to the claim. In the case of White v. Deering, 38 Cal.App. 516, 179 P. 401, 402, the court said, "In this connection, it must be remembered that a claim against an estate is not required to state the facts with all the precision and minuteness required in a complaint, and

its sufficiency is not to be tested by the rules of pleading. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911. It would follow that even greater liberality should be shown in allowing amendments than in the ordinary class of cases, provided, of course, that the cause of action be not entirely changed and there be no prejudice to the substantial rights of those opposed in interest to the claimant." In the instant case the representative of the estate was afforded sufficient information regarding the claim to act on it advisedly.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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30 Cal.App.2d 750

AUSTIN et al. v. TURRENTINE, Judge.*

Civ. 2200.

District Court of Appeal, Fourth District, California.

Feb. 9, 1939.

Rehearing Denied March 11, 1939.

1. Mandamus 🔑26

Mandamus is proper remedy to compel court to exercise jurisdiction where court has jurisdiction but has refused to proceed on ground of lack of jurisdiction.

2. Discovery 🔑97(4)

The court has no power to order production of books or papers by one party to be used as evidence for other party without affirmative and substantial showing by affidavit or otherwise that they contain evidence material to cause of action or defense of party requiring them.

3. Trusts 🔑370

Where parties to an action stand in relation of trustor and trustee, trustor or beneficiary has right to a full and complete inspection of all books and records of other party with relation to the trust.

4. Corporations 🔑1

Corporation is agent and trustee of its stockholders in their behalf and for their use and benefit, holding, controlling, and managing corporate property and business.

5. Corporations 🔑307

Corporate directors are trustees for stockholders and also for corporation.

6. Corporations 🔑181(1)

A corporation's stockholders have a right to inspect books, records, and journals of the corporation. Civ.Code, § 355.

7. Discovery 🔑80

The statute relating to obtaining of evidence by inspection of books and records was enacted to provide a more speedy and less expensive remedy than that afforded in chancery, and should be liberally construed. Civ.Code, § 355.

8. Corporations 🔑181(2)

Where plaintiffs, in taking deposition of corporate president, were entitled to have corporate records produced for inspection in court, right also existed as to second corporation formed to take over assets of first corporation. Civ.Code, § 355.

9. Discovery 🔑97(1)

In action to be declared owner of one-fifth interest in oil lease, allegations and proof that plaintiff and individual defendants entered into joint adventure to procure oil lease and caused defendant corporation, which was formed to raise money for drilling well, to enter drilling agreement with leaseholder, sufficiently showed trust relationship entitling plaintiff to an accounting and hence to a full and complete inspection of the records of the defendant with relation to the trust.

10. Joint adventures 🔑5(1)

Where a joint adventure is alleged and one of the joint adventurers is claimed to have received a secret profit, relief can be had only by way of an accounting.

11. Mandamus 🔑40

In action against corporation for accounting, plaintiffs, in taking deposition of corporate president who was also a defendant, were entitled to peremptory writ of mandamus to compel production of corporate books and records for plaintiffs' inspection. Civ.Code, § 355.

◆

Mandamus proceeding by John W. Austin and others against L. N. Turrentine, as Judge of the Superior Court of the State of California, in and for the County of San Diego, to require the production of certain books in connection with the taking of a deposition.

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*Rehearing denied 88 P.2d 178.

Peremptory writ issued.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for petitioners.

Stearns, Luce, Forward & Swing and Fred Kunzel, all of San Diego, for respondent.

GRIFFIN, Justice.

Petitioner represents that there was and is pending an action in the superior court of Kern county entitled John W. Austin, Helen P. Austin and Luethel Austin, Plaintiffs, v. Hallmark Oil Company, a corporation, et al., Defendants, in which action petitioners herein were the plaintiffs and the Hallmark Oil Company, a corporation, Frank D. Carroll, J. D. Bryan, Charles H. Forward, James D. Forward, Reuben E. Harrison, Lucille J. Porter and others were defendants.

The complaint in that action is very voluminous, but the salient allegations and those only pertinent to this application, may be thus stated: Plaintiff and petitioner John W. Austin asked that it be decreed that he was the owner of a 20 per cent interest in a certain oil lease covering some 30 acres of oil-producing land in the county of Kern; that he be adjudged to have been such owner ever since September 24, 1934, and that at all times since he has been entitled to such 20 per cent interest in the production and profits therefrom. Plaintiffs also asked that petitioners be declared to be the legal and equitable owners of certain shares of stock of the defendant Hallmark Oil Company; that said stock be ordered issued and delivered to plaintiffs; and that there be an accounting, both with relation to said stock ownership and with relation to said 20 per cent leasehold interest.

The complaint alleges that petitioner John W. Austin and John K. Porter, now deceased, had entered into an agreement to procure the said oil lease and to share equally in the benefits thereof; that the lease was thereafter procured and taken in the name of the said John K. Porter, who thereupon assigned a one-half interest therein to said Austin; that said petitioner had consulted the defendant Reuben E. Harrison with reference to investing the moneys required for drilling an oil well on the property; that Harrison refused so to do, but declared he would purchase stock in a corporation to be formed for the purpose of raising the money to conduct drilling operations, provided the defendant Charles H. Forward, his personal attorney, be given entire charge of all legal matters in connection with the formation of said corporation and the management of its affairs; that in so doing the said Charles H. Forward would undertake to act as attorney on behalf of petitioner John W. Austin, the said John K. Porter, Charles H. Forward, and the said Reuben E. Harrison; that the defendant Charles H. Forward accepted said employment and continued to bear such relationship during all of the times set out in the complaint. It is alleged that the aforesaid attorney then fraudulently organized a corporation under the laws of the state of Nevada, known as Hallmark Oil Company, Inc., over which he and his associates exercised all practical control; that upon the formation of said corporation the said John K. Porter, acting for himself and plaintiff John W. Austin, entered into an agreement with said Hallmark Oil Company, Inc., for the advancement of moneys necessary for the developing of the property; that this agreement contemplated that Porter and Austin should devote their time to drilling operations and that the corporation should, in consideration thereof, receive 50 per cent of their leasehold interests; that thereupon the lease was assigned and transferred to the said corporation; that drilling operations were begun and continued until about January 18, 1935, when the company ran short of money and then had outstanding a considerable amount of unpaid bills and no credit by which it could obtain further funds. Additional funds were raised and a reorganization effected under certain conditions, one of which was that the plaintiff, Austin, was to act as trustee in the expenditure of the money thus raised. Plaintiffs, the petitioners, further alleged that the defendant, Charles H. Forward, with fraudulent intent, secretly directed the resident officers of the Hallmark Oil Company, Inc., of Nevada, to resign and to appoint in their place Charles H. Forward, the defendant James D. Forward, and the defendant Frank D. Carroll, the same to constitute the new board of directors; that the principal office of the corporation in California had theretofore been at Bakersfield, California; that Charles H. Forward and his associate directors changed the principal place of business to his (Forward's) law office in San Diego; that plaintiff Austin had theretofore been the resident agent in California; that he was thereupon removed and the said Charles H. Forward appointed resident agent; that thereafter, on November 4, 1935, the defendants Charles H. Forward, James D. Forward and Reuben E. Harrison formed a corporation under the laws of California without assets or liabilities known as Hallmark Oil Company, to take over the property and assets of said Hallmark Oil Company, Inc., and to issue stock in the new corporation in the same proportionate amounts as had theretofore been issued to the stockholders of said Hallmark Oil Company, Inc.

It is further alleged that plaintiffs had theretofore advanced various sums for purchase of stock in said Hallmark Oil Company, Inc.; that said stock was duly issued to them on the orders of the said former board of directors of said company and placed in the hands of the defendant James D. Forward for delivery to plaintiffs; that instead of so delivering their stock to them he fraudulently gave it to the defendant Charles H. Forward, who has ever since retained it and both he and the Hallmark Oil Company refused to deliver any stock of either of said corporations to plaintiffs.

It is further claimed that besides this, there was certain stock erroneously issued to defendant R. E. Harrison. It is further alleged that on January 30, 1936, the defendants Charles H. Forward, Reuben E. Harrison and James D. Forward, acting for said California corporation, applied to the commissioner of corporations of this state for permission to issue stock of the said company to those persons who were theretofore stockholders of the Nevada corporation; that in so doing they omitted all reference to the stock that had been issued to these plaintiffs and sought and received a permit to issue stock, omitting therefrom all reference to these plaintiffs; that said permit authorized the taking over of the property and assets of the Nevada corporation; that ever since about March 5, 1935, the oil lease has been very productive and highly profitable; that Hallmark Oil Company and other defendants have been in complete control and possession and have received all of the moneys and things of value therefrom; that they have never, either by way of stock dividends or proportionate amounts of profits, or in any way whatsoever, given to plaintiffs any of the income, but have appropriated it all to themselves and refused also to account to plaintiffs for any of the income; that the total value of the leasehold is in a sum not less than $1,500,000.

Plaintiffs sought the imposition, by decree, of a trust in their favor on the leasehold property, the issuance to them of the stock to which they are entitled, an accounting, a declaration of their rights, the appointment of a receiver, and general and specific equitable relief.

A copy of the complaint is attached to the original of this petition.

The defendants Charles H. Forward, Hallmark Oil Company, and other defendants filed their answer which denied most of the allegations of plaintiffs' complaint and alleged that on September 24, 1934, Charles H. Forward entered into an agreement with John W. Austin and Reuben E. Harrison, as co-adventurers to procure the oil lease described in the complaint and to thereafter cause the property to be drilled for oil and that the interest of each of the parties in the venture was to be determined by the amount that they subscribed; that they thereupon caused the Hallmark Oil Company, Inc., to enter into an agreement with John K. Porter to drill for oil on the property; that thereafter, on November 2, 1934, John W. Austin, without paying any consideration therefor, caused said John K. Porter to assign to him one-half of the interest reserved to him under the terms of said agreement; that he accepted said assignment with the intent of procuring for himself a secret profit and thereby defrauding his other joint adventurers. A copy of their answer is attached to the original of this petition.

At the same time, the defendants filed their cross-complaint, setting forth the same matters, alleging that plaintiff John W. Austin obtained a secret profit from a joint adventure, and separately sought money judgments against the plaintiff Austin.

This was the situation existing at the time of the taking of the deposition of the defendant Charles H. Forward, which is the subject of this petition for a writ of mandate.

Subsequently, plaintiffs' demurrers to all of the cross-complaints have been sustained without leave to amend. On May 5, 1938, plaintiffs caused to be filed and served an affidavit for the taking of the deposition of the defendant Charles H. Forward before the respondent, the Honorable L. N. Turrentine, one of the judges of the superior court of San Diego county, and also filed an affidavit for the issuance of a subpœna duces tecum for the production by him of books and records of the Hallmark Oil Company and the Hallmark Oil Company, Inc. A copy of these documents is attached to the original petition herein. A subpœna and subpœna duces tecum were issued and accordingly, on May 16th, the taking of the deposition commenced.

During the taking of the deposition the court had before it all of the pleadings in the case, including the affidavit for issuance of the subpœna duces tecum, which sets out minutely and in much detail the materiality for the production of the books and papers therein specified. The witness Charles H. Forward testified that he was president of the Hallmark Oil Company and one of its directors; that he was also the president of the Hallmark Oil Company, Inc., at the time of its dissolution. Thereupon, petitioner called upon him to produce the stock book of the Hallmark Oil Company, Inc., in response to the subpœna. The record shows that this book was in the court room. The witness refused to produce it and the court denied petitioners' request that he order the witness to produce it. The record also shows that the minute book of said corporation was in court at the time of the taking of the said deposition but the attorneys for the defendant Charles H. Forward refused to permit any portion of it to be examined or introduced in evidence except such portions as they declared bore upon the subject of plaintiffs' stock issuance. The witness produced copies of certain minutes of the Hallmark Oil Company, Inc., which he declared were the only minutes dealing with the affairs of the plaintiffs. The witness then produced certain stock certificates showing certain shares of stock to be issued to the plaintiffs and refused to permit any examination of the book or further evidence of its contents. In this, the court upheld him, denying petitioners' request to be allowed to examine the record or to introduce it in evidence. The reasons given by the court for denying petitioners' request will be referred to later.

Petitioners then called upon the witness to produce the stock certificate book of the Hallmark Oil Company. The witness refused with the excuse that the stock certificates that were material had already been produced, and the court upheld him in that refusal.

There was then introduced in evidence the minutes of the Hallmark Oil Company, Inc., of March 31, 1935, directing the issuance of stock to the plaintiffs and the delivery of the stock to James D. Forward for delivery to them. It was then shown that the said stock was immediately issued and so delivered to James D. Forward; that the defendant James D. Forward received it and placed it in the possession of the defendant Charles H. Forward, who never delivered it; that it was held in his office until February 4, 1936, at which time he had the new board of directors pass a resolution ordering the said stock canceled. A notation of such action was made across the face of the certificates, and in that way they are now held in the office of the new corporation, the Hallmark Oil Company, of California.

The witness testified that after the issuance of the stock in the new California corporation, all of the assets of the Hallmark Oil Company, Inc., were transferred to it and the Nevada corporation was dissolved. The witness was asked if he knew the approximate amount of monthly production from the property during any of the time. The court refused to permit the question to be answered because he considered it a matter touching on the accounting phase of the action and had nothing to do with the primary rights of the parties. The witness, in justifying his refusal to deliver the plaintiffs their stock and the passage by the board of directors of the corporation of the resolution canceling it, asserted that Austin had never put any money into the company.

It was then shown that an application had been made to the corporation commissioner showing additional advances for which certain of the defendants sought to have stock issued to them amounting to $28,000. Petitioners asked that he produce the books of account to show the amounts and data concerning it. This was refused. A check for $1,000 given by John W. Austin and deposited in the company account was produced. The witness testified that this check represented money contributed by others than Austin and he assumed that stock was accordingly issued to the real contributors. The court refused to compel the books of account to be produced. The court then ruled that he would give no instructions in regard to producing the books, solely because he considered he did not have any power to make a valid order. That is, the court ruled that no books or records of account showing receipts and disbursements of the defendant Hallmark Oil Company or the Hallmark Oil Company, Inc., should be produced in the deposition under any circumstances, and petitioners must await the question until the trial of the issues of the case to determine whether or not a right to an accounting existed.

It was admitted by the defendants that all of the stock of the new corporation was distributed directly to the stockholders of the old corporation, share for share, except as to the petitioner John W. Austin.

One of the allegations of the complaint was that the plaintiff John W. Austin had made advancements of money to the Hallmark Oil Company, Inc., for which he was entitled to have issued to him, and which was issued to him, stock of said corporation.

On the taking of the deposition it was conceded by the witness that a certain check of said plaintiff in the amount of $1,000 had been received by the corporation. The witness testified, however, that this $1,000 represented moneys advanced by the witness and his associates. Counsel for petitioners thereupon requested the respondent to instruct the witness to produce said books and records for the purpose of showing thereby that the $1,000 was not money that had theretofore been advanced by the witness and his associates but represented new money of the plaintiff John W. Austin. This request was denied. The witness had been subpœnaed to produce a certain instrument wherein one M. P. McGuire assigned and transferred to the Hallmark Oil Company for one of the other defendants, all his right, title and interest in and to the leasehold described in the complaint. The witness refused to produce the document and the respondent denied petitioners' request for an order directing him to do so. The deposition of the witness in relation to other phases of the case, consisting of 325 pages, was left with this court for examination. The taking of the deposition is still pending before respondent, as the same has not as yet been signed by the witness.

The point to be decided is whether the court was justified in his refusal to have certain of the books and records of the Hallmark Oil Company and the Hallmark Oil Company, Inc., produced, and the evidence therefrom relating to the subject of the complaint and answers encompassed within the deposition. The court based its refusals on the ground that it did not have jurisdiction so to do.

Petitioners contend (1) that the evidence sought to be made a part of the deposition was material and competent evidence in petitioners' behalf upon a trial of their pending case; (2) that the evidence and the witness being beyond the reach of a subpœna of the Kern county court, could only become available to them through the deposition proceeding; (3) that the refusal of respondent to order the witness to produce the evidence would make it impossible for the petitioners, upon the trial of the action, to prove many of the material allegations of their complaint.

Respondent demurs to the petition for writ of mandate on the following grounds: (1) That the petition does not state facts sufficient to warrant the granting of the writ of mandate; (2) that the petition is uncertain in that it cannot be ascertained therefrom how or in what manner the books and documents of which petitioners seek to compel the production are material to the proof of petitioners' cause of action.

In the answer, respondent admits that he refused to instruct the witness to produce the stock certificate book of the Hallmark Oil Company, Inc., and alleges in justification thereof, that all the stock certificates that were shown to be material were produced; that there was no showing by petitioners that the balance of the stock certificate book was in any way material or necessary to the proof of petitioners' cause of action. A similar refusal and justification was made by respondent as to each of the above-mentioned demands.

[1] Mandamus is the proper remedy to compel a court to assume or exercise jurisdiction in such a proceeding where it has jurisdiction and has refused to proceed on the ground of lack of jurisdiction. Harrison v. Superior Court, 3 Cal.App.2d 469, 39 P.2d 825; Christ v. Superior Court, 211 Cal. 593, 296 P. 612.

Respondent contends that petitioners were seeking, in the taking of the deposition, to discover how much money plaintiffs were entitled to prior to a prima facie showing that they were entitled to anything, and therefore they were not allowed to examine the books of the company prior to establishing that they were entitled to an accounting and cites as a logical precedent for such action the case of

Terry v. Stull, 20 Del.Ch. 39, 169 A. 739, 741. This action was for an accounting. Plaintiffs had filed certain written interrogatories to which the defendants filed exceptions. The trial court sustained defendants' exceptions and held that the defendants did not have to answer the interrogatories on the ground that the plaintiffs were not entitled to an accounting prior to establishing their right to an accounting, and stated as follows:

"The proper procedure in such cases is for the complainant to first establish his right to an accounting. If he succeeds in carrying that burden, an interlocutory decree is then in order declaring the right to an accounting to be established and ordering the manner of its taking. The final decree settles the account. This being the procedure, there is no duty on the defendant to make discovery of matters entering into the account prior to the interlocutory decree which adjudges a duty on the part of the defendant to account. * * * [Citing cases.] It may be true that where an account is pertinent for the purpose of establishing the complainant's title to an account, as where an account in a present business is evidentiary of its identity with another business concerning which the bill is filed and as to which the duty to account is not denied, discovery will be required of an account of the present business in advance of an interlocutory decree establishing that that business is one in which the complainant has the right to call upon the defendant to account. * * * When the defendant answers as he has here that he did acquire property from his father, describing its nature and amount, but emphatically denying every suggestion of wrongful acquisition alleged by the bill, I think it is not permissible for the complainant to exact accounting details with respect to that property until he has first established that its acquisition was under such circumstances as raise a constructive trust in his favor."

Respondent further cites the case of O'Brien v. Mackey, D.C., 36 F.2d 89, in support of this holding.

[2] In the case of Ex parte Robert S. Clarke, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176, it was held that the people of the state have a constitutional right to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, and it is not to be tolerated that a person should be compelled to deliver his private books and papers to another who does not claim any ownership in them, except when warranted by a law clearly not inconsistent with the constitutional provision. It was also held that the court is bound to protect a party to an action from undue inquisition into his private affairs, and cannot allow a dragnet of inspection to be drawn through all of his books and papers to discover whether they do or do not contain legal evidence in favor of the opposite party. Nor will a mere suspicion that they contain material evidence warrant an order for their production. The court has no power to order the production of books or papers by one party to be used as evidence for the other party without an affirmative and substantial showing by affidavit or otherwise that they contain evidence material to the cause of action or defense of the party requiring them.

[3] In the late case of Union Trust Company v. Superior Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259, the above holding receives support. However, there appears to be an exception to this general rule, namely, that in such a proceeding, where it appears that the parties to the action in question stood in the relation of trustor and trustee, respectively, one to the other, the ordinary strictness of the rule relating to the right of inspection is greatly relaxed, and under such circumstances, almost as a matter of course, the trustor or the beneficiary has a right to a full and complete inspection of all books and records with relation to the trust, both parties having a common interest therein. This rule was recognized even in Ex parte Clarke, supra, at page 241, 58 P. at page 548, wherein it is said:

"Originally, an order for the production of a paper, document, or book was made only when the document was one declared on in the bill, or set up as a defense; or where the party asking for it had an interest in the document itself—as where it was a contract between the parties, and there was only one copy of it, which was in the hands of the opposite party; or where the instrument was, in the very nature of things, material evidence,—as where it was alleged to have been forged or altered, and that it would, on its face, show the fact alleged; or where books belonged to both parties and would necessarily contain evidence of the issues pending, —as in case of a suit between partners, or generally between principal and agent or trustee and beneficiary."

[4, 5] That a corporation is the agent and trustee of its stockholders in their behalf and for their use and benefit, holding, controlling and managing the corporate property and business is well settled. The directors are the trustees for the stockholders and also for the corporation. Hobbs v. Tom Reed Gold Mining Co., 164 Cal. 497, 129 P. 781, 43 L.R.A.,N.S., 1112; Wright v. Oroville M. Co., 40 Cal. 20, 27; Rossi v. Caire, 174 Cal. 74, at page 81, 161 P. 1161; Havemeyer v. Superior Court, 84 Cal. 327, 362, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192.

[6] The right of stockholders in a corporation to inspect the books, records and journals of the corporation is equally well settled. Johnson v. Langdon, 135 Cal. 624, 67 P. 1050, 87 Am.St.Rep. 156; Civ. Code, § 355.

[7] The enactment of statutes relative to the remedy of obtaining evidence by inspection was had with a view of providing a more speedy and less expensive remedy than by the proceedings in chancery, and, being remedial in their nature, they should be liberally construed. The trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method, to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered.

In the case of Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114, at page 115, the court said: "But, when both parties have an equal right to the examination and inspection of documents and books of account, as in cases of partners, and books kept by a trustee of the trust account, and of documents acquired in a trust relation, which have to do with a pending suit between such parties, the rule is different, and the court will on application of either party order their production for inspection at any stage of the suit to enable him to prepare his case. * * * So a trustee is bound to render every necessary information required of him, and when he is called to account he will be compelled to produce all the books, papers, writings, vouchers, and other documents which are in any way connected with the trust, and which are in his possession or under his power." (Citing cases.)

Under the holding in this case, the determinative question, as we see it, is this: From the pleadings, the affidavits and the testimony adduced, is there a sufficient showing that the parties to the action in question stood in a trust relationship one to the other, together with sufficient allegations of fraud of the trustee and did the trustee admit sufficient allegations that indicated that a trust relationship was created?

[8] If it may be reasonably determined from the pleadings, the affidavits and proofs submitted that a trust relationship is created and there has been a breach of that trust relationship, a right to an accounting exists. In the light of the decisions cited, petitioners are entitled, under the supervision of the respondent court, to have produced for the inspection of the court such books, papers, records, journals and entries as, in the light of the pleadings and issues, may be material and pertinent, and such records should not be sealed against judicial inquiry.

If such right exists as to the examination of the books of the first corporation formed in the instant case then that same right, under the circumstances here disclosed, exists as to the second corporation. Schaake v. Eagle, etc., Can Co., 135 Cal. 472, 63 P. 1025, 67 P. 759.

Let us tersely review the pleadings, affidavit and proof, to determine whether it appears that the parties to the action in question stood in a trust relationship. One of the defenses of the Hallmark Oil Company, as well as of all other active defendants, was that the plaintiff John W. Austin, had entered into a joint adventure with the defendants Charles H. Forward and Reuben E. Harrison, to procure the lease, and caused the Hallmark Oil Company, Inc., to enter into the drilling agreement with John K. Porter, the holder of the lease.

[9, 10] It is claimed by certain defendants in the superior court action that certain other persons were by agreement admitted into the joint adventure arrangement but that John W. Austin, with the intention of defrauding his associates, caused John K. Porter to assign to him, without consideration, a portion of his rights under the leasehold; that he did so with the intention of securing for himself a secret profit; that when he entered into the joint adventure Austin had especially assured his associates that there were

no secret profits or commissions in which he was to participate. It is settled law of this state that where a joint adventure is alleged, and it is claimed that one of the joint adventurers received a secret profit, then relief can only be had by way of an accounting. Mosher v. Helfend, 7 Cal. App.2d 48, 51, 44 P.2d 1050. The defendant Hallmark Oil Company concedes that it has and holds, and for a long time has had and held the leasehold property and all the fruits of it. The pleadings admit that all of the original parties were to contribute approximately an equal amount of money to procure a lease on the property in Kern county and drill for oil; that the Hallmark Oil Company, Inc., was formed and stock issued in the names of the parties, including John W. Austin, in proportion to the amount of money allegedly advanced; that the stock certificates were delivered to James D. Forward, for delivery to the respective parties. The only contention in regard to the delivery arises over the issue as to whether Austin failed to advance his portion of the money. It was admitted that a check for $1,000 was given by John W. Austin and deposited in the company accounts. The undenied affidavit for issuance of the subpoena duces tecum in support of the materiality of the proffered evidence is more than ordinarily replete with respect to a statement of facts. We believe from the undisputed facts, the pleadings and proof, that it may be fairly inferred that a trust relationship is involved and that the books and documents contain evidence material to plaintiffs' cause of action.

The case of Crocker v. Conrey, 140 Cal. 213, 73 P. 1006, 1007, was an original proceeding by mandamus to compel the respondent judge to complete the taking of a deposition which was taken before him. In that case the court said: "He is not, like the notary in such case, a mere ministerial functionary endowed with no power except to write down what a witness consents to say; he is the judge of the court in which the cause is awaiting trial, and he is engaged in the performance of the legitimate judicial duty of securing to a party the means of producing at the trial the evidence necessary to sustain his action or defense."

Dowagiac Manufacturing Co. v. Lochren, 8 Cir., 143 F. 211, 6 Ann.Cas. 573, was a case wherein a petition for a writ of mandamus was sought to direct the judge of the Circuit Court to issue a subpoena duces tecum and to direct certain witnesses to testify in an accounting before a master. It was there held that it was not the duty of the auxiliary court or judge within whose jurisdiction testimony is being taken in a suit pending in the court of another district to consider or determine the competency, materiality or relevancy of the evidence which one of the parties seeks to elicit; that it is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence cannot possibly be competent, material or relevant and that it would be an abuse of the process of the court to compel its production. (Citing cases.)

Also, in Re Randall, 90 App.Div. 192, 197, 85 N.Y.S. 1089, 1092, a commission had been issued out of the court in the state of Ohio, in which the action was pending, to take the testimony of the secretary and treasurer of a corporation in the state of New York. The officer appeared in response to a subpoena duces tecum but refused to answer many questions upon the ground that the evidence sought was incompetent and immaterial. The court there said: "We are not, however, called upon to pass upon the competency of the evidence sought to be elicited from the witness, or its admissibility upon the trial of the action. That will become a matter for determination by the Ohio court when the commission shall be returned to it. For present purposes, it is sufficient if it appear that such testimony may be competent; and, so far as the examination is not entirely irrelevant to the subject-matter of the action, the court will not, nor is it called upon to, pass upon the strict legality and competency of the evidence sought to be elicited."

[11] The demurrer to the petition is overruled. Let a peremptory writ issue as prayed for in the petition.

We concur: BARNARD, P. J.; MARKS, J.

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PEOPLE v. HICKMAN.

Cr. 1967.

District Court of Appeal, First District,
Division 1, California.

Feb. 10, 1939.

Hearing Denied by Supreme Court
March 10, 1939.

1. Larceny ⇨24

Where, after fixing a reasonable fee, attorney is notified that purpose of attorney's appearance would be accomplished without further effort on his part, an effort by attorney to obtain an amount in addition to the reasonable fee would be an "attempt to unlawfully and feloniously take away the property of another" within the statute. Pen. Code, §§ 484, 664.

2. Larceny ⇨66

Conviction of an attorney of an attempt to commit grand theft *held* sustained by the evidence. Pen.Code, §§ 484, 664.

3. Criminal law ⇨562

Where indictment sets forth several counts and a verdict of guilty is returned on one count and a verdict of not guilty on another count, it is necessary in determining whether the evidence is sufficient to sustain the guilty verdict to differentiate the essential ingredients of each offense from both a factual and a legal standpoint.

4. Criminal law ⇨44

An "attempt" to commit an offense against the law is a direct, ineffectual act towards its commission with the intent to consummate the crime.

[Ed. Note.—For other definitions of "Attempt," see Words & Phrases.]

5. Larceny ⇨1

In the completed offense of "grand theft" it is necessary that the personal property of another should be feloniously taken away.

[Ed. Note.—For other definitions of "Grand Theft," see Words & Phrases.]

6. Larceny ⇨24

In the "attempt to commit grand theft" it is not necessary that the owner should part with the property, and it is immaterial whether intended victim believed statements or relied upon the circumstances which culminated in the ineffectual efforts toward the commission of the attempt. Pen.Code, §§ 484, 664.

7. Criminal law ⇨878(4)

Where a defendant is convicted on two counts relating to the same act, transaction, or event, the test is whether the defendant could be guilty of both.

8. Criminal law ⇨878(3)

When the defendant is convicted on one count and acquitted on another count, test is whether the essential elements in the count on which defendant was acquitted are identical and necessary to proof of conviction on the other count.

9. Criminal law ⇨29

A single act may be a violation of more than one statute.

10. Criminal law ⇨196

If a single vital fact is necessary in proof of one offense but not necessary in the other, an acquittal is not a bar and is not inconsistent with a conviction of the other.

11. Criminal law ⇨44

If there is an intent to commit the crime and an overt act is accomplished, the result may be ineffectual because of an obstruction physically or mentally on the part of the intended victim, but the crime of "attempt" is complete if the bar to the fulfillment of the object is unknown to the perpetrator at the time that the overt act is performed.

12. Criminal law ⇨878(4)

Acquittal of solicitation to offer and join in offer of a bribe in the sum of $1,500 and of grand theft of a promissory note of the value of $1,500 did not prevent conviction of defendant of attempt to commit grand theft in the same amount on the same date against the property of the same parties and another. Pen.Code, §§ 484, 653f, 664.

13. Criminal law ⇨511(1)

Testimony of accomplice in prosecution for an attempt to commit grand theft *held* sufficiently corroborated. Pen.Code, § 1110.

14. Criminal law ⇨673(2)

In prosecution for attempt to commit grand theft, admission of defendant's testimony before grand jury *held* not error where court instructed jury that parts of it should be considered only for certain purposes.

15. Criminal law ⇨1169(1)

Any error in admission of evidence was harmless where it did not concern the count on which defendant was convicted.

16. Witnesses 🔑277(5)

In prosecution for attempted grand theft, question on cross-examination whether on certain date defendant borrowed $800 was proper to assist in refreshing recollection of witness as to dates.

17. Criminal law 🔑1171(1)

Statements and questions provoked by caustic remarks of opposing counsel were not prejudicial, in view of defendant's acquittal on two counts and conviction on only one count.

18. Criminal law 🔑1173(3)

Any error in refusing to give instruction relating to count on which defendant was acquitted was harmless.

19. Larceny 🔑70(3)

In prosecution for attempt to commit grand theft where facts showed that defendant's attorney had fixed a fee for services to be performed, refusal to give instruction grounded on theory that case involved either a fixing of a contingent fee, or a fee to be fixed in the discretion of one of the interested parties, was proper.

20. Criminal law 🔑822(6, 12, 13)

In prosecution for attempt to commit grand theft, instruction concerning attempt, corroboration, expert testimony, and legality of contract involved from a civil aspect correctly stated the law in view of all the instructions fairly informing jury upon the law applicable to the facts of the case.

◆

Appeal from Superior Court, Alameda County; Edward H. Tyrrell, Judge.

George W. Hickman was convicted of an attempt to commit grand theft, and he appeals.

Judgment and order denying motion for new trial affirmed.

Myron Harris and William H. Older, both of Oakland, and John J. Taaffe and George B. Harris, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

WARD, Justice.

The grand jury of the county of Alameda presented an indictment against the defendant, a licensed and practicing attorney and city judge of Albany, charging in three counts: First, a violation of section 653f of the Penal Code of the State of California, alleging that defendant solicited George R. Fauset, Fred D. Hurlbut and C. D. Hoel to offer and join in the offer of a bribe in the amount of fifteen hundred dollars to certain state officers, namely, the members of the board of equalization; the second count charged an attempt to commit grand theft in the same amount on the same date against the property of the same parties named in the first count and the Lakeside Club, Inc.; the third count charged grand theft of a promissory note of the value of fifteen hundred dollars, the property of George R. Fauset. A plea of not guilty was entered to the three counts. Defendant was found guilty by a jury on the second count, namely, attempt to commit grand theft, and acquitted on the first and third counts. This appeal is prosecuted from the judgment of conviction and the order denying the motion for a new trial.

Fauset was connected with the Lakeside Club, Inc., in the conduct and operation of a restaurant and liquor business. He was ordered to show cause before the state board of equalization in Oakland why the Lakeside license should not be revoked. It was alleged that one of the club's bartenders had served intoxicating liquor to a minor female. A similar establishment and a hotel were cited in connection with the same matter. Fauset retained appellant as his attorney. Prior to the hearing, according to appellant, there was paid by Fauset $225 in two instalments, $125 and $100 respectively. Fauset testified that he had an agreement that the total charge would be $400 for attorney fees and an additional $30 as costs in the event it should become necessary to attend a hearing in Sacramento to review any possible unfavorable ruling or suspension that the board might make or impose at the Oakland hearing. The license of all three establishments were indefinitely suspended.

[1, 2] Appellant contends that the evidence is insufficient to sustain the verdict. The testimony given by the various witnesses is conflicting but, taking the portions thereof that tend to sustain the verdict, it appears in the transcript of testimony that not later than December 9, 1935, Fred E. Stewart, a member of the board of equalization, who supervised and directed the district wherein the Lakeside Club was located, informed appellant that he would

recommend the restoration of the license. Prior to that time the president of the board had notified appellant that the restoration depended on Stewart's recommendation. On the following morning appellant attempted to contact Fauset on the telephone. Appellant then called Fred D. Hurlbut, one of Fauset's associates in the Lakeside Club and said that new arrangements had to be made. Hurlbut referred appellant to Fauset. Subsequently, in a telephone conversation with Fauset, appellant said that there was more "talk and trouble" than had been anticipated and that it was "going to take more money". Appellant called later in the day by telephone and part of this conversation was heard over an extension telephone by C. D. Hoel, a third associate in the Lakeside Club. Hoel testified that "Mr. Fauset asked Mr. Hickman whether or not those men would accept less than the $1,500, and I heard the defendant ask someone in the room whether it could be done for less, and then we received a negative answer". The board took no action on the morning of December 10th, but on the following day restored the license. On the same day Fauset executed and delivered to appellant a promissory note for $1,500. The jury acquitted appellant of soliciting Fauset and the others to offer and join in an offer to bribe the members of the board of equalization, and likewise acquitted appellant of the charge of grand theft, but found appellant guilty of attempting to commit grand theft upon the allegation that appellant attempted to take the property of the Lakeside Club and the associated partners therein. If the jury believed that appellant had fixed a reasonable fee for legal services to be rendered, and thereafter on an assurance by the supervising member of the board of equalization for the Oakland district, that the purpose for appellant's appearance, namely, to restore the license, would be accomplished without further effort on appellant's part, then the jury was justified in finding that an effort to obtain any amount in addition to the reasonable fee was an attempt to unlawfully and feloniously take away the property of another. Sections 484, 664, Pen. Code. Whether the fixing of the amount was in fact reasonable or excessive under all the circumstances, and if excessive, whether there was an intent to feloniously deprive the owners of the property, were questions of fact to be determined by the jury. The witness Stewart testified that he would have made a motion to restore the licenses of each establishment without the appearance of an attorney after thirty days had elapsed, if the licensees had appeared and made some kind of a showing, with the recommendation of the police officers.

[3] In a case wherein the indictment sets forth several counts, and a verdict of guilty is returned on one count and a verdict of not guilty on another count, it is necessary in determining whether the evidence is sufficient to sustain the guilty verdict, to differentiate between the essential ingredients of each offense from a factual and legal standpoint. In the instant case the manner and means employed by appellant in count two were identical with the method employed in counts one and three, but the results were not the same under each count. The difference in the results is well exemplified in counts two and three. Count three charged grand theft, in that appellant "took the property of George R. Fauset, consisting of a promissory note of the value of fifteen hundred dollars". There was no evidence to show to a moral certainty and beyond a reasonable doubt that the promissory note had any value. The note in part read: "* * * we The Lakeside Club, Inc. & George R. Fauset promise to pay * * *", but it was signed only by Fauset in his individual capacity. The note was not paid and eventually the Lakeside Club was closed and Fauset resorted to bankruptcy proceedings. The jury could have, and undoubtedly did, reach the conclusion that Fauset did not believe the statement of appellant that new difficulties had arisen in Sacramento, and that Fauset gave the promissory note to appellant, but never intended to pay the instalments. Likewise the jury evidently concluded that Fauset did not believe that the demand for $1,500 was for the purpose of bribery. Under such circumstances no other verdict should be returned upon counts one and three than not guilty.

[4-6] An attempt to commit an offense against the law is a direct ineffectual act toward its commission, with intent to consummate the crime. In the completed offense of grand theft it is necessary that the personal property of another should be feloniously taken away. In the attempt to commit such offense, it is not necessary that the owner should part with the property, and it is immaterial whether or not the intended victim believed the statements

or relied upon the acts and circumstances which culminated in the ineffectual efforts toward the commission of the attempt. In the third count appellant was charged with actually taking a promissory note; in the second count he was charged with attempting unlawfully to take cash.

The cases cited by appellant are not in point. In People v. Andursky, 75 Cal.App. 16, 241 P. 591, the defendant was charged with rape upon a fifteen year old girl, and a violation of the Juvenile Court Act in that defendant had sexual intercourse with a minor girl. The alleged rape and the alleged intercourse referred to the same act. An acquittal upon one count was inconsistent with a conviction upon the other. In Rosenthal v. United States, 9 Cir., 276 F. 714, the defendant was indicted in count one for receiving stolen property with the knowledge that it had been stolen, and in count two with having the identical property in possession, with knowledge that it had been stolen. The gist of each offense was knowledge of the fact that the property had been stolen. A verdict of guilty on either count would have conflicted with a verdict of not guilty upon the remaining count. Likewise, in Kuck v. State, 149 Ga. 191, 99 S.E. 622, a verdict finding a defendant guilty of selling spirituous liquors is repugnant to a verdict of not guilty upon a charge of having possession of the same liquor. In People v. Novo, 12 Cal. App.2d 525, 55 P.2d 915, 56 P.2d 560, the defendant was charged in count one with burglary in the first degree in unlawfully entering a building with intent to commit rape, and in count two with an assault upon a female with intent to accomplish sexual intercourse through the use of force and violence. The jury returned a verdict on the first count of guilty of burglary in the second degree, and of simple assault on the second count. The verdict on count one was a refutation of the charge of burglary with an assault, and hence the verdict on the second count was void. The court permitted the first verdict to stand upon the theory that the defendant entered the building with intent to commit rape, which is not inconsistent with the definition of burglary of the second degree. In the matter of In re Johnston, 3 Cal.2d 32, 43 P.2d 541, cited by appellant, there was no element in one count charging the specific offense, that was not identical with all of the elements alleged in a corresponding count charging conspiracy to commit the offense.

[7-10] In a case wherein a defendant is convicted on two counts relating to the same act, transaction or event, the test is, could the defendant be guilty of both. People v. Koehn, 207 Cal. 605, 609, 279 P. 646. When the defendant is convicted of one and acquitted upon another count, the test is whether or not the essential elements in the count wherein the defendant was acquitted are identical and necessary to proof of conviction on the guilt count. In Oliver v. Superior Court, 92 Cal.App. 94, 96, 267 P. 764, 765, it is stated: "The situation is clearly different from that which would have been presented had the conspiracy charge contained allegations of a number of overt acts which, taken together, would constitute grand larceny or embezzlement. Had the indictment been so drafted, it could not be said that an acquittal of grand larceny or embezzlement would necessarily have been a determination that no criminal conspiracy pertaining to the same transactions had occurred." A single act may be a violation of more than one statute. If a single vital fact is necessary in proof of one offense, but not necessary in the other, an acquittal is not a bar and is not inconsistent with a conviction on the other.

In People v. Coltrin, 5 Cal.2d 649, 661, 55 P.2d 1161, 1167, quoting from People v. Day, 199 Cal. 78, 248 P. 250, the court said: "'It may be conceded that, if the two counts stated precisely the same offense, that an acquittal upon one count would operate as an acquittal upon the other count. * * * It is not the great similarity in most of the facts constituting separate offenses but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate.'"

[11] The offenses of grand theft and attempt to commit grand theft are not identical. In the completed offense, the property must be obtained, and in the attempt, the element of possession by the culprit may be entirely lacking, or, if the possession of the property is obtained, it may be valueless. If there is an intent to commit the crime, and an overt act is accomplished, the result may be ineffectual because of an obstruction physically or mentally on the part of the intended victim, but the crime of attempt is complete if the bar to the fulfillment of the object is unknown to the perpetrator at the time that the overt act is performed. In People v. Moran, 123 N.Y. 254, 257, 25 N.E. 412, 413,

10 L.R.A. 109, 20 Am.St.Rep. 732, the court said: "The question whether an intent to commit a crime has been made, is determinable solely by the condition of the actor's mind, and his conduct in the attempted consummation of his design." People v. Lee Kong, 95 Cal. 666, 30 P. 800, 17 L.R.A. 626, 29 Am.St.Rep. 165; In re Magidson, 32 Cal.App. 566, 163 P. 689.

[12] In the present case the jury determined from all of the circumstances that appellant attempted unlawfully and feloniously to take $1,500 in cash, more or less, from the party named in the indictment. Under the facts of the case we are unable to decide that the evidence was not sufficient to substantiate the implied findings of the jury.

[13] Appellant contends that the testimony of Fauset is not corroborated as required by section 1110 of the Penal Code. According to appellant's own testimony, he originally contracted to receive a fee in amount far below the sum of $1,500. The testimony of witness Hoel, as set forth heretofore, amply corroborates the testimony of Fauset.

On appeal, for the first time, appellant objects to a statement by the trial judge that part of the testimony of witness Hurlbut corroborated the testimony of witness Fauset. A mere reading of the statement indicates definitely that the court instructed in effect that the portion of Hurlbut's testimony was to be limited by the jury to corroboration of the fact that a conversation over the telephone had occurred, and that Fauset was one of the participants.

Appellant presents eight assignments of error concerning rulings of the trial court on the admission of evidence. On appeal attention is called to the introduction of testimony elicited from appellant before the grand jury and read "wholesale" by the district attorney into the present record. At the time of its offer counsel for appellant and the trial judge made the following statements respectively which sufficiently answer the objection made upon appeal. "Mr. Harris: I think the objection might be premature. I might say briefly that as, we know, the Grand Jury investigation is a general investigation of many, many things. The portion of the investigation that would be inadmissible would be what touches upon what is classified here as the Lakeside Club, but all the other, such as relates trucking concerns and to Bergsten and a man named Connolly, would be incompetent, irrelevant and immaterial and not admissible. We will make a special objection on that ground." "The Court: Ladies and Gentlemen, the testimony of the defendant Hickman before the Grand Jury may be admitted in evidence subject to certain objections. That portion of it which has to do with his transactions in connection with the Lakeside Club, with Fauset, Hurlbut and Hoel, is submitted without restriction. The rest of his testimony subject to motion or specific objections to be made later on, may be admitted in evidence for the limited purpose of showing, if it does show, the defendant's familiarity with the procedure of the Board of Equalization and the method of procedure of said Board of Equalization and his acquaintance and association with any member of the Board of Equalization. It must not be considered by the Jury for any other purpose, and none of it is admitted for the purpose of showing or tending to show, if it does show, any other alleged independent offense or offenses, other than there is set forth in the indictment, subject to specific objections later on."

[14] Wide latitude in the admission of evidence was extended to each side in the trial of this case. Much of the evidence could have been eliminated but we are not prepared to say, after an examination of the entire transcript, that it was not admissible, and particularly the matters touched upon during cross-examination by appellant's counsel. This was a case in which both the prosecution and the defense found it necessary to endeavor to paint a picture of the amicable or hostile condition of mind of appellant and the various witnesses or the parties named by witnesses, and through circumstantial evidence to draw inferences favorable or unfavorable to the respective sides. Some of the evidence was introduced as part of the res gestae; some to rebut certain contentions of appellant presented during the trial. Part of the evidence objected to related to appellant's experience in practice before the board of equalization, and the fees charged in various cases, also to the fee charged by another attorney representing the proprietors of a hotel who had been cited on an order to show cause why their license should not be revoked, which citation was akin to the citation against the Lakeside Club. Much

of the evidence was introduced first without objection, and subsequently, when an effort was made to elaborate and explain the evidence, an objection was made.

[15] A great deal of evidence which appellant claims was prejudicial to his rights related to the close relationship that seemed to exist between appellant and a member of the board of equalization. This evidence, if prejudicial, concerned the allegations set forth in count one. That it did not prejudice the jury is best exemplified by the jury's action in acquitting appellant upon the charge of soliciting Fauset and others to join in the offer of a bribe. The evidence of witness Gleason, who testified to appellant's activity in suggesting that a fee in another matter might be divided with a member of the board of equalization, may have been prejudicial to appellant on count one. Whatever inference might be drawn from the Gleason testimony, it could not injure the theory of the defense on count two, namely, that the fee fixed was a reasonable fee, and that the whole thereof was to be retained by appellant and not split or divided with anyone. The court instructed the jury: "This defendant is on trial only for the offenses charged in the indictment, and you may not convict him of any of the offenses charged in the indictment solely, or only, or because you may believe, if you do believe, that he is guilty of some other crime or public offense or offenses not charged in the indictment." "The testimony of Walter Gleason may only be considered by you as tending to show, if it does so tend to show, the relationship existing between the defendant and Fred E. Stewart, and the defendant's knowledge of the manner of presenting matters before the State Board of Equalization. The testimony of the witness Bergstrom may only be considered by you for the purpose of tending to show, if it does tend to show, the relationship existing between the defendant and Fred E. Stewart and in considering the truth or falsity of the defendant's testimony as to reasons why he went to Sacramento on December 7th and remained there until December 11th." We cannot conclude that the evidence noted in the briefs prejudiced appellant's rights, and certainly it was not predjudicial so far as count two was concerned.

[16] Appellant cites fourteen items of alleged misconduct of the assistant district attorney and claims that they represent a series of subtle and adroitly conceived incidents which in accumulative effect gravely prejudiced appellant. The first incident refers to a question propounded to witness Stewart: "On the 12th of December did you borrow $800?" The question was proper to assist in refreshing the recollection of the witness relative to dates. The witness volunteered the reason for the loan and that part of the answer was permitted to stand without objection. This is a fair example of the questions or statements from which some inference unfavorable to appellant might have been drawn respecting count one.

[17] The alleged misconduct that might be construed as statements made or questions asked in reference to count two are as follows:

"Now he has testified before the Grand Jury in certain ways and he has testified here in other ways."

"Well, there is plenty to show that you did so testify."

"Q. You think it is proper for a Judge to be connected or be interested in any way in connection with criminal cases?"

"Q. When he told you that, Judge, did you remind [him] of the fact that he had made an order allowing minors to work in places where liquor was sold and such an order was a direct violation of the State?"

"Oh, he changed his testimony. Do you wish to change your testimony in any other regard?"

"Q. There was a certain telephone call that did not have anything to do with business, a telephone call down here to Oakland. * * * It was not to your family either, was it?"

An examination of the transcript would seem to show that the foregoing statements and questions did not have their origin in any preconceived plan on the part of the prosecutor to prejudice the defendant in the minds of the jurors, but rather were provoked by caustic remarks made by opposing counsel in repeated objections and assignments of error, with or without merit. Irrespective of the actuating motives of opposing counsel, the question arises, did the remarks and questions of the assistant district attorney, accumulative in effect, prejudice appellant. The reference to the fact that appellant had testified before the grand jury in "other ways", and likewise the question, calling for the conclusion of the witness, as to whether a judge as an attorney should prosecute or defend criminal cases, are matters that might have been left for argument before the jury. The reference to the policy of the board of equalization permitting minors to work in places where liquor is sold might have a possible tendency to degrade witness Stewart, but we hardly see how it could prejudice the defendant in view of the verdict on count one. The assistant district attorney's question in relation to a telephone call to some one other than a member of appellant's family was propounded in connection with the cross-examination of appellant as to his recollection of his activities covering certain dates. Appellant now contends that the asking of this question was "unpardonable conduct", and that the purpose of the question was to imply that appellant sought to arrange a clandestine meeting. Eliminating the statements in appellant's brief and likewise the reasons set forth for the question in respondent's brief, which are not substantiated by the record, we must, after reading the transcript of testimony, conclude that the question or the testimony given prior or subsequent thereto does not justify the implication placed thereon by appellant.

If, as appellant contends, the assistant district attorney, through his conduct, prejudiced appellant's right to a fair trial, we cannot understand why the jury did not convict upon count one, the charge to which the alleged improper questions in major part was addressed. The acquittal of appellant on count one is an acquittal of the prosecutor upon the charge of misconduct as to any question, or that his conduct generally in asking the questions resulted in accumulative effect of prejudicing the appellant.

[18, 19] Turning to the claim that the court erred in refusing to give four of appellant's proposed instructions, we find that two of them might be worthy of consideration if the defendant had been convicted of grand theft instead of an attempt to commit grand theft. The other two were grounded upon the theory that this was either a case of fixing a contingent fee or a fee to be fixed in the discretion of one of the interested parties. But the facts indicate that this was a case in which a fee had been fixed. Whether the jury believed appellant's or witness Fauset's testimony as to the agreed amount, no other conclusion could be reached than that a contract for fee had been made. The subsequent effort to obtain $1,500 was made upon representation that further legal services were necessary when in fact appellant knew that the petition to restore the license would be granted.

Appellant argues that, assuming the fee to be excessive, such fact cannot afford a predicate to sustain a conviction in a criminal case. An attorney is well within his rights in charging a substantial and fair fee based upon services rendered or for services to be rendered in the future upon matters then undetermined, but when an unfair advantage is taken of a client, and a legal fraud perpetrated with felonious intent to steal the property of the client, all remedies imposed by law for the protection of the client may be invoked but cannot abridge the right of the state to penalize for a violation of the criminal code.

[20] Appellant also objects to four instructions given covering the subjects of "attempt", "corroboration", "expert testimony" and the "legality of the contract from a civil aspect". When read with all of the instructions the jury was fairly informed upon the law applicable to the facts of the case, and no error appears prejudicing or tending to prejudice the substantial rights of the defendant.

The judgment and order denying a motion for a new trial are affirmed.

We concur: TYLER, P. J; KNIGHT, J.

SUTPHIN v. SPEIK. *

Civ. 11654.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1939.

Hearing Granted by Supreme Court April 6, 1939.

1. Judgment ⚷713(2)

Defendant, not asserting defense that wells on certain lots drew oil from under ocean tidelands after his counsel brought out such fact on examination of witness in action for oil royalties under assignment of interest in oil from wells on such lots, nor alleging such fact in answer to supplemental complaint, though he knew of such possibility, is estopped to urge such defense in subsequent action for additional royalties.

2. Mines and minerals ⚷79(1)

One not party to another's agreement with state for acquisition of right to produce oil from beneath ocean tidelands is not bound thereby, and hence not precluded from recovering oil royalties from such producer under latter's assignment of interest in oil from wells on certain lots.

3. Mines and minerals ⚷79(7)

A judgment, giving assignee of royalty interest in oil from wells on certain lots title to stated interest in all oil produced or sold from such property, entitled him to specified share of oil reduced to possession at mouths of wells thereon, though emanating from ocean tidelands outside such lots.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by I. O. Sutphin against Frederick A. Speik for oil royalties. Judgment for plaintiff, and defendant appeals.

Affirmed.

John W. Preston and Crump & Rogers, all of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

YORK, Presiding Justice.

Respondent Sutphin recovered judgment against appellant Speik on April 5, 1934, in an action brought by him to recover certain oil royalties under an assignment of a five per cent participating royalty interest in the gross total production of all oil, gas and other hydrocarbons produced, saved and sold from a well located upon two certain lots in the Huntington Beach oil district, said assignment covering a well being drilled thereon or any substitute well. The judgment also gave title to respondent of a five per cent interest in the total production of oil, gas and other hydrocarbons produced, saved or sold from said property "whether the same is produced from one or more wells upon said premises".

Said judgment was affirmed by this court upon appeal (Sutphin v. Speik, 15 Cal.App.2d 516, 59 P.2d 611), and a petition for hearing therein was denied by the Supreme Court.

The instant action, based upon the aforesaid judgment, is for royalties accruing subsequent to said judgment and the matter is again before this court on an appeal from a judgment rendered by the trial court on July 6, 1937, in favor of respondent Sutphin for the sum of $31,932.54 and interest.

At the time the assignment was made to respondent a well known as well No. 3 was being drilled upon the property in question, which well was later completed and placed on production. Thereafter, the derrick and machinery surrounding this well were destroyed by fire and in June, 1933, appellant redrilled said well, using part of the same hole and casing, and renamed it well No. 3-A. This latter well was placed on production in August, 1933, and in October, 1933 well No. 4 was drilled. Both wells have been producing continuously since that time, except when temporarily shut down.

In the instant action appellant denies respondent's claim to royalties on the ground that the oil produced from well No. 4 does not emanate from the lots referred to in the former judgment, but comes from without the lateral limits of said lots, to-wit: from the tidelands of the state of California which underlie the Pacific ocean; that said well No. 4 is what is commonly known as a "whipstock well", drilled diagonally to and into an oil-producing sand under the ocean, more than two thousand feet from the said leasehold property.

Respondent answers that the total production of oil and gas in the instant case was reduced to possession at the mouths of wells Nos. 3-A and 4, located upon the two lots, and that title thereto vested in respondent and appellant according to their respective interests at that time and not before.

*For subsequent opinion see 99 P.2d 652.

The trial court found as to this issue: "That it is immaterial whether or not wells 3-A and 4 are, or are commonly known as, 'whipstock wells', or whether or not they are drilled diagonally; because of the doctrine of res judicata said issues do not constitute a defense in this action which is based upon the former judgment. * * * Plaintiff has an estate, right title and interest amounting to five per cent in said well No. 4 and in and to the oil, gas, asphaltum and other hydrocarbons produced, saved or sold therefrom and the moneys derived from such sale."

Appellant maintains that such findings are erroneous because the rights in the production of oil and gas in areas beyond the limits of the lots in question were in nowise determined by the judgment in the prior action. Appellant also contends that it was prejudicial error for the trial court to reject his offer to prove that since the rendition of the prior judgment he had acquired from the state of California a new and independent right to produce oil and gas from beneath the tidelands, and that the trial court employed the doctrine of res judicata to actually destroy such unlitigated property right in appellant which he acquired in October, 1934, under an agreement with the state of California.

[1,2] During the trial of the first action, to-wit, on or about February 1, 1934, it was brought out in evidence by counsel for appellant upon his voir dire examination of the witness Amlin that the wells on lots 12 and 14 drew oil from the supply or pool underlying the tidelands along the ocean, therefore the defense which appellant here urges was available to him during the trial of the original action. At any rate, if he did not definitely know that wells Nos. 3-A and 4 were producing oil from the pool underlying the ocean he did know that such a possibility then existed and he could very readily have alleged that fact as a defense to the supplemental complaint which was filed in the original action on March 19, 1934. Not having taken advantage of that opportunity, he is estopped to urge such defense in the instant action. So far as appellant's agreement with the state of California is concerned, respondent was not a party thereto and cannot be bound thereby, especially in the face of the judgment in the original action, which was rendered on April 5, 1934, when both wells Nos. 3-A and 4 were actually producing, said judgment reciting as follows: "2. That the plaintiff, I. O. Sutphin, is the owner of five per cent of the total production of oil, gas and other hydrocarbons produced, saved or sold from lots 12 and 14 block 118, in the Huntington Beach Seventeenth Street Section, as per map thereof in book 4, page 10 of miscellaneous maps, records of the county of Orange, state of California, whether same is produced from one or more wells upon said premises, and as such owner plaintiff is entitled to receive all moneys derived from the sale of said five per cent of the total production of oil, gas and other hydrocarbons from said lots 12 and 14."

[3] So long as the oil and gas are reduced to possession at the mouths of wells Nos. 3-A and 4 which are located upon the lots covered by the original assignment to respondent, title to his proportionate share thereof is vested in respondent by virtue of the prior judgment upon which the present action is based.

In Price v. Sixth District Agricultural Association, 201 Cal. 502, 258 P. 387, a leading case on the question here being considered, it was stated at page 509, 258 P. at page 390, quoting from 23 Cyc. 1215:

"'A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action.' * * * Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed *not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto.* This rule has been aptly stated as follows: 'It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise *extend to every matter which was or might have been urged to sustain or defeat* the determination actually made.' (Freeman on Judgments, 5th ed., sec. 677, p. 1432.) To the same effect see Sullivan v. Triunfo Gold etc. Min. Co., 39 Cal. 459. Numerous California cases may be found where this rule has been applied.

"This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them. The rule has been stated as follows: 'The defendant in an action is ordinarily required to set up all his defenses which do not constitute separate causes of action and if he neglects to do so is concluded by the judgment rendered in such action. The judgment operates as res judicata, not only in regard to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded. The reason for this rule lies in the principle that there must be an end to litigation and, where a party has an opportunity to present his defense, and neglects to do so, the demands of the law require that he should take the consequences.' (15 R.C.L. § 446, pp. 969, 970.)" (Italics added.)

See, also, Nelson v. Lake Hemet Water Co., 212 Cal. 94, 99, 297 P. 914, 916, where it is stated: "It is therefore not germane to review the events transpiring prior to this adjudication, as all questions *which could have been raised prior to the judgment* are conclusively deemed to have been presented, and all proof that could have been presented is conclusively presumed to have been received. Price v. Sixth District, 201 Cal. 502, 258 P. 387. * * *" (Italics added.)

Again in Edmonds v. Glenn-Colusa Irr. Dist., 217 Cal. 436, 446, 19 P.2d 502, 506, it is stated: "'A former judgment between the parties to an action is conclusive, in all subsequent actions involving the same question, not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues *which also might have been raised and determined.*' Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597, 598; Curtis v. Upton, 175 Cal. 322, 165 P. 935; Philbrook v. Newman, 148 Cal. 172, 82 P. 772; Estate of Harrington, 147 Cal. 124, 81 P. 546, 109 Am.St.Rep. 118. * * *" (Italics added.)

In support of his contention, appellant cites the case of English v. English, 9 Cal. 2d 358, 70 P.2d 625. That was an action to rescind a separation agreement settling property rights between husband and wife on the ground that the agreement was procured by fraud and duress rendering it void. The defendant and appellant in that case contended that a former judgment which directed the payment of certain instalments of the separation agreement necessarily determined the validity thereof and constituted res judicata of the issues presented in the proceeding to rescind said agreement so as to estop the plaintiff from asserting the invalidity of the said agreement. It was held page 363, 70 P.2d page 628, that the contract or agreement was severable and that each instalment represented a different obligation. "The validity of the contract was not raised by the pleadings nor was it a direct issue in the former case. Judgment was rendered in the first case by default. Under such circumstances the parties are not estopped from raising the issue of fraud, coercion, or duress in a subsequent suit upon a different obligation."

The cited case is not applicable to the case now under consideration. No question arises here as to the validity of the assignment, and furthermore, the question of fraud in the inception of the assignment is not involved.

Therefore, since the defense here urged is one which was within the power of appellant to present during the trial of the original action, he is estopped to raise it in the instant action, and the trial court was bound, as is this court, by the judgment in the original case of Sutphin v. Speik, 15 Cal.App.2d 516, 59 P.2d 611.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

30 Cal.App.2d 700

FRANKISH v. FEDERAL MORTG. CO. et al.

Civ. 2168.

District Court of Appeal, Fourth District, California.

Feb. 7, 1939.

Hearing Denied by Supreme Court April 6, 1939.

1. Deeds ⚷211(3)

In action to cancel deed of trust and note executed by grantee of corporation to which plaintiff had been induced to deed her property, findings that deed from plaintiff was obtained by fraud *held* sustained by the evidence.

2. Contracts ⚷270(1)

A party desiring to rescind must do so promptly if he is free from duress, menace, undue influence, or disability and is aware of his rights to rescind. Civ.Code, § 1691.

3. Contracts ⚷97(1)

If, after discovering the facts, person conducts himself as though the contract were valid, he waives right to rescind based on the known facts. Civ.Code, § 1691.

4. Cancellation of instruments ⚷47

In action to cancel trust deed and note executed by grantee of corporation to which plaintiff was induced to deed her property, finding that plaintiff exercised reasonable diligence in attempting to rescind *held* sustained by the evidence. Civ.Code, § 1691.

5. Cancellation of instruments ⚷34(1)

Where negotiations were pending for settlement of plaintiff's demand for return of her property free of incumbrances and the parties intended to leave the matter open, plaintiff's delay in instituting suit to cancel deed of trust and note executed by grantee of corporation to which plaintiff was induced to deed her property was not subject to doctrine of laches.

6. Cancellation of instruments ⚷47

In suit to cancel deed of trust and note executed by grantee of corporation to which plaintiff was induced to convey her property, finding that plaintiff had received nothing of substantial value and was not obliged to restore anything to defendants *held* sustained by the evidence. Civ.Code, § 1691, subd. 2.

7. Vendor and purchaser ⚷220

To be a "bona fide purchaser" one must have purchased in good faith and for a valuable consideration and must have had no knowledge or notice of prior rights at the time of his purchase or at any time prior to payment of the purchase money.

[Ed. Note.—For other definitions of "Bona Fide Purchaser," see Words & Phrases.]

8. Fraudulent conveyances ⚷271(3)

Where a plaintiff attacks a conveyance as being in fraud of his rights, it is incumbent upon him to show the fraudulent intent of the vendor, whereupon the burden shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to plaintiff, who must show vendee's knowledge of vendor's fraudulent intent.

9. Mortgages ⚷186(5)

In action to cancel deed of trust and note executed by grantee of corporation to which plaintiff was fraudulently induced to convey her property, evidence showed that both original grantee and corporation taking deed of trust and note were aware of the fraud and recipients of benefit therefrom and participated therein through their agents.

10. Mortgages ⚷154(1)

Where plaintiff was fraudulently induced to deed her property to corporation which deeded it to its subsidiary which gave trust deed and note to another corporation which knew of the fraud and participated therein through its agents, trust deed and note were properly canceled.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Adele Frankish against the Federal Mortgage Company and others to cancel a trust deed and note. From a judgment for plaintiff, the defendants appeal. Affirmed.

See, also, Cal.App., 82 P.2d 962.

Burr & Smith, A. M. Cross, and S. J. Loughlin, all of Los Angeles, for appellants.

Edward E. Gray, of Upland, for respondent.

GRIFFIN, Justice.

This is an action to cancel a trust deed and note. Respondent, a widow, was the owner of certain real property, subject to a mortgage of $1,535.29, located in the city of Ontario, San Bernardino county. Parcel 1 was an unimproved city block. Parcel 2 consisted of a lot which was improved with a store building and under lease by paying tenants at a monthly rental of $100. Both parcels were valuable properties. It appeared that respondent was willing to sell these properties to avoid the cares of rental, upkeep, and the like, and to transform the vacant block into securities that would return an income. In San Jose there lived one DeWitt C. Rucker, a real estate and insurance man. His family and Mrs. Frankish's family were close and old time friends. One of respondent's intimate friends was the betrothed of Mr. Rucker.

From the complaint and the testimony it appears that respondent sought out Mr. Rucker to sell her vacant lot for a post-office site. Rucker induced her to turn these properties over to the General Insurance Securities Company (for brevity's sake hereinafter referred to as the GIS), a Nevada corporation, with headquarters in Los Angeles. The National Title Insurance Company, a corporation, one of the appellants herein, was trustee under the trust deed involved.

Among the many representations made, respondent was told by Rucker that for her properties this corporation would give her $40,000 worth of gold notes, secured by upwards of a million dollars' worth of pledged securities.

The evidence shows that she relied absolutely upon Mr. Rucker, who was acting as her broker. He was to receive from her a 5 per cent commission for the transaction. He also sought a like commission from the GIS.

During this time he was agent for the GIS, and on July 10, 1933, he was elected as one of the directors of the company. On March 4, 1933, he submitted a report to the GIS as a member of their executive committee.

On February 3, 1933, respondent deeded the property to the GIS. On March 23, 1933, she received a naked $40,000 promissory note from it and never received any gold notes secured by pledges of a million dollars or otherwise. In 1932, the GIS commenced negotiations to secure a controlling interest in the Intermountain Title Guarantee Company, a corporation (hereinafter referred to as the Intermountain), one of the appellants herein. Its principal place of business was in Salt Lake City, Utah. From January to June, 1933, the GIS secured from 51 per cent to 93 per cent of the capital stock of the Intermountain. The stock of another corporation, the Federal Mortgage Company (hereinafter called the Federal), was wholly owned by the GIS.

Respondent claimed that these two corporations were but a few of the numerous lesser companies owned or partially owned by the GIS and that the GIS was in fact acting as a "parent or holding company".

After paying off the mortgage of $1,535.29, on March 23, 1933, the GIS conveyed the property deeded by Mrs. Frankish to the Federal, which company it wholly owned, with directions to it to issue a promissory note for $20,000, secured by a trust deed on the property to the other company, i. e., the Intermountain, which was done in accordance with the request. Hence, on that date the title to the property was in the Federal, subject to a trust deed of $20,000 held by the Intermountain.

The minute books of the GIS disclose the following entry in reference to the Frankish deal: "That the proposition presented, be accepted, subject to the approval of the Corporation Commissioner." The corporation commissioner's permit allowed it to issue to respondent its series A, first lien collateral gold notes in an amount of not to exceed $60,000, as consideration for the real and personal properties described in its application for the permit. Respondent claims the GIS violated the terms of this permit in taking over the Frankish property and giving her a mere promissory note unsecured by anything.

Within a year or so from the date of the receipt of the deed from Mrs. Frankish, the GIS went into bankruptcy. Prior to this time, however, the GIS was unable, or failed to deliver to her the $40,000 in gold notes. Negotiations were kept in abeyance for some period of time as between the GIS and respondent, due to some claimed agreement whereby it was to return the property to her free and clear of all incumbrances. It allowed her for several months to collect the rents from the property, due to the fact that the GIS had not paid all of the interest on its promissory note to her and because she had no funds of her own. After considerable controversy the Federal, on January 3, 1934, deeded the property, subject to the $20,000 trust deed, to DeWitt C. Rucker, as trustee for Adele Frankish. This was done apparently for the purpose of attempting to perfect some arrangements for the return of the property to respondent in accordance with the negotiations with the GIS. In July, 1935, Rucker, as trustee, conveyed his equity to respondent.

Appellant claims that in addition to the GIS paying off the mortgage on respondent's property, she collected in rent and was paid a sum totaling $1,360, in cash, all of which was paid to her prior to November, 1933, excepting the sum of $150, which was collected subsequent to that date. The GIS also charged her with $666.67, as commission due Rucker, and title charges in the sum of $156.

Appellants claim that the findings of the court that plaintiff had been defrauded are not supported by the evidence and are contrary to the evidence and the law. As to this issue, generally speaking, the court found:

"That plaintiff herein had no independent advice, reposed the fullest confidence at all times herein at issue in the said Rucker and believed his representations and statements without reserve and relied and acted thereon, and that he thereby misled and deceived her to her harm; that such representations were made with intent to deceive plaintiff or thereby to induce her to grant and convey her said realty unto GIS. * * * That he concealed from plaintiff the fact that he was a director and officer of GIS, and that he was also acting as sales agent for GIS. * * * That the one or more papers signed in this case in relation to this transaction, other than the deed itself, were not read by plaintiff, nor understood by her, and that she signed the same without reading, upon the definite representations of her said broker that they were for different purposes, and contained different provisions than actually was the case in the writings themselves. That the representations of the said Rucker to her included suggestions as facts of matters which were untrue and which the said Rucker knew were untrue; and included positive assertions by him in a manner not warranted, of things and matters which were not true, even though he believed them to be true, and included other acts and representations by him calculated to deceive her and which did deceive her, by reason of her complete confidence in him, and that thereby plaintiff was misled to her serious injury. That in any view of the case, the statements, assertions and representations of the said Rucker to plaintiff, and his conduct generally in all matters pertaining to the transfer of such real estate constituted constructive fraud on his part, and had all of the actual consequences and legal effects of actual fraud, and that there were both actual and constructive frauds in the entire episode on his part. That the confidential relations between plaintiff and the said Rucker were by him grossly abused to her harm. * * * The court finds that while such written contract or offer to sell is signed by plaintiff, she did not sign the same having knowledge of the contents thereof, or understanding of the contents, and that she signed the same under such undue influence and misrepresentations as aforesaid and in the belief that she was to secure highly valuable and safe securities therefor in such Gold Notes, secured by upwards of a million dollars in pledges, and not otherwise. * * * The court finds that the officers and directors of GIS had by March 4, 1933, been warned or informed that said corporation and some or all of its subsidiaries were threatened with insolvency."

It is to be noted in this case that the Federal, although served with summons, did not appear in the action, and its default was subsequently entered. The GIS was not made a party defendant.

[1] We have carefully examined the record at length on the issue of fraud as between respondent and the GIS, the Federal, and their agent, Rucker, and will hereafter quote some of the testimony bearing on this issue. We are firmly convinced that the detailed findings of the trial court on this issue are amply supported by the evidence. Whether the Intermountain had notice of the fraudulent transactions, as found by the trial court, will be considered and discussed later in this opinion.

The court made further findings as to which appellants make the same objections. The court found that respondent exercised reasonable diligence in attempting to rescind promptly under the circumstances. The pertinent portions of those findings may be thus stated:

"17. The court further finds and determines that while plaintiff had accepted such $1,360.00 during the period specified, that she did not thereby intend to ratify and affirm such transaction, nor to affirm, approve or ratify such $40,000 promissory note. That in truth and fact she did not accept or ratify and affirm such transaction, but to the contrary denied the same and ever insisted throughout such period that she should have her property back, free and clear, or else that she be given such Gold Notes secured by ample pledges and that in any event her interests be thoroughly secured against any possible loss. * * * That repeatedly during such period the said Rucker assured her that he would get her property back for her, free and clear; that she first learned of the existence of the trust deed in favor of Intermountain along in November, 1933, and that thereafter and prior to February 28, 1934, and after such date, also, the said Rucker promised and agreed that she would get her property back, free and clear. That at no time after February 2, 1933, did plaintiff accept the status quo and did not knowingly or intentionally or by her course of conduct ratify and affirm that transaction whereby she received such promissory note for $40,000, but to the contrary still relied upon the assurance given her that she would get her property back free and clear of any and all encumbrances, or that she would be absolutely secured and protected against loss. That during the period from the time she conveyed her property to GIS, until this action was instituted by her, plaintiff had no source of revenue whatsoever, had absolutely no income and had no means of livelihood, or to support her aged mother who lived with her, her husband being dead, other than the moneys she secured as interest as aforesaid, which ceased February 28, 1934. * * *

"18. The court finds that Intermountain did not pay plaintiff anything at any time, nor did it advance any moneys whatsoever in respect of such real estate. That it suffered no prejudice and that it is and was not entitled to have restored unto it anything or moneys from plaintiff. That it did not change its position, or suffer any hurt or loss whatsoever by reason of any act or omission by plaintiff, in the entire episode. * * *

"19. * * * That at all these times Intermountain was able to protect itself against any possible hurt or loss and was offered or given contributions from GIS much larger than the sum of $20,000. * * *

"23. The court also finds that plaintiff by reason of the assurance and representations made unto her by the said Rucker, nd because of her continued confidence in him, was lulled into a sense of security, even after she learned of the trust deed given to Intermountain, and up to the date that GIS had been adjudicated a bankrupt. That Intermountain was not prejudiced or damaged by any delay on plaintiff's part, or by any lack of notice from her. That no harm or prejudice resulted to Intermountain by any omission or act on plaintiff's part. That plaintiff was not made aware of her right or duty to give notice, to offer to restore, or to cancel or rescind, and that in any event plaintiff was still under the influence of said Rucker long after November, 1933, when she first learned of the existence of the Intermountain trust deed. The court finds from the evidence, and concludes from the unusual circumstances of this case, that plaintiff was not guilty of any laches and that Intermountain did not change its position, nor was it hurt or prejudiced by any act or omission on her part. The court also concludes and finds that any such notice would have been a useless and vain thing. That Intermountain was already charged with all knowledge it might have received from her."

Appellants strongly maintain that respondent knew every material fact entitling her to rescind and that she may not rightfully delay indefinitely the ascertainment of her rights, and that the delay in the instant case was fatal to a recovery, citing McCray v. Title Insurance & Trust Co., 12 Cal.App.2d 537, 55 P.2d 1234; Victor Oil Co. v. Drum, 184 Cal. 226, at page 243, 193 P. 243; Stevens v. Bryson, 135 Cal.App. 684, 686, 27 P.2d 932; Oppenheimer v. Clunie, 142 Cal. 313, 320, 75 P. 899; Hannah v. Steinman, 159 Cal. 142, 112 P. 1094.

[2, 3] It is the general rule in courts of equity that a party desiring to rescind, must do so promptly if he is free from duress, menace, undue influence or disability and is aware of his rights to rescind (Civ. Code, sec. 1691; Bailey v. Fox, 78 Cal. 389, 396, 20 P. 868), and that if, after discovering the facts, he conducts himself as though the contract were valid and in full force, he waives all right of election to rescind, based on the known facts (Evans v. Duke, 140 Cal. 22, 73 P. 732).

Respondent defends this finding of the court on the theory that appellants did not plead laches, but did plead waiver, or that respondent ratified and affirmed the trust deed in question, and cites Victor Oil Co.

v. Drum, supra, wherein it was stated at page 243, 193 P. at page 250: "We might also add that laches is a defense, and not a condition of relief, and, if it does not appear on the face of the complaint, must be affirmatively pleaded and proven by the defendants."

Respondent further contends that the instant action is not one for rescission but is a case of cancellation based on fraud. The record discloses that from the time Mrs. Frankish discovered the fraud negotiations continued between her and the GIS or between her and Rucker as a representative of GIS for the return of the property to her free and clear of incumbrances and that the whole matter was left open for their action until appellant attempted to foreclose the trust deed. Then this suit was instituted. At no time did GIS or anyone else repudiate the transaction or refuse to continue the negotiations with her or to hand her back the property clear of the incumbrance.

[4] The detailed facts related in the findings are adequately supported by the evidence.

In the recent case of Potter v. Contra Costa Realty Co., 220 Cal. 31, 29 P.2d 189, our Supreme Court has clearly defined the rule applicable to the facts disclosed in the instant case and clearly distinguishes the effect of the cases above cited. In that case Mrs. Potter made a contract to buy a lot on February 11, 1916, agreeing to pay $1,000 for it. On December 12, 1921, she completed her payments and demanded a deed. Some controversy arose about water mains, construction of sidewalks, etc. In November, 1929, nearly eight years after the full payment of the purchase price, the negotiations finally terminated, notice of rescission was given, and the money paid in was demanded. The lower court held that she was guilty of laches which barred her right to rescind. In reversing the judgment that court stated: "The judgment is sought to be justified upon the equitable principle of laches, but it derives no support from that doctrine."

The court further recites:

"That defendant in the course of the negotiations promised to fulfill its obligations, and did not, until 1929, in any way repudiate the same. That she had a right to rescind for failure of consideration is clear, and she did not lose that right by her indulgence of defendant in reliance upon its promise to perform. * * *

"The doctrine of laches bars equitable relief where the party seeking relief has been guilty of excessive, unjustified delay in asserting rights, but delay is justified where it results from negotiations to reach a settlement of the controversy, and this must be particularly true where the defaulting party represents that he will make good his default."

We quote a few excerpts from the testimony given in support of this point. Referring to Mr. Rucker, Mrs. Frankish stated:

"I said to him at the time 'Do you know that is the only income that I have and that I am supporting my mother?' * * * I said 'DeWitt, I cannot afford to lose that property.' He said 'I thoroughly understand that; I appreciate that.' They all knew my circumstances; I had nothing but that. The wife that was to be and the mother-in-law, I had known them for years, and he said 'this is a sound good proposition. I have thoroughly investigated it.' He said 'so much so that we are all—my family is willing to go into it, and which is more' he said 'I am to be made a Vice President of this Company.' He told me that to encourage me. He said 'By that, Adele, you cannot lose that property; I would see that you didn't.' * * *

"Q. Did you have any independent advice in this matter at all? A. None whatever. I relied completely on Rucker. * * * He says 'I have thoroughly investigated and I am in a position to investigate it better than you.' He says 'Don't you trust me?" He (Rucker) said, 'I have thoroughly investigated.' I said 'How about me seeing a lawyer.' He said: 'Don't you trust me? I can be as good as a lawyer to you; I am your broker; I know as much as any of them; I would not do this deal only as a broker,' so of course, I left it at that, and a broker is supposed to make a clean deal for a person.

"* * * A. All through that I said to him—I cautioned him every time I met Mr. Rucker, I kept hammering and hammering and harping on that subject that it was the only income I had, and that I could not lose it. I says 'DeWitt, I want you to promise me'—he said that being a Vice President he could see that I never lost that and I said to him time and time again 'I want that property; when you find that deal is not going through I want that property back clear' and he said 'I can give you that property back clear.'"

Mrs. Frankish told how, along in November, 1933, she learned of the existence of the trust deed against her property. In the meantime, she had received nothing but the promissory note and a few occasional payments. Her testimony in reference to this subject is as follows:

"A. I says to him 'now, see here, you go back to that company—you promised me that back clear as I handed it to you'—I says 'you go back there; you are representing me; you are my broker; and I have put faith and confidence in you'; I says 'you were making this deal for me'; I says 'you go back to that company and see just what they will do. I want that property back clear or $40,000.00.'"

Later, in December, she went to the company's office in Los Angeles. She wanted the payments they had promised her in the interim. Her testimony is as follows:

"A. * * * I says 'I demand to have my money then or the property back clear' and he (Rucker) says 'just wait a minute and keep cool and I will go into Mr. Schroder's office', so he went into Herman Schroder's office—

"Q. Who was he? A. Vice President.

"Q. Mr. Schroder was? A. Yes; so he brings me into his office and he acted as if he had never heard of me before.

"Q. Mr. Schroder did? A. Yes; and yet he did know me finally, and he says 'well, Mrs. Frankish,—I told him—related my circumstances at the time, and I told him just the facts and the truth and I says 'you know that is the only income that mother and I have and we want that income back or we want all the property back as I handed it to you, or the money.'

"Q. What did he say, if anything? A. He says 'well, Mrs. Frankish, you shall have some money if Mr. Rucker and I have to take it out of our personal account; we will send you the money.'"

Along in the early part of 1934, the negotiations were still continuing. At that time Mr. Rucker informed Mrs. Frankish that he "had a very good proposition on whereby he was going to get a large market in my building". Mrs. Frankish testified that he said: "'will you be willing to wait (this was early in January) for a few months until we get this deal through, and then we will go back to paying you your regular interest'. * * * He was dickering with the Fisher Company of Riverside to rent the property for this market, which he succeeded in making this deal with the Fisher Company and they moved in." Mrs. Frankish then testified that Mr. Rucker had never informed her that he held the property as trustee for her.

It also appears from the minutes of the executive committee of the GIS dated January 3, 1934, that the corporation recognized their obligation to return the property to Mrs. Frankish free and clear of all incumbrances, for we find those minutes read in part as follows:

"Whereas, it is now deemed advisable to abrogate the agreement originally entered into and return to Adele Frankish her property. It is deemed advisable to request the Federal Mortgage Company, a corporation, and the officers of this corporation do hereby request the officers of Federal Mortgage Company, to transfer the title now held by it of the Frankish property to DeWitt C. Rucker, as Trustee, for Adela Frankish in consideration of the return to this Company of the promissory note of this Company issued to Adela Frankish, whenever DeWitt C. Rucker as Trustee is in position to deliver to Adela Frankish title to said property free and clear of all encumbrances and further that this corporation deliver to DeWitt C. Rucker as Trustee for Adela Frankish 400 shares of the preferred capital stock of Intermountain Title Guaranty Company now owned by this company, and 420 shares of stock of the Belt Fire Insurance Company, as collateral for the purpose of acquiring two notes aggregating $20,000.00 secured by first deeds of trust on the properties originally deeded to this Company by Adela Frankish."

[5] We believe it is obvious from the foregoing testimony and by the excerpts from the minutes, that negotiations or plans were instituted to return this property free and clear of encumbrances to Mrs. Frankish and that she relied upon these representations. It may be noted that Rucker was even handed a lot of stock, including 400 shares of the preferred capital stock of Intermountain, to pay off Intermountain and satisfy it and to have it release or cancel the trust deed. The book value, as of April 19, 1933, of such

preferred Intermountain shares, was $85 per share. Under this evidence we are impelled to hold that the intent of the parties was to leave the negotiations open. Under the rule above cited, the doctrine of laches would not apply. Mills v. Richmond Company, Inc., 63 Cal.App. 594, 219 P. 465; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356; Grotheer v. Panama-Pacific Land Co., 41 Cal.App. 19, 181 P. 667; Sherratt v. Hellman Commercial T. & S. Bank, 112 Cal.App. 542, 297 P. 582; Curtis v. Title Guarantee, etc., Co., 3 Cal.App.2d 612, 621, 622, 40 P.2d 562, 42 P.2d 323.

[6] Further objection is made to the findings with reference to lack of restoration prior to rescission. The court specifically found:

"22. The court further finds that plaintiff received no real or substantial consideration whatsoever for the real estate thus conveyed by her to GIS. That the said sum of $1,360.00 actually paid her by GIS was the total amount paid her from any source in the transaction. * * * That the said amount included the rentals collected by her during the period she actually continued to retain possession of said business property on A Street, before and on and after March 23, 1933. That such payment constituted substantially nothing but a return to her of rents collected by GIS. That her losses by reason of the entire transaction are much greater than any such payment received by her, also, inclusive of the satisfaction of said mortgage indebtedness by GIS in the sum of $1535.29. * * *

"24. The court further finds that plaintiff did not offer to restore anything to Intermountain prior to the commencement of this action. The court finds that she had nothing of Intermountain's to restore. That plaintiff received nothing of value whatsoever, above what she was entitled to retain. That the sum of $1535.29 received by her was paid by the bankrupt GIS and that Intermountain has no claim to or interest in such sum. The court further finds that in any event plaintiff would be entitled to retain such sum. That plaintiff received nothing from Intermountain, directly or indirectly."

Appellants contend that "the person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part." Citing Pomeroy's Equity Jurisprudence, 4th ed., sec. 897. *"He must restore to the other party everything of value* which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Civ.Code, sec. 1691, subd. 2.

The evidence discloses the fact that the GIS did pay off the mortgage in the sum of $1,535.29 that was against the Frankish property at the time of the transfer to it. It is also true that respondent received payments of interest and collected rents on the property for a period after the transfer, amounting to the sum of $1,360. Appellants apparently forget that respondent was, during all of this time, entitled to a payment of interest at the rate of six per cent on the gold bonds or the promissory note which was due her under her agreement. This sum would offset any and all amounts actually received by her.

It is also claimed by respondent that the GIS agreed to assume the small mortgage on the property in the original transaction. Peterson v. Wagner, 52 Cal.App. 1, 198 P. 25; 4 Cal.Jur. 768. We feel that the finding as to restitution is amply supported by the evidence.

The trial court made a further finding that the permits of the corporation commissioner had been disregarded in reference to the transactions. Appellants complain of this finding in this, that it is not supported by the evidence. A permit was issued by the corporation commissioner to the GIS to issue its securities, to wit, 30,992 class A, series 1, shares, and 60,688, class B shares, in exchange for certificates evidencing the issued and outstanding preferred and common shares of Intermountain. A similar permit was issued March 15, 1933, expiring June 15, 1933, allowing the GIS to sell and issue to Charles W. Rollinson and Adele Frankish its series A, first lien collateral gold notes in an amount of not to exceed $60,000, as consideration for the real and personal property described in the application for the permit, with certain reservations and conditions. It is apparent from the record that no securities were sold or issued to Mrs. Frankish under the second permit above mentioned. The first permit mentioned becomes involved in so far as it may substantially affect the purported exchange of securities between the GIS and the Intermountain. Appellants contend that they were innocent purchasers for value of the $20,000 trust deed on the Frankish property and that it was by virtue of an exchange agreement and the authority of this permit, that they parted with value.

Respondent contends that at no time thereunder did GIS transfer unto Intermountain any of the capital stock of GIS and that all of such shares of Intermountain stock acquired by GIS was paid for by GIS with other considerations, and not by capital stock of GIS and that in all respects such transaction between these two corporations was carried out in complete disregard of the above-mentioned permit, and also in substantial disregard of the written contract between the two corporations.

The contract to which reference is made was dated October 7, 1932, between the GIS and the Intermountain, wherein Intermountain agreed to purchase 2917 shares of the capital stock of the Belt First Insurance Company (another subsidiary) at a value of $58,341.01, together with notes secured by mortgages and/or trust deeds of a face value of $35,000. Intermountain, in consideration of this sale, agreed to transfer to GIS all of the capital stock of the Intermountain Securities Corporation, a company to be organized, which company was to own 28 per cent interest in the various plants owned by the Intermountain, stock subscription notes, and other assets. The Intermountain also agreed to use their best efforts to cause to be exchanged, not less than 51 per cent of the preferred and common stock of the Intermountain, for the capital stock of the GIS, within one year from the date of the agreement, on the basis therein specified.

The evidence indicates that the GIS acquired in the transaction, from 51 per cent to at least 80 per cent of the stock of the Intermountain.

Respondent further advances the theory that the GIS had no permit which would authorize it to issue its promissory note in the sum of $40,000 in exchange for the Frankish properties and therefore the note being a security, disposed of by the GIS without obtaining a permit so to do, was in violation of the Corporate Securities Act, St.1917, p. 673; that these transactions were consequently void as a matter of law.

It is true that a sale or issue materially deviating from the conditions of the permit is invalid by the language of the act. Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36; Becker v. Stineman, 115 Cal.App. 740, 2 P.2d 444; 6A Cal.Jur. 605, sec. 338. It was held in the case of Herkner v. Rubin, 126 Cal.App. 677, 14 P.2d 1043, that where a permit required a sale for cash but deliveries were paid for by merchandise instead of cash, the agreement was void. We believe that it will be unnecessary to a proper determination of the ultimate decision to pass upon the question of the permit or to give further consideration to the legal effect of the contract and the exchange thereunder if there was other sufficient evidence to support the finding of the court that the Intermountain had notice of the alleged fraudulent transaction and was not an innocent bona fide purchaser for value.

[7] The fundamental rule may be thus stated. To be a bona fide purchaser one must have purchased in good faith and for a valuable consideration and must have had no knowledge or notice of prior rights at the time of his purchase or at any time prior to payment of the purchase money. 25 Cal.Jur., p. 821, sec. 268.

Guided by the light of this rule, let us review portions of the evidence bearing upon this phase of the controversy. It must be remembered that among the officers and directors of the GIS as of January 17, 1933, as disclosed in a statement prepared by them were DeWitt C. Rucker, vice-president in charge of fire operations, director of real estate and insurance since 1919 for San Jose and San Francisco, past president of the San Jose Realty Board; W. Herman Schroder, director of Belt Fire Insurance Company; R. G. Kemp, director, vice-president and manager of the Intermountain Title Guarantee Company and eleven or twelve others of equal or greater importance. This data submitted to respondent contained the following statement:

"January 17th, 1933: Gentlemen: As per your request, I am submitting certain data in connection with General Insurance Securities, Ltd., and its subsidiary Companies. The General Insurance Securities, Ltd., is a Nevada corporation, organized for the purpose of acquiring control of, financing and operating Insurance and Finance Companies, and for the purpose of developing agency organization, created in 1912 by Fred C. Nichols and his associates, known as the Belt Agency Organization. The General Insurance Securities, Ltd., owns the control of the Belt Fire Insurance Company of Los Angeles, the Belt Casualty Company of Chicago, Illinois, the Transpacific Life Insurance Company of Los Angeles, and the Federal Mortgage Company. This latter corporation is a Finance Company organized under the laws of the State of Delaware, but has its home office in Los Angeles, California. In addition to these Companies, the General Insurance Securities, Ltd., has entered into a contract for the purchase of the control of the Intermountain Title Guaranty Company, a corporation of Salt Lake City, and it is expected that this contract will be completed within a very short time now as it has already been approved by the Division of Investments, Department of Corporations, of the State of California.

* * *

"The General Insurance Securities, Ltd., is not a Holding Company in the accepted sense of that term, but is rather an Operating Company, controlling through active management and stock ownership the organization of the Companies referred to above. * * *

"Either one or some of the companies owned by the General Insurance Securities, Ltd., are licensed to do business in the following states. * * *

"Later on the stock of these two companies was sold through the method of a stock exchange to the General Insurance Securities, Ltd., which company shortly afterward acquired the stock ownership of the Federal Mortgage Company and has entered into a contract for the purchase of the stock of the Intermountain Title Guaranty Company and of the Trans-Pacific Life Insurance Company. * * *

"Therefore, the gold note issue referred to above which has been authorized by the Division of Investments, Department of Corporations of the State of California, is intended to be used to acquire such assets as can be used to increase the capital and surpluses of these subsidiary companies."

The minutes of the GIS dated January 28, 1933, read in part as follows:

"Resolved: That the officers of General Insurance Securities, Ltd., be and they are hereby authorized and empowered to contribute to Federal Mortgage Company, an undivided one half interest in the Frankish property, and

"Be it further Resolved: That the officers of General Insurance Securities, Ltd., be and they are hereby authorized and empowered to sell to Federal Mortgage Company the other one half interest in the Frankish property, for the sum of $20,000.00 in consideration of their issuing a note secured by a First deed of Trust on the property in favor of the Intermountain Title Guaranty Company."

This resolution was later rescinded by the GIS because it was in conflict with certain permits issued by the corporation commissioner. The minutes of the Intermountain as of January 31, 1933, indicate that among the six or seven persons elected as directors of that corporation were R. G. Kemp, general manager and secretary-treasurer, and W. Herman Schroder. At this meeting the Intermountain authorized a conversion of their stock for the stock of the GIS. Mervyn Hope, a member of the executive committee of the GIS was also elected vice-president of the Intermountain. Mr. Kemp, representing the Intermountain, came from Salt Lake City to Los Angeles to investigate the proposed deal with GIS and was shown the corporation commissioner's permit. Of interest is an analytical report of various subsidiaries by a committee composed of Mervyn Hope, J. W. Frawley and DeWitt C. Rucker, as of March 4, 1933, wherein they report as follows: "It is apparent after reading this report that the companies are becoming more insolvent every day, and it is therefore necessary for the Executive Committee to take definite action immediately."

This date is prior to the date of the trust deed given by the Federal to the Intermountain.

On November 17, 1933, by resolution, we find that GIS favored Intermountain with a release of any and all dividends due on Intermountain preferred stock. The minutes are replete with authorizations of contributions from the GIS to the Intermountain. On July 27, 1933, such a contribution was authorized in the sum of $50,000, to settle a judgment and have sufficient available assets to extend the operations of the Intermountain.

All parties are agreed that the Federal was never indebted to the Intermountain and that at the time of the execution of the trust deed by the Federal in favor of the Intermountain, no consideration passed between them. After hearing all the evidence the trial court found, and we think properly so:

"That as a part of such contract Intermountain agreed to transfer to GIS certain of the capital stock of such corporation by indirect means. * * *

"That at no time thereunder did GIS transfer unto Intermountain any of the capital stock of GIS, and that all of such shares of Intermountain stock acquired by GIS, inclusive of the entire 93% or approximately 93%, secured by GIS prior to June 1, 1933, was paid for by GIS by other considerations, and not by capital stock of GIS; and that in all respects such transaction between these two corporations was carried out in complete disregard of said Permit of the Corporation Commissioner of the State of California, and also in substantial disregard of the said written contract made by and between said two corporations on or about October 7, 1932. * * *

"10. That by resolution of the Executive Committee of GIS, held April 6, 1933, it was provided that the action of GIS in contributing plaintiff's property to Federal, in consideration of the latter company issuing its trust deed to Intermountain for $20,000, was in conflict with the Permits issued by the Corporation Commissioner of California, and that thereupon the said Executive Committee rescinded, annulled and cancelled such grant and conveyance. * * *

"14. The court further finds that while Intermountain through its testimony asserted that the entire transaction between it and GIS was completed by the giving and the acceptance of this $20,000 promissory note and trust deed. * * * That nevertheless thereafter GIS offered to give or gave Intermountain large sums in the form of gifts or contributions. That GIS as an unwritten part of the original contract between these two corporations, agreed to and did waive all claims to dividends on Intermountain stock up to January 1, 1935. That it also entered into an arrangement or contract with Intermountain to contribute $9,000 cash to the latter company, on January 29, 1934. The court further finds that on or about July 27, 1933, the Executive Committee of GIS offered to contribute 617 shares of Intermountain preferred stock to that company, having a value of approximately $50,000; and that Intermountain was favored by GIS in substantial sums of money called contributions at a time when GIS was facing insolvency. * * *

"19. The court finds that on or prior to July 27, 1933, Intermountain had requested GIS to furnish it with additional capital in the form of a contribution or gift of $50,000; that at such time GIS by Resolution provided that it was ready and willing to contribute 617 shares of preferred stock of Intermountain to the latter company having a book value of substantially $50,000; and at such time also requested Intermountain to cancel and return said $20,000 promissory note secured by trust deed on said described realty, in exchange for other securities of like value, secured by first mortgages or trust deed on other properties. * * *

"20. The court finds that by resolution of the Executive Committee of GIS adopted January 3, 1934, it was provided: to abrogate the agreement originally entered into and return to Adele Frankish, plaintiff herein, the said real property. That such resolution further provided, to request Federal to transfer the title thereof to the said Rucker, as Trustee for plaintiff, and to secure back from plaintiff said $40,000 promissory note, whenever the said Rucker, as Trustee, was in position to deliver to plaintiff title to said property free and clear of all encumbrances; and that thereupon by said resolution certain valuable assets were turned over unto said Rucker for the purpose of carrying out such abrogation and return unto her all of said real estate free and clear of any and all encumbrances. * * *

"21. * * * That certain liens were also filed against both of said properties for the costs involved in the removal of such wall and other incidental work, and all to plaintiff's loss and damage."

Appellants are quite insistent that the facts, as established, do not under any stretch of the imagination constitute notice to the Intermountain, and as vehemently claim their status to be that of a bona fide purchaser for a valuable consideration. In support of their position they cite Mercantile National Bank v. Parsons, 1893, 54

Minn. 56, 55 N.W. 825, 827, 40 Am.St.Rep. 299, an action to foreclose a mortgage, wherein this language was used: "Generally, and for most purposes, a corporation is a legal entity distinct from the body of its stockholders; and, in any event, to render the knowledge of the individual corporators the knowledge of the corporation it must be the knowledge of all the corporators." Also cited is Lothian v. Wood, 55 Cal. 159; Utah Construction Co. v. Western Pacific Ry. Co., 174 Cal. 156, 162 P. 631; Havens v. Dale, 18 Cal. 359; Ross v. Wellman, 102 Cal. 1, 36 P. 402.

[8] It seems to be the well-settled rule that where a plaintiff attacks a conveyance as being in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's knowledge of the fraudulent intent of the vendor. Ross v. Wellman, supra.

The state of facts here disclosed does not present a case where an agent gains knowledge in the commission of acts in which he has an interest hostile and adverse to his principal, which furnishes a basis for an exception to the general rule announced in the above cited cases, but clearly herein all the acts of the common agents of all companies were conceived, arranged, and performed for the benefit of the respective companies not for the agent himself, and each company derived and retained the benefit of the acts in question. The GIS received a credit of $20,000 on this trust deed and the Intermountain received a note in that same amount secured by a trust deed on the property.

[9] From the foregoing, it follows that in so far as the GIS and the Intermountain as corporate entities are concerned, both had knowledge of the fraud perpetrated, both were recipients of benefit therefrom, and both, by their legal and corporate agents, participated therein. Under these circumstances, in arriving at the ultimate conclusion, we need but refer to the well-reasoned case of Verder v. American Loan Society, 1 Cal.2d 17, at page 27, 32 P.2d 1081, at page 1085, wherein our Supreme Court said: "The agents of each company being the same, acting at the same instant in dual capacities in the transaction of their principals' business inter sese, were carriers of such knowledge to both principals synchronously, with the result that each company principal is charged with all the knowledge and acts of its agents, gained or performed in transacting the business of the respective companies." Citing McKenney v. Ellsworth, 165 Cal. 326, 132 P. 75; Williams v. Hasshagen, 166 Cal. 386, 393, 137 P. 9; National Bank of San Mateo v. Whitney, 40 Cal.App. 276, 180 P. 845; Live Oak Cemetery Ass'n v. Adamson, 106 Cal.App., Supp.. 783, 288 P. 29. See, also, Blue Diamond Plaster Co. v. Industrial Acc. Comm., 188 Cal. 403, 205 P. 678; Gonzalez v. Interstate Guaranty Co., 218 Cal. 612, 24 P.2d 462.

[10] In the light of the reasoning expressed we are of the opinion that the judgment of the trial court must be and is accordingly affirmed.

We concur: BARNARD, P. J.; MARKS, J.

THOME v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.*

Civ. 6186.

District Court of Appeal, Third District, California.

Feb. 8, 1939.

Rehearing Granted March 6, 1939.

1. Animals 🔑29, 32

The Bovine Tuberculosis Act does not authorize the destruction of healthy animals, and while an owner of cattle may not obstruct an official inspection of his animals there is nothing to prevent him from being present with his own veterinarian to observe and "participate" in the examination so long as he does not interfere with the performance of duties of the state veterinarian. St.1933, pp. 97–105, §§ 221–254.

[Ed. Note.—For other definitions of "Participate," see Words & Phrases.]

2. Animals 🔑29

Where smear of tuberculin about to be injected into cattle by state veterinarian was refused owner, owner was justified in refusing to permit state veterinarian to further proceed with tuberculin test of cattle, since owner has right to recover if test is

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*For subsequent opinion see 90 P.2d 364.

improperly administered, and approved virus being prerequisite of test, whether test was properly administered could only be determined by obtaining a sample of the virus. St.1933, pp. 97–105, §§ 221–254.

3. Poisons ⚿3

Under statutory definition of economic poisons, tuberculin used in diagnosing tuberculosis in cattle is not an "economic poison" required to be kept in a container to which is affixed imprinted label containing certain facts. St.1933, pp. 97, 237, 238, §§ 221(a), 1061(a), 1065.

* * *

Proceeding by Manuel Garcia Thome against Superior Court of the State of California in and for Merced County and others to review an order finding petitioner guilty of contempt.

Order annulled and petitioner discharged.

J. L. Royle, of Fresno, for petitioner.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and F. A. Silveira, Dist. Atty., of Merced, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

By this writ petitioner seeks to review an order of the Superior Court of the County of Merced finding petitioner guilty of contempt.

This is another case growing out of the preliminary injunction issued by the superior court restraining and enjoining certain defendants, including petitioner, from interfering with the agents of the state department of agriculture in testing cattle under the provisions of the Bovine Tuberculosis Act. Secs. 221–254, St.1933, pp. 97–105.

After the issuance of the preliminary injunction an order was directed to petitioner to show cause why he should not be punished for contempt of said preliminary injunction. A hearing was had and petitioner adjudged in contempt of court, and ordered punished therefor.

There seems to be no conflict in the testimony. Upon a certain day petitioner was notified to have his cattle in stanchions, preparatory to receiving the tuberculin test. Upon that day a duly authorized veterinarian of the agricultural department appeared at the dairy of petitioner, and found the cattle were all confined in their stanchions. Petitioner was present in person and with a duly licensed veterinarian. Petitioner then requested of the state veterinarian a sample or smear of the tuberculin about to be injected into his cattle. This request was refused, and the petitioner then would not permit the test to proceed, and the citation and conviction of contempt followed.

[1] This court recently upheld the constitutionality of that portion of the Agricultural Code relating to bovine tuberculosis (Affonso v. Brock, 84 P.2d 515), upon the ground it was a valid exercise of the police power enacted in the interest of the public health. We there pointed out, however, that although stringent and summary, the act did not deprive the owner of his remedy for wilful and unlawful destruction of his cattle, if in fact they were not afflicted with tuberculosis, and that he had a remedy for the wilful or wrongful destruction in a subsequent action for damages against those who were responsible for such killing. The destruction of healthy animals was not authorized by the statute, and while an owner of cattle may not obstruct an official inspection of his animals nor interfere with the department nor its agents while carrying out the provisions of the act, there is nothing to prevent him from being present with his own veterinarian to observe and participate in the examination.

A misunderstanding seems to have arisen as to the meaning of the word "participate". By the use of that word it was intended, and its meaning justifies the interpretation, that an owner might at that time, do any and all things, either by himself or through his veterinarian, that would not in any manner or way interfere with the performance of the duties of the state veterinarian.

[2] Accordingly we believe an owner in the protection of his subsequent right to challenge the acts of the state, was entitled to and was justified in requesting a smear of the tuberculin about to be injected into his cattle. One of the prerequisites of the administration of this test is the use of approved virus. The only practical way that such a fact can be determined is to obtain, prior to its use, a sample thereof. Where, as in the case at issue, this right was refused the owner, he was justified in refusing to permit the department to further proceed with its test.

The law accords the owner every right and opportunity to show that the law had been carelessly or improperly administered or that his cattle were not reactors, and to deprive him of the means of so showing would be to deprive him of a constitutional right. It would be an idle act to declare that the owner could, upon an appropriate showing, recover for abuse upon the part of the state and at the same time deny him the opportunity of obtaining the evidence necessary to make such showing.

As regards the uncertainty of the terms of the preliminary injunction, we have, in Mattos v. Superior Court, 86 P.2d 1056, considered that point. We need not here repeat what was there said.

[3] Petitioner also objected to the use of the tuberculin by the veterinarian because it did not have affixed to the container a printed lable stating certain facts required by section 1065 of the Agricultural Code. We do not believe that tuberculin is a substance as that term is used in the definition of economic poison.

"'Economic poisons' includes any substance, or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all insects, fungi, bacteria, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the director may declare to be, a pest, which may infest or be detrimental to vegetation, man, animals or households, or be present in any environment whatsoever." Sec. 1061(a), Agricultural Code.

Tuberculin is defined as the "product of the growth of the tubercle bacillus from any source, used or intended to be used in diagnosing tuberculosis in cattle." Sec. 221(a), Agricultural Code.

The order is annulled and the petitioner discharged.

I concur: THOMPSON, J.

12 Cal.2d 681

LORD et al. v. ATCHISON.

L. A. 16693.

Supreme Court of California.

Feb. 9, 1939.

Rehearing Denied March 9, 1939.

1. Executors and administrators ⚿315(6)

A decree of final distribution, declaring widow's right to undivided one-half interest in community property and distributing other one-half to widow for life with an absolute right to rents, issues, and profits, constituted a conclusive adjudication of testamentary disposition by husband and became measure of right of remaindermen.

2. Wills ⚿616(4)

A testamentary provision creating life estate in widow with power to use and consume part or all of principal for specified purposes with absolute ownership of rents, issues, and profits of the property, with devise over of remainder was valid.

3. Executors and administrators ⚿315(6)

A decree of distribution giving widow an absolute interest in rents, issues, and profits of property constituting life estate arising during her life gave widow all rents, issues, and profits or income thereafter accruing to any portion of husband's estate as her sole property.

4. Wills ⚿577

Where will gave widow power to use and consume principal of life estate thereby created in community property and gave her absolute ownership of income from the property, remaindermen were entitled only to an undivided one-half of what remained at date of widow's death of former community assets.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Florence Lord and others against Lillie M. Atchison, as executrix of the estate of Lucy C. Cristler, deceased, for termination of a life estate and determination of extent of remainder interest. From a decree awarding plaintiffs less property than they claimed, plaintiffs appeal.

Affirmed.

Bernard B. Laven, of Los Angeles, for appellants.

George D. Howland and Frank Benedict, both of Los Angeles, for respondent.

WASTE, Chief Justice.

The sole question presented by this appeal is whether in terminating a life estate in real and personal property, the trial court awarded plaintiffs the full interest to which they are entitled as remaindermen.

The life estate was created by the will of Michael Cristler for the benefit of his widow, with remainder to certain nieces and nephews, these plaintiffs. Michael Cristler died on June 2, 1919; his widow on August 23, 1935. During these sixteen years the widow commingled and handled with her own property, the property in which she had only a life estate, and such usage led to the present disputation. Plaintiffs brought this action after the death of the widow, against her executrix, praying that the life estate be terminated and that the extent of the remainder interest be determined. The findings and decree of the trial court in effect sustained the contentions of defendant executrix, and awarded plaintiffs less property than they claimed. Plaintiffs therefore appealed from the decree, and the cause is now before this court on motion of defendants to dismiss the appeal or affirm the decree, and also on the merits.

The Cristlers were married in Kansas in 1874. They came to California in 1892, and established a permanent residence in Los Angeles, where Michael Cristler died testate in 1919. His will, after declaring that all of his estate was community property, that he was not attempting to dispose of his wife's one-half interest therein, but was disposing only of his own interest, provided: "To my beloved wife, Lucy C. Cristler, I give, devise and bequeath all of my said property, to have and to hold for and during her natural life, (with remainder over to my nephews and nieces as herein provided); with full power to sell, dispose of, convey, change the character thereof, alter, improve, or reinvest in any form that she may see fit, without order of Court; and I do hereby direct that no order of Court shall be necessary for any of the above purposes at any time. And I do hereby give, devise and bequeath to my said wife, all the rents, issues and profits arising from said property during her natural life. And I do hereby further give, devise and bequeath to my said wife, such parts and parcels of said property hereinbefore given to her as a life estate, as she may at any time need; she to be the sole judge, without the right of any one to dispute or question as to whether or not she needs such parts or parcels; with full power to sell and dispose of, without order of Court, and to use the proceeds thereof as she may see fit, and she shall not be held to account therefor to any one. * * *"

This will was duly admitted to probate, and a final decree of distribution was entered declaring that the entire estate was community property, and distributing it pursuant to the terms of the will. There thus passed into the widow's possession all of the community property of herself and her deceased husband, an undivided one-half of which she possessed in her own right, and the other half of which she took for life under the terms of the probate decree. During her remaining years she handled and used all of this property as a unit, making no effort at any time to segregate the two estates. She died testate in Los Angeles on August 23, 1935, bequeathing all of her property to certain of her own nieces and nephews, one of whom is defendant executrix, but by her will she expressly directed that the provisions and intentions of her husband's will should be fully and fairly complied with.

The estimated value of the community property as inventoried in the husband's estate, and as distributed to the widow, was in excess of $33,000. Of this sum $2,563.65 was in cash; ten items of personal property were valued at about $14,800; and two parcels of real property at $16,000. The two parcels of real property, so the evidence shows, were preserved intact by the widow, but she transmuted many of the items of personal property, and consumed some. By saving the rents, issues, and profits of the property as a whole, and by other transactions, she accumulated a considerable sum, which stood to her credit in various bank accounts at the time of her death. The inventory of her estate showed over $23,000 in cash, some items of personal property, the two parcels of real property from the husband's estate, and a third parcel of real property which had been acquired in part with some of the former community assets.

The decree entered by the trial court awarded to appellants an undivided one-half interest in the two parcels of real property, an undivided 5/23ds interest in the third parcel, and $908, rentals thereof collected by defendant executrix from the date of the widow's death. Appellants challenge the correctness of this award, and contend that the evidence is insufficient to support the findings upon which it is based. Among other things, they claim that they are entitled to an undivided one-half interest in the third parcel of real property, rather than only a 5/23ds interest, and that they are also entitled to certain personal property.

So far as the division of the real property is concerned, the evidence furnishes ample support for the findings and decree. The third parcel was acquired in part with former community assets, and the 5/23ds interest is the equivalent of an undivided one-half of those assets.

With respect to the personal property, however, the record is somewhat confused. Certain items are referred to which were not listed in the inventory of the husband's estate. Whether the court was of the view that they were never a part of the former community property, or whether appellants' right to some of them was conceded and they were actually surrendered by defendant prior to trial of this cause, does not clearly appear. Defendant's answer alleged that in so far as appellants "could agree upon the parts that should be delivered to them and they were willing to accept, delivery by this defendant has been made". This delivery is not shown by the evidence, but neither is it denied. Although there is no express reference to the allegation in the findings, they do declare it to be untrue that the estate of the deceased husband "now consists" of any other property than the interests in realty awarded to appellants. In short, so far as can be ascertained from the record, substantially all of the former community property has been accounted for, and an undivided one-half of that portion, or the transmutation thereof, which remained unconsumed at the death of the widow, has been given to appellants. The additional assets in the hands of the executrix were not traced to the husband's estate, and the evidence affords sufficient support for the conclusion that appellants are not entitled to any portion of them. Indeed, appellants' claim to them is not asserted with convincing urgency. It is advanced in a meager supplemental brief, filed in the face of the following comment found in the opening brief under the heading "Limits of Appeal": "During the trial, plaintiffs made certain contentions. * * * Many of these contentions were not sustained by Judge Gould, and, to the extent that they are not now maintained by appellants in this appeal, they may be deemed abandoned."

The main contention of appellants may best be stated in their own language: "In substance, what appellants contend for is that the estate Mrs. Cristler received under her husband's will was community property; that at the time of his death she had no separate property of her own; that what she had left at the time of her own death was still, essentially, the old community property in one form or another, and that at her death her life estate in it terminated, leaving plaintiffs vested with their share or interest in it, and entitled to have all of said share or interest decreed to them." This statement overlooks two factors: First, that the widow was given power to use and consume the principal of the life estate, and second, that she was also given the absolute ownership of the income of the property.

[1-3] The provisions of the husband's will to this effect were carried into the decree of final distribution of his estate, which was couched in the precise language of the will. It decreed that all of the property was community property of the deceased and his widow. It declared the widow's right to her undivided one-half interest in that property, and distributed it to her. It also distributed the other one-half (including all property, whether described or not) to her "to have and to hold for and during her natural life * * *" (following the language of the will). It also provided: "To said Lucy C. Cristler an absolute and entire interest in all the rents, issues and profits arising from said property during her natural life. * * *"

This decree constituted a final and conclusive adjudication of the testamentary disposition made by the deceased husband of his property, a judicial construction of the will, and it has become the measure of the rights of the parties herein. Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247, and cases therein cited; see, also, 11b Cal.Jur. p. 796 et seq., par. 1296. The type of estate decreed to the widow, a life estate with power to use and consume part or all of the principal for specified purposes, and a devise over of the remainder, has long been recognized in this jurisdiction. In re Estate of Rath, 10 Cal.2d 399, cases cited at page 404, 75 P.2d 509, 115 A.L.R. 836; Colburn v. Burlingame, 190 Cal. 697, 214 P. 226, 27 A.L.R. 1374; Luscomb v. Fintzelberg, supra; In re Estate of Garrity, 108 Cal. 463, 38 P. 628, 41 P. 485.

Likewise valid is the provision giving the widow the absolute ownership of the rents, issues, and profits of the property. In this connection appellants concede that the widow was entitled to receive and use the income during her lifetime, but they contend that the accumulation of that income which existed at her death was subject to their remainder interest. The decree of final distribution is not susceptible of such a construction. If it had provided that the widow was entitled to an "absolute and entire interest during her life in all rents * * *", there might be force to appellants' argument, but what it actually gave the widow was an "absolute and entire interest in all rents, issues and profits * * * arising during her natural life". This was a conclusive adjudication that all rents, issues, profits, or income thereafter accruing to any portion of the husband's estate should become the sole and separate property of the widow, subject to her testamentary disposition.

[4] Appellants urge that because the widow commingled the properties, the burden was upon her executrix either to prove what items were exempt from the remainder interest or else to give the remaindermen one-half of the entire assets of which the widow died possessed, upon the presumption that they represented former community property, or transmutations thereof. It is sufficient for present purposes to note, without declaring the extent of the burden resting upon the plaintiffs or upon the defendant in a case of this character, that the testimony which was introduced by appellants themselves is ample to support the findings. When the community property passed into the possession of the widow at the time of her husband's death, an undivided one-half becoming her own property and the other half being devised to her for the period of her life, the two estates were already commingled, and the assets were received as a unit. Although the widow made no attempt to segregate or divide the property, it is clear that she is not chargeable with deliberate commingling. She kept a fairly complete written record of all of her transactions, expenditures, and accumulations. This data was presented by appellants and received in evidence upon the trial of this cause. Appellants also introduced the record of the proceedings had on the probate of the husband's estate. Bank statements of the widow's various accounts were also placed in evidence. In this volume of records and accounts practically every item of

former community property inventoried in the husband's estate was accounted for, and appellants have been given the substantial equivalent of an undivided one-half of what remained, at the date of the widow's death, of those former community assets. The court's conclusion that other property possessed by the widow was not former community property (including the transmutations but excluding the rents, issues, and profits thereof), has sufficient support in the evidence and will not be disturbed.

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.; HOUSER, J.

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12 Cal.2d 691

HINKLE et al. v. SOUTHERN PAC. CO. et al.

Sac. 5230.

Supreme Court of California.
Feb. 14, 1939.

1. Trial ⇨143

Where evidence conflicted, fact issues were to be decided by jury.

2. Appeal and error ⇨930(1)

Reviewing court on appeal was required to accept as true the evidence in favor of respondents and to resolve all conflicts in evidence in respondents' favor.

3. Evidence ⇨588

The jury is at liberty to reject the testimony of a witness.

4. Appeal and error ⇨930(2)

The jury is presumed to have followed court's instruction.

5. Railroads ⇨350(13, 21)

In action against railroad for injuries sustained by motorist and guest when automobile collided at crossing with backing train at night, where evidence conflicted as to whether trainmen gave warning either by light or sound, question of contributory negligence was for jury.

6. Railroads ⇨351(2)

In action against railroad for injuries sustained when automobile collided at crossing with backing train at night, where plaintiffs alleged negligent operation of train, instruction which allegedly permitted jury to find railroad negligent in failing to give warning by signaling device or lanterns was not error as outside the issues, since accident could not have been caused by mere failure to give warning without operation of train.

7. Appeal and error ⇨882(12)

In action against railroad for injuries sustained when automobile collided, at night, with backing train at crossing, where plaintiffs sought to prove railroad's negligence in not having brakeman stationed at crossing, and railroad injected issue whether failure to have signaling device or to equip trainmen with red lanterns was negligence, railroad could not complain that such issue was not involved.

8. Railroads ⇨307(7)

That a railroad crossing is frequently used by travelers is not an indispensable factor to a determination that crossing is particularly dangerous, as respects necessity of warning devices, since hazardous nature of crossing may depend upon physical nature of the crossing.

9. Railroads ⇨351(7)

Instruction that although railroad was not required to furnish warning devices at public crossings, nevertheless, railroad was obligated to exercise reasonable care for safety of travelers at crossings and that, if ordinarily prudent person would have supplied such warnings, and injury to motorist and guest resulted from such failure, railroad was liable, was not error.

10. Appeal and error ⇨1068(1)

An instruction relative to warning devices and lantern signals of train crew at railroad crossing where accident occurred could not be deemed prejudicial, where it did not appear that jury's verdict was based upon failure to give such signals, notwithstanding that conductor of colliding train was exonerated by the jury, and that other members of the crew were not served with process, since such fact did not show that jury did not find the railroad negligent in operation of the train through the train crew.

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Bliss I. Hinkle and another against the Southern Pacific Company and others for injuries sustained in a collision between an automobile in which plaintiffs were riding and a train of the named defendant. Judgment for plaintiff Bliss I. Hinkle for $11,000 and for plaintiff George H. Hinkle for $2,500 against the named defendant, and the named defendant appeals.

Affirmed.

For prior opinion, see 76 P.2d 528.

T. L. Chamberlain, of Auburn (Devlin & Devlin & Diepenbrock, of Sacramento, of counsel), for appellant.

Lowell L. Sparks, of Auburn, and Robert E. Burns, P. J. Murphy, and Peter J. Mullins, all of San Francisco, for respondents.

M. Mitchell Bourquin, of San Francisco, amicus curiæ.

PER CURIAM.

This is an action for damages for personal injuries suffered by plaintiffs, husband and wife, as a result of a collision between their automobile and a train of the defendant railroad company at a highway crossing. The conductor of the train, Rablin, was joined as a defendant. Other members of the train crew were named in the complaint as First Doe, Second Doe and Third Doe, but were never served with summons. The complaint charged that the said defendants, and each of them, "so negligently operated, conducted and ran a certain train owned by the defendant, Southern Pacific Company, a corporation, in a generally easterly direction, over and along said railroad tracks so as to cause it to, and it did, at said time and place aforesaid collide with the automobile in which plaintiff Bliss I. Hinkle was being driven. * * *" The complaint contained a like count with reference to the other plaintiff, George H. Hinkle. The case was tried in the superior court in and for the county of Placer and resulted in a verdict by the jury in the sum of $11,000 in favor of Bliss I. Hinkle, and in favor of George H. Hinkle in the sum of $2,500, against the Southern Pacific Company alone. Motions by said defendant for nonsuit, for a directed verdict, for a judgment notwithstanding the verdicts, and for a new trial, were denied by the trial court. From the judgment entered upon said verdicts, and from the order denying the motion for judgment notwithstanding the verdicts, this appeal is taken.

The accident occurred at about the hour of 10:20 p. m. on the night of July 31, 1935, at the crossing where highway No. 89, connecting the town of Truckee and Lake Tahoe, intersects the main track of the branch line of the appellant Southern Pacific Company, which runs from Truckee to the summer resort known as "The Tavern" on Lake Tahoe. This railroad crossing is about a quarter of a mile west of the railroad station at the Tavern, and is within the railroad yards maintained by the railroad company. The Southern Pacific Company regularly operates two mixed trains daily over the branch line, one of which arrives at the Tavern at 7:35 a. m. and leaves the Tavern at 10:30 p. m. The highway extends in a northerly and southerly direction. At the time of the collision, respondents were traveling, with George H. Hinkle at the wheel, in their Ford Sedan in a general southerly direction. The train operated by the agents of the Southern Pacific Company, the engineer, fireman and two brakemen, was being backed in an easterly direction toward the Tavern. The train consisted of a locomotive and tender, a dark red boxcar and a dark colored oil-tank car. As they were being backed over the crossing, they approached the crossing in the reverse order, the oil-tank car being the lead car which came in contact with the respondents' automobile. Respondent George H. Hinkle is an instructor at Stanford University and his wife is a teacher in a branch of the Placer Union High School. They were on their way to the Tavern Casino to bring their three children and Mr. Hinkle's mother home from the moving picture entertainment which they had been attending at the Tavern Casino. Respondents' home was north of the railroad tracks, and finding the other road to the Casino which was on the south side of the tracks obstructed by the train of the appellant railroad company which was being "made up" preparatory to its scheduled leaving at 10:30 p. m., the respondents turned around and took highway No. 89 to reach the Casino. There were three tracks of the railroad company at this crossing, the northerly track, the main line track, and the southerly track. The track is straight at the crossing, but looking east from the crossing, it curves at a distance of 200 feet to the south, and looking west from the crossing, it curves at a distance of 359 feet to the south. The crossing is a narrow crossing of approximately twenty feet in width, and large pine trees grow within eight or nine feet of the track on both sides of the crossing. It was a very dark night, and there was no overhead artificial lighting at the crossing or any point west of the crossing, the direction from which the train was backing, although there was an overhead light 150 feet to the east of the highway in the direction of the Tavern. There was no automatic electric signaling device nor a mechanical warning of any kind maintained by the railroad company at the crossing. The highway was a good road of asphalt but the pavement between the tracks was corrugated. It was the practice of the railroad company to "spot" or leave empty cars on the northerly or southerly tracks both to the east and west of the crossing, and on the night in question an old fashioned sleeping coach had been left standing on the northerly track to the east of the crossing.

[1, 2] As often happens in cases of this character, the evidence with reference to the accident was sharply conflicting and the testimony of the witnesses for the appellant, not being reconcilable with the testimony of the respondents and their witnesses, it was necessary for the jury as triers of fact, to determine which of the contrary versions of the accident should be accepted as true. It is self-evident that the jury accepted as true the testimony of the respondents, and necessarily rejected a portion, at least, of the evidence proffered by appellant. It follows that it is incumbent upon this court upon appeal to accept as true the evidence in favor of respondents and to resolve all conflicts in the evidence in their favor.

The testimony of the respondents is to the effect that they were familiar with the crossing, and as they approached it they slowed down, came to a full stop within four to eight feet of the northerly track in order to have a view down the track, and looked both to the right and left for any approaching train, but saw nothing and heard nothing. Mrs. Hinkle testified that her husband put the car into gear and was proceeding across the crossing, being between the rails of the northerly track and the main line track, when she noticed to her right a backing train "looming out of the trees" about twenty or twenty-five feet away from her, that she screamed, "train" and the next instant the impact took place. Mr. Hinkle testified that he did not see the train at all and did not know that they had been struck, that he was dazed after the accident and had only the most confused recollection of what happened after the accident. His first lucid moment came when he found himself in the doctor's office to which he had been taken after the accident. It was Mrs. Hinkle's testimony that after the accident, both she and her husband climbed out of the automobile by themselves and that none of the train crew were present to give them assistance. She testified that the conductor, Rablin, who was not on the backing train but was up by the station helping passengers board the train, and who upon hearing the noise of the collision came down the track, was the first employee to reach them. Respondents denied emphatically that the radio in the car was going at the time of the collision, and Mr. Hinkle categorically denied that on July 31st, the day of the accident, he had anything to drink which contained alcohol. Both the doctor who treated Mr. Hinkle and Mrs. Hinkle after the accident, and a woman friend of the Hinkles who came to the doctor's office at 10:35 p. m. immediately after the accident, testified that there was no odor of liquor upon Mr. Hinkle's breath at that time.

The testimony by members of the train crew was to the effect that the train crew had been instructed by the conductor, Rablin, to go to the Moss Hill siding west of the crossing and pick up the two freight cars which were to be made up into the mixed train. The train crew testified on behalf of the railroad company that the usual crossing whistle had been given and the bell was continuously rung; that the headlight was lit and there was a deck light of 300 candle power in the engine cab and the engineer's reading light, as well as two indicator lights on the engine; that the two brakemen each carrying a white lantern were stationed on the rear of the oil-tank car which was the end nearest the crossing; that the train which had been going at a rate of about ten miles an hour slowed down to four miles as it neared the crossing; that when the end of the oil-tank car was about four or five cars lengths from the crossing, Nixon, one of the brakemen, jumped off the oil-tank car and ran ahead of the car at a speed of about eight miles an hour to protect the crossing; that he waved his lantern to warn the respondents, and that he had to jump out of the way to avoid being struck by the automobile of the respondents. There was testimony that the brakeman at the same time he jumped gave the signal for the emergency stop and that the fireman repeated the signal to the engineer who had already reached for the automatic brake valve to make the stop. When the train came to a stop it had pushed the automobile parallel to the tracks and the automobile was just off the highway on the east side of the crossing. The two brakemen testified that after the accident the radio in respondents' car was playing jazz music and that they smelled liquor on Mr. Hinkle's breath. Mr. Nixon testified that he assisted both Mr. Hinkle and Mrs. Hinkle from the automobile.

Appellant railroad company in its closing brief states that it has raised but two points on the appeal, that is that the plaintiffs were guilty of contributory negligence as a matter of law for violating the well-established "stop, look and listen" rule, and secondly, that the court erroneously instructed the jury in two particulars.

[3] Appellant insists that the train necessarily must have been seen by respondents if they had looked, and that their evidence to the contrary that they did look but did not see the train is not worthy of credence and will not support the verdict in their favor. Upon this phase of the case it will suffice to say that appellant bases its assumption that the train must necessarily have been seen by the respondents in time for them to have avoided the accident if they had in fact looked, upon the testimony of its train crew, which the jury, as triers of fact, were at liberty to reject, and which they evidently did reject.

[4, 5] In this regard it should be noted that it is quite obvious that the jury did not accept as true the evidence in behalf of the appellant that Nixon, the brakeman, jumping off the rear end of the oil-tank car and running ahead of the car, reached the crossing ahead of the backing train, and gave a warning signal to the respondents with his white lantern in time to enable them to stop their automobile outside of the danger zone. The jury was specifically instructed by the court with reference to the purported giving of the warning signal by the brakeman as follows: "You are instructed that the law of the State of California provides that it shall be unlawful for the driver of a vehicle to traverse a grade crossing when a human flagman gives or continues to give a signal of the approach or passage of a railway train or car, and if you find from the evidence that plaintiff, George Hinkle, violated this positive rule of law, that I instruct you that plaintiff, George Hinkle, was guilty of negligence as a matter of law, and if you find that such negligence, if any, proximately contributed to the injuries complained of, then I instruct you that neither plaintiff can recover." It is to be presumed that the jury followed this instruction and if so, the only possible conclusion is that they did not believe that at a time prior to the accident the brakeman did protect the crossing by giving a warning signal. It is highly probable, in our opinion, that the implied finding of the jury exonerating the respondents from contributory negligence was based upon their acceptance of the respondents' testimony that they saw no one at the crossing and the jury's belief that the respondents did not see anyone because in fact there was no one there. Having in mind the fact that the jury was at liberty to reject much of the evidence proffered in behalf of appellant, together with the circumstance that the accident happened on a very dark night at a narrow crossing where large pine trees were growing close to the tracks, and that the train was not approaching headon with its headlight lighting up the track ahead, but was backing toward the crossing, we cannot say as a matter of law that respondents were negligent in not seeing the backing train in time to avoid it. They were not, therefore, guilty of contributory negligence as a matter of law.

The specific instruction complained of by the appellant, the giving of which, it claims, constituted prejudicial error on the part of the trial court, requiring a reversal of the judgment by this court, is as follows: "You are instructed that although as a matter of law the defendant was not required to equip its employees with a red lantern for the purpose of signaling the approach of a train at a highway grade crossing, and although in this action you cannot find the defendants guilty of negligence because of the absence from the crossing of an automatic signaling device to warn travelers upon the highway of the approach of a train, and also, although the law does not require the defendant to have any light on the forward end of the lead car in any switching movement within the yard limits, and it is not negligence to make such a movement without a light on the forward end of the lead car, nevertheless, if from a consideration of all the facts and circumstances of this case you find from the evidence that at the time and place referred to in plaintiffs' complaint and in the evidence, an ordinarily prudent person would have maintained a person with a red lantern, would have furnished an automatic signaling device or would have had [a light] on the forward end of the lead car in such switching movement within the yard limits, or would have maintained a flagman, or would have rung a bell, or sounded a whistle, or either one or more thereof, at or near the crossing, to warn travelers of the approach of said train to said crossing, and you further find that the Southern Pacific Company, a corporation, through its agents and servants acting in the discharge of their duties and within the scope of their authority, did not furnish and maintain the same, and that by reason thereof, the plaintiffs were injured, then and in that event I instruct you, the defendant, Southern Pacific Company, was guilty of negligence."

[6] While it must be conceded that the instruction above quoted is not as precise in its language nor as free from ambiguity as would be desirable, nevertheless, we do not feel it is susceptible to attack upon the grounds advanced by appellant. Appellant's first ground of criticism is that this instruction permitted the jury to find the railroad company guilty of negligence by virtue of its failure to maintain an automatic wig-wag signal at the crossing, or a failure on its part to equip its employees with red lanterns rather than white ones, all of which failure to maintain warnings at the crossing was completely outside of the issues of the case by reason of the fact that the only negligence charged in the complaint was the negligent *operation* of the train by the appellant railroad company through its employees. The accident was caused not by the mere failure by the railroad company to provide proper warnings at the crossing, but by the operation of the train across the crossing in the absence of proper warnings, for of course, unless the train was in fact being operated, and there was a movement of the cars, the accident could not possibly have happened. It is true that in the case of Young v. Southern Pacific Company, 182 Cal. 369, 190 P. 36, it was held that an instruction should not have been given because the complaint had failed to allege as a basis of the claim of negligence the failure to have a flagman at the crossing. But the real basis of the decision reversing the judgment in that case was not the giving of that particular instruction, but the finding by the appellate court that the deceased was guilty of contributory negligence as a matter of law. Moreover, we are of the opinion that the more recent decision of Sheets v. Southern Pacific Company, 1 Cal.2d 408, 35 P.2d 121, 123, is contrary to appellant's contention. In that case the contention was made that inasmuch as the complaint alleged that the defendants "so negligently and carelessly operated said freight car" as to cause the accident, the plaintiff was restricted to proof of the operation of the freight car to sustain his claim of negligence, claiming that the action of a brakeman in guarding the traffic and guarding the crossing was no part of the operation of the train. This claim of the defendant was repudiated by the trial court, and upon appeal, the correctness of its action was affirmed by this court. The facts of the instant case are sufficiently similar to the facts of that case to warrant an application of the same rule.

[7] Moreover, from a reading of the respective instructions proposed to the trial court by the respondents and by the appellant, it appears that respondents made no request whatever for any instructions relative to the maintenance of automatic signaling devices or the furnishing by the railroad company of red lanterns to its employees. It is apparent therefrom that the respondents had no intention of relying for a finding of negligence against the railroad company upon the absence from the crossing of any automatic signaling device, or the fact that the brakemen were using white lights rather than red ones, but principally predicated their claim of negligence by the company upon the absence from the crossing of a brakeman with either a red or white lantern to give a warning signal. However, appellant proposed two separate instructions to be given by the trial court, one of which was to the effect that it "was not required as a matter of law for any of defendant's employees to be equipped with a red lantern for the purpose of signaling the approach of a train at a highway crossing", and the other one to the effect that the jury "could not find the defendant guilty of negligence because of the absence from this crossing of an automatic signaling device to warn

travelers upon the highway of the approach of a train." These proposed instructions are in almost the identical words of the first part of the instruction now complained of by appellant. The trial judge was of the opinion that these instructions, standing alone, under the circumstances of the instant case, by failing to completely state the law, failed to state it correctly, and proposed that such instructions should be added to other instructions referring to other warning signals such as the blowing of the whistle, the ringing of the bell, and maintaining of lights on the forward end of the lead car. Appellant made no objection to this procedure and at no time drew the attention of the court to the fact that the question of the maintenance of automatic signaling devices or the failure to equip its employees with red lanterns was not within the issues raised by the complaint. In view of the fact that the questions of whether the maintenance of automatic signaling devices, or the failure to equip the company's employees with red lanterns constituted negligence on the part of the railroad company were injected into the case by the appellant itself, we do not think it can now fairly be heard to complain that such questions were not in issue in the case.

[8] With reference to the contention of appellant that there was no evidence that the crossing was a particularly dangerous crossing and in the absence of such showing there could be no finding of negligence on the part of the railroad company in failing to maintain an automatic signaling device, we are not prepared to say that a specific finding by the jury that the crossing was sufficiently hazardous to require the maintenance of an automatic signaling device would not find support in the evidence. It is true the crossing is not in a populous city, but it is over a public highway where there is much travel to and from a popular summer resort. Moreover, it is apparent from the photographs introduced as exhibits that an unobstructed view of the tracks cannot be had until one is almost upon them. The fact that a crossing is frequently crossed over by travelers is not an indispensable factor to a determination that a crossing is a particularly dangerous one, but the hazardous nature of the crossing may depend upon the physical nature of the crossing itself.

[9] When the instruction is read in its entirety, and not in segregated portions thereof, we think it is apparent that it contained a correct exposition of the law. The gist of the instruction was to the effect that although the railroad company was not required by statutory provisions, as a matter of law, to furnish certain warning devices at public crossings, such as red lanterns to its employees, automatic signaling devices, or any light on the forward end of the lead car in any switching movement within the yard limits, nevertheless, the absence of such statutory requirement did not relieve the defendant railroad company of its obligation to exercise reasonable care for the safety of travelers at crossings, and if an ordinarily prudent person would have supplied one or more of these warnings and the injury to respondents was a result of the failure by the railroad company to furnish and maintain one or more of such warnings, then the railroad company was guilty of negligence. This is substantially correct. Bush v. Southern Pacific Company, 106 Cal.App. 101, 289 P. 190.

[10] Finally, it may be said, as before indicated, that we doubt very much that the verdict of the jury was based upon a failure to maintain an automatic signaling device, or to furnish red lanterns to its employees. The fact that the conductor, Rablin, was exonerated by the jury does not conclusively prove that the jury did not find the railroad company guilty of negligence in the operation of the train through its agents, the train crew, and must, therefore, have based the negligence of the company upon the factors for which it alone was solely responsible. The other members of the train crew were named in the complaint as First Doe, Second Doe and Third Doe. As they were not served, a judgment could not be rendered against them. If the brakeman did in fact fail to properly protect the crossing, then the defendant railroad company was guilty of negligence, despite the fact that no verdict could be returned against such negligent brakeman.

In our opinion, no error was committed by the trial court either in failing to find the respondents guilty of contributory negligence as a matter of law, or in instructing the jury.

The judgment is affirmed, and likewise the order denying the motion for judgment notwithstanding the verdicts is affirmed.

12 Cal.2d 703

CLAYTON (CLAYTON, Intervener) v. SCHULTZ et al.

S. F. 16095.

Supreme Court of California.

Feb. 15, 1939.

1. Appeal and error ⟜479(1)

Where appellate court decision in quiet title action decided rights adverse to petitioner, and "accounting" was had to give effect to such decision, any error in subsequent judgment in allowing or rejecting items of the accounting was not sufficient, in itself, to warrant issuance of writ of supersedeas, since alleged errors could be passed upon on consideration of the merits of the appeal.

2. Appeal and error ⟜1099(3)

In supersedeas proceeding to stay execution of judgment in quiet title action in favor of respondents who were defendants, and against petitioner, decisions on former appeals in the action were res judicata of question whether court lacked power to render affirmative relief to defendants in absence of cross-complaint.

3. Appeal and error ⟜479(1)

That contempt proceedings might be instituted against petitioner pending appeal from judgment did not warrant issuance of writ of supersedeas to stay execution of judgment in quiet title action.

4. Appeal and error ⟜478

Appellate court must, in issuing an order which will stay proceedings upon a prohibitory injunction, consider the rights of respondent as well as of appellant, and, if a stay can be granted only at the risk of destroying rights belonging to the respondent if the judgment is affirmed, appellate jurisdiction is properly refused.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Action to quiet title by A. D. Clayton against William A. Schultz and others, wherein Phineas D. Clayton intervened. On petition of intervener for writ of supersedeas to stay execution of money judgment of $1,633.58, which was rendered against intervener.

Order to show cause discharged and petition denied.

J. E. White and Abraham Setzer, both of San Francisco, for appellant.

Thomas T. Califro, of San Francisco, for respondents.

PER CURIAM.

The petitioner in this proceeding, Phineas D. Clayton, seeks a writ of supersedeas to stay the execution of a money judgment amounting to the sum of $1,633.58, which was rendered against him in a quiet title action in which he intervened, claiming to be the owner of the real property involved by virtue of a tax sale and his subsequent acquisition of the rights of the purchaser thereunder. The money judgment was for the amount of rentals collected by him as such purported owner, less expenses incurred by him in his efforts to secure title to the real property from the state. After denial of issuance of the writ of supersedeas by this court, and upon a further showing by petitioner of the alleged necessity therefor, a rehearing thereof was granted and thereupon an order was made to show cause why the writ should not issue, the court meanwhile ordering the stay of execution pending determination of the said order to show cause.

As grounds for the issuance of the writ, the petitioner alleged, among other things, that the judgment of the court below was in excess of the power of the court to render, in that no pleading had been filed on the part of any defendant (respondent) which raised an issue sufficient to support an affirmative judgment in favor of such defendant; that certain inconsistencies existed in said judgment in that therein petitioner was charged with the payment to respondents of the gross rentals collected by him, without an allowance to him of certain interest he asserts he was entitled to, but with regard to which he contends the court in its judgment had failed to allow him because of an erroneous computation of the amount of said interest; that a certain item of expense which he claimed to be entitled to was erroneously denied him; that the form of the judgment was such that upon noncompliance therewith, it might subject him to contempt of court, and that the said judgment was intended to have such effect.

Respondents' return to the order to show cause discloses the situation that certain undeniable facts and circumstances arising out of proceedings theretofore had in this litigation were not divulged to this court by the petitioner in his petition for issuance of the writ, and that these facts and circumstances so omitted have a material bearing on the propriety of the issuance of the writ.

It appears by the said return of respondents that on July 29, 1932, one A. D. Clayton filed an action to quiet title to the real property involved in the above-entitled proceedings; that Phineas D. Clayton (petitioner in the instant proceedings) intervened in said action, claiming title to the premises to be vested in himself by virtue of a purported tax sale by the tax collector of the city and county of San Francisco, at which sale A. D. Clayton was the purchaser and to whose rights as such the petitioner succeeded. By the complaint in intervention it was alleged that the defendants in the action (respondents herein) claimed some interest or title to the said real property, but that such claim or interest was subordinate to petitioner's title. The defendants who appeared in the action answered specifically, denying all the allegations that were contained in the complaint in intervention, but admitting that they claimed some interest in, title to or lien upon, the said real property—praying that plaintiff in intervention take nothing by his complaint, and decreeing that plaintiff's asserted title be declared invalid and void. The judgment was in favor of the defendants, one of whom was adjudged to be the owner of the property. The plaintiff in intervention appealed from the judgment (Clayton v. Schultz, 4 Cal.2d 425, 50 P.2d 446); and on such appeal it was held that the record was insufficient to properly determine the rights of the parties under the tax sale proceedings and the judgment was therefore reversed, this court there stating that if upon a retrial the tax proceedings should be held to be defective, the purchaser would be entitled to reimbursement for all taxes, penalties, costs and expenses incurred in his attempt to secure the title from the state, with foundation for such award laid by introduction of evidence as to the amount of these items, and that the said purchaser should be held to account for rentals collected by him from the property during the period of his possession thereof under the tax deed. The court there also held, upon the authority of the case entitled Risso v. Crooks, 217 Cal. 219, 17 P.2d 1001, that even though affirmative relief had not been specifically asked for by defendants by virtue of a cross-complaint or otherwise, an award in their favor in the judgment which would benefit the plaintiff in securing an allowance to him of moneys expended by him for taxes, even if erroneous, would not be prejudicial to plaintiff's substantial rights. The return further shows that thereafter a retrial was had and that it resulted in a judgment for the intervener, from which judgment an appeal was again taken to this court by the defendants. Thereafter, the appeal was transferred to the District Court of Appeal, Third Appellate District, where the judgment was reversed (Clayton v. Schultz, 22 Cal.App.2d 72, 70 P.2d 512, 513), that court holding that because the proceedings leading up to the sale of the real property for nonpayment of taxes were irregular and illegal, the tax deed was void, and the intervener secured no rights thereunder. The court there reiterated the direction of this court on the former appeal to the effect that since the cause again might be retried, the purchaser must be reimbursed for all expenditures incurred in his attempt to secure title from the state, with foundation for such award laid by the introduction of evidence as to the amount of these items and that "The purchaser may also be held to account for rentals collected from the property during the period of possession under the tax deed."

It further appears from the return of respondents to the order to show cause that on November 29, 1937, the trial court granted their motion to give effect to the decision of the appellate court, which motion was supported by affidavits and the respective remittiturs of the Supreme Court and of the District Court of Appeal relating to said two appeals, and to the granting of which motion petitioner made no objection; that pursuant thereto the court appointed a referee and directed that an "accounting" be had for the purpose of giving effect to the decision of the District Court of Appeal and, in accordance therewith, to determine the amount of "all taxes, costs, penalties, and expenses" incurred by the plaintiff in intervention in his attempt to secure title from the state, together with the amount of "rentals collected from the property" during his possession under the tax deed.

By the terms of the judgment which followed the "accounting" proceedings, the respondents were adjudged to be the legal owners of the property involved—and petitioner was ordered to pay to respondents the sum of $1,633.58, which was found to be the sum remaining after deducting the amount of expenses incurred by petitioner in his pursuit of title, from the total amount of rentals collected by him while in possession of the said real property. It is thus seen that the "accounting" proceedings and the rendition of the judgment which followed, and of which petitioner now complains, were had in response to the specific directions of both of the appellate tribunals hereinbefore mentioned.

It further appears by the terms of the said judgment that petitioner was permanently enjoined from asserting or setting up any claim whatsoever in or to the real property involved, or to the possession of any of the rents, issues or profits thereof. It appears, however, by the return to the order to show cause that "ever since the taking of said accounting * * * and the making and entering of said judgment of the * * * Superior Court", the petitioner has "demanded, and continues to demand from the tenants and occupants of said premises * * * rentals therefrom", and that he has entered the premises and asserted ownership in the property and threatened the tenants and occupants with eviction unless they paid to him the rentals of said premises.

[1-3] It is clear that the rights and equities of the respective parties to this litigation were conclusively and finally determined in favor of the respondents and against the petitioner by virtue of the appellate court decision above referred to; that the "accounting" proceedings and judgment rendered thereon were necessarily in furtherance thereof and that if, in the judgment which followed the "accounting" proceedings, error may have been committed in the allowance or rejection of certain or any items of the accounting, or in a computation of interest—which assumed fact, however, we do not concede—such error (if any) is not a sufficient reason, in itself, for the issuance of the writ here sought. Upon a consideration of the merits of the appeal the question of such alleged error may properly be passed upon by the court. One of the other grounds urged for the issuance of the writ, to-wit, that the court was without power to render affirmative relief to the defendants in the absence of a cross-complaint or its equivalent, is now res judicata by virtue of the decisions rendered on the two former appeals in this case. Nor is the fact that contempt proceedings against petitioner might be instituted pending the appeal from the judgment a sufficient cause under these circumstances for the issuance of the writ. People v. City of Westmoreland, 135 Cal. App. 517, 27 P.2d 394; Wolf v. Gall, 174 Cal. 140, 162 P. 115, and In re Graves, 62 Cal.App. 168, 216 P. 386.

[4] Manifestly, the facts of this case do not warrant the issuance of an order for the stay of execution of the judgment without adequate protection to the rights of respondents. Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2; Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653; Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161, and Swift v. Shepard, 64 Cal. 423, 1 P. 493. Even if it be conceded that in the case of a prohibitory injunction this court has inherent power to issue a writ of supersedeas to maintain the subject of the action in status quo pending appeal (People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Dry Cleaners & Dyers Institute v. Reiss, 5 Cal.2d 306, 54 P.2d 470; Goodall v. Brite, 1 Cal.2d 583, 36 P.2d 190), petitioner has not presented such a statement of facts as would justify this court in exercising the power in his behalf. In this regard it is said in 2 California Jurisprudence, page 465, that an "appellate court must, * * * [in issuing an order which will stay proceedings upon a prohibitory injunction] consider the rights of the respondent as well as of the appellant, and contemplate the possibility of an affirmance as well as a reversal. If, therefore, a stay can be granted only at the risk of destroying rights which will belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction". See, also, Hulbert v. California, etc., Cement Co., 161 Cal. 239, 256, 118 P. 928, 38 L.R.A.,N.S., 436; 23 Cal.Jur. 982; Dry Cleaners & Dyers Institute v. Reiss, 5 Cal. 2d 306, at page 310, 54 P.2d 470; Ohaver v. Fenech, 206 Cal. 118, at page 124, 273 P. 555.

It follows from the foregoing that the order to show cause should be discharged, and the petition denied. It is so ordered.

12 Cal.2d 687

AHO et al. v. KUSNERT.

Sac. 5217.

Supreme Court of California.

Feb. 9, 1939.

1. Trusts ⚷110

In suit to establish trust on land alleged to have been separate property of plaintiffs' mother and devised to defendant by plaintiffs' stepfather in violation of agreement with mother, evidence *held* insufficient to establish that an amount slightly less than one-half of amount paid for property was paid from separate funds of the mother.

2. Husband and wife ⚷255

Payment from separate funds of the wife of not more than half the purchase price of property taken in the name of husband and wife does not establish ownership by the wife as her separate property of the entire interest in the property.

3. Trusts ⚷110

In suit to establish trust in land claimed to have been separate property of plaintiffs' mother and distributed at her death as community property to plaintiffs' stepfather, evidence that mother and stepfather had agreed that plaintiffs were to have land upon death of mother and stepfather did not show intention of mother that property should be distributed as her separate property on her death.

4. Trusts ⚷110

Evidence, that plaintiffs' stepfather received title to land upon death of plaintiffs' mother by reason of his oral promise that plaintiffs should succeed to the land upon his death if he survived the mother and that such property was paid for in part by her separate funds and in part by community funds, warranted judgment imposing trust for benefit of plaintiffs on the land in hands of stepfather's devisee; the stepfather's compliance with his promise not being dependent on his making a will in plaintiffs' favor. Probate Code, § 228.

◆

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Suit by Jouko Herbert Aho and another against Louise Kusnert, as executrix of the last will and testament of Gustaf Kusnert, deceased, to establish a trust in real property. From a judgment for plaintiffs, defendant appeals.

Affirmed.

H. C. Nelson, of Eureka, for appellant.

Irwin T. Quinn, of Eureka, for respondents.

SEAWELL, Justice.

Respondents brought this action against the executrix of the will of their stepfather to establish a trust in a parcel of real property. Said property was purchased by their mother and stepfather as a family home, and upon the death of their mother was distributed to their stepfather as community property. Plaintiffs alleged that said property was in fact the separate property of their mother, which fact their stepfather concealed from his attorney and from the court, and thereby procured distribution to himself as community property; that he caused his attorney to represent to them that the property was community and that he was entitled to distribution thereof; and that in reliance on this representation and the promise of their stepfather that he would make a will leaving it to them, they made no appearance in the proceeding for the probate of their mother's estate. In a second count plaintiffs alleged that their stepfather induced their mother to purchase the property with her separate funds in reliance on his representation and promise that plaintiffs should have the property when the mother and stepfather "were gone". In violation of said promise, he devised the property to Louise Kusnert, defendant herein, whom he married after the death of plaintiffs' mother. The court gave judgment for plaintiffs for the whole of said property, from which defendant prosecutes this appeal.

Plaintiffs' father died in 1924. About a year later their mother, then Elizabeth Aho, married their stepfather, Gustaf Kusnert. Kusnert moved into the Aho family home, a rented house in Falk, near Eureka. Plaintiff Alli Price was then a student at the State Teachers College at Arcata, and plaintiff Jouko Herbert Aho was attending high school. The property which is the subject of this action was purchased in March, 1926. It is located in Eureka. The contract of sale provided for a purchase price of $3,600, with a down payment of $1,000, which was made, and payments of $40 a month thereafter. Payments were completed in advance of the time provided in the contract, and on November 3, 1928, a deed was executed to Gustaf and Elizabeth Kusnert. Mrs. Kusnert died intestate in April, 1930.

[1-3] Plaintiffs herein contend that approximately $1,800, which is less than one-half the amount paid for the house as principal and interest, was paid from separate funds of their mother, the balance being paid from community earnings of their mother and stepfather. The evidence is insufficient to establish that so large an amount was paid from the separate funds of their mother. But however this may be, payment from separate funds of the wife of not more than half the purchase price of property taken in the name of husband and wife, does not establish ownership by the wife as her separate property of the entire interest in the property. Furthermore, the testimony of plaintiffs themselves, several times reiterated, that the understanding between their mother and stepfather was that they were to have the property when both their mother and stepfather "were gone", negatives the idea that it was the intent of their mother that said property, or even an undivided half interest therein, should be distributed on her death as her separate property, one-third to each of them and one-third to their stepfather.

But the judgment for plaintiffs must be sustained on the theory that separate funds of their mother, and her earnings after her marriage to Kusnert, were invested in the purchase of the property on the understanding and agreement with their stepfather that if he survived her plaintiffs should succeed to the property upon his death.

At the time of the death of their own father in 1924, their mother deposited life insurance money paid to her in the sum of $1,268.66 in a joint bank account which she and her husband had maintained, bringing the balance in said account to $1,544.18. The sum of $437.51 was on deposit in another account at the death of their father. When the Eureka home was purchased in March, 1926, after their mother's marriage to Kusnert, $450 was withdrawn from the larger account to apply on the down payment, and on July 30, 1926, $500 withdrawn from these accounts was applied on the purchase price. Although not clearly shown by the evidence, it is possible that other separate funds of the mother were paid on the purchase price. Plaintiffs also testified that $600 of their mother's separate funds was applied on the purchase of an automobile for $800 after her marriage to Kusnert.

Kusnert earned between $100 and $140 a month as a lumber mill worker. At the time of his marriage to plaintiffs' mother in 1925 there was a balance of $9.93 in his bank account, and he had no other property. Plaintiffs became self-supporting in 1926.

During both her first and second marriages plaintiffs' mother added to the family income by selling milk, butter and eggs, by doing laundry for the lumber mill workers, and by doing domestic work outside her home. The evidence shows that she entered into the purchase of the Eureka home with some reluctance, that she thought it too expensive for their means, but was reassured by Kusnert, who impressed upon her that when they "were gone" it would be a valuable property for the children, meaning plaintiffs.

Upon the death of their mother, Kusnert promised plaintiffs to carry out the understanding had with her when the property was purchased. He did in fact execute a will in their favor on the same day he signed the petition for letters of administration on their mother's estate. He remarried in 1931, about a year after their mother's death, and soon thereafter drew a will devising his estate, consisting of this parcel of real property, to his second wife. Plaintiffs were not informed of this will. Kusnert died on July 15, 1935.

[4] By reason of his promise and understanding with plaintiffs' mother, Kusnert, upon her death, received title to real property paid for in part by her separate funds and in part by community funds. He broke his promise to her when he devised said property to his second wife. In such circumstances equity, through fastening a trust upon the property, will secure to plaintiffs the benefits of said promise although orally made. Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Allen v. Meyers, 5 Cal.2d 311, 54 P.2d 450; Miller v. Forster, 131 Cal.App. 509, 21 P.2d 678; Prior v. Andrews, 83 Cal.App. 782, 257 P. 560; Rundell v. McDonald, 62 Cal.App. 721, 217 P. 1082; 25 Cal.Jur. 170, 174-177. Kusnert's compliance with his promise was not dependent on his making a will in plaintiffs' favor, since in the event of his intestacy they would have succeeded to

this property. Sec. 228, Probate Code; Estate of McArthur, 210 Cal. 439, 292 P. 469, 72 A.L.R. 1318.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; HOUSER, J.

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31 Cal.App.2d 63

PAINTER v. BERGLUND et al.

Civ. 10765.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1939.

Rehearing Denied March 18, 1939.

Hearing Denied by Supreme Court April 17, 1939.

1. Subrogation 🔑31(1)

Where surety on bond of realty broker and salesman satisfied judgment obtained against broker and salesman, judgment creditor's assignment to surety of "judgment obtained * * * in * * * action against" broker was assignment against salesman as well, as against contention that quoted phrase constituted words of limitation and not of description. St.1919, p. 1252; Civ. Code, §§ 1638, 1639.

2. Subrogation 🔑31(1)

A judgment obtained against principal could be transferred by judgment creditor to surety who satisfied judgment.

3. Subrogation 🔑31(1)

Judgment creditor's assignment of judgment against principal to surety who satisfied judgment was not required to be in writing.

4. Subrogation 🔑31(1)

Assignment of judgment against principal to surety who satisfied judgment was subordinate to rights of subrogation.

5. Subrogation 🔑31(1)

The right of surety which satisfied judgment against principal and obtained assignment of judgment, to pursue the assigned judgment, depended on subrogation rather than upon the assignment.

6. Subrogation 🔑36

One of principals who participated in fraud resulting in judgment which was satisfied by surety was with other principal who was also tort-feasor primarily responsible for damages.

7. Subrogation 🔑41(1)

The statute entitling surety who pays judgment on surety bond to repayment from principal was intended to provide convenient method of procedure to enable debtor, holding right of judgment, to claim and execute for the whole or proportion of judgment to which such debtor might be entitled. Code Civ.Proc. § 709.

8. Execution 🔑1

"Execution" is a process in an action to carry into effect the directions in a decree or judgment.

[Ed. Note.—For other definitions of "Execution," see Words & Phrases.]

9. Subrogation 🔑31(5)

Under surety's right of subrogation, surety's payment of judgment on surety bond gave rise to an assignment of judgment to surety by operation of law and formal assignment by judgment creditor was unnecessary. Code Civ.Proc. § 709.

10. Subrogation 🔑41(2)

Surety's filing of written assignment of judgment on surety bond to surety who satisfied judgment was a sufficient notice to principals of payment and claim to repayment. Code Civ.Proc. § 709.

11. Subrogation 🔑6

A surety who pays liability which it contracted to pay under surety bond was entitled to all the benefits of the doctrine of subrogation. Code Civ.Proc. § 709.

12. Subrogation 🔑33(3)

A surety who satisfied judgment obtained on surety bond for an amount less than judgment and obtained assignment of judgment stood in position of judgment creditor except that surety's recovery by execution upon judgment was limited to amount paid by surety with interest and costs. Civ.Code, §§ 2847, 2848; Code Civ.Proc. § 709.

13. Subrogation 🔑41(1)

Where execution after judgment has been resorted to as a proceeding under doctrine of subrogation for mere purpose of reimbursement, separate action on assignment of the judgment or in assumpsit would be ineffective. Civ.Code, § 3532.

14. Subrogation ⟹41(3)

The right of a surety who satisfied judgment on surety bond and obtained assignment of judgment to subrogation was not barred by limitations against action on implied assumpsit, since surety succeeded through subrogation to judgment creditor's remedy of execution within five years after entry of judgment. Code Civ.Proc. § 681.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by T. G. Painter against Nels Berglund and others, doing business under the name and style of Pacific Sales & Finance Company and another to recover for fraud in connection with the sale and assignment of a leasehold interest in an automobile camp. Judgment for plaintiff in the sum of $1,650, which was assigned to the Continental Casualty Company, surety on the bond of the other defendants. From an order denying a motion to recall the surety's execution, defendant F. M. Knapp appeals.

Affirmed.

Burton B. Brace, of Oakland (J. Adrian Palmquist, of Oakland, of counsel), for appellant.

Crozier C. Culp, of Oakland, for respondent.

WARD, Justice.

Upon the application of H. R. Scott, engaged as a real estate broker and doing business under the name and style of Pacific Sales and Finance Company, the Continental Casualty Company, a corporation, as surety, issued a surety bond for the benefit of "H. R. Scott, and his salesmen and employees" pursuant to the provisions of the California Real Estate Act, Stats.1919, chap. 605, p. 1252, in the sum of $2,000, conditioned for the faithful performance by the said broker, his salesmen and employees respectively, in their dealings with the public. F. M. Knapp, during the period of the life of the bond, was a real estate salesman in the employ of broker Scott. Plaintiff, T. G. Painter, filed an action alleging the perpetration of a fraud as joint tort feasors against certain operators and conductors of an automobile camp, together with Scott and Knapp as the broker and salesman respectively, in connection with the sale and assignment of the leasehold interest of the auto court. The Continental Casualty Company was named not as a participant of the alleged fraud but as surety under and by virtue of the bond. The plaintiff obtained a judgment against Scott, Knapp and the surety company for $1,650, interest at the legal rate until paid, and the costs of the action. Judgment was rendered in favor of the leaseholders and operators of the automobile camp. Neither Scott nor Knapp satisfied the judgment and the surety company after a period of negotiations paid $1,400 in lieu of the face of the judgment, and received as consideration therefor the following assignment: "In consideration of the sum of Fourteen Hundred ($1,400.-00) Dollars, in hand paid, T. G. Painter hereby assigns to Continental Casualty Company that certain judgment heretofore obtained on the 21st day of April, 1933, in the matter of the above entitled action against H. R. Scott. Dated this 15th day of June, 1933. T. G. Painter, Plaintiff. H. W. Brunk, Attorney for Plaintiff." On October 23, 1937, the surety company secured a writ of execution against Knapp and Scott. The writ sets forth that the judgment, as appears of record, was duly assigned to the Continental Casualty Company and that such company was the owner thereof. Knapp presented a motion to recall the execution, and for an order to cause the judgment to be fully satisfied of record. The motion was denied and from the order of denial defendant Knapp has taken this appeal.

[1-5] Respondent surety company asserts and argues that under the facts it is entitled, not only by reason of the doctrine of equitable subrogation but by virtue of the assignment of the judgment, to enforce the execution against either codefendant Knapp or Scott. Appellant Knapp cites sections 1638 and 1639 of the Civil Code and contends that the designation of "H. R. Scott" is conclusive and is an elimination of Knapp as a judgment debtor under the terms of the assignment. If it is appellant's claim that the intention of the parties to this writing should be ascertained from the writing alone, that position was negatived by filing the affidavit of plaintiff Painter which was attached to the motion to recall the execution. The affidavit was filed for the purpose of ascertaining the intention of the assignor. The affidavit relates in part as follows: "that in assigning said judgment it was the intent of this affiant to assign only

his right and claim against H. R. Scott and in giving said satisfaction it was the purpose and intent of affiant to fully and completely satisfy said judgment as against all other defendants named therein, including the defendant F. M. Knapp; that as far as this affiant is concerned, said judgment is fully satisfied". If this affidavit could be considered, the testimony of the attorney who negotiated the compromise of the judgment was likewise pertinent and relevant, and in passing it may be well to note that no objection was interposed to this latter testimony, which indicates that the assignment was directed against each of the tort feasors. In denying the motion to recall the execution, the court impliedly found that the words "against H. R. Scott" were words of description and not of limitation, a finding which must be approved. It must be borne in mind that the surety at some period possessed the right of subrogation. It is inconceivable that respondent surety company should deliberately attempt to limit its right to obtain redress against one only of the joint tort feasors. The judgment could be transferred as property just as other property of a similar nature. Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962. It need not be in writing and is subordinate to any rights of subrogation. Meyers v. Bank of America, etc., Ass'n, 11 Cal.2d 92, 77 P.2d 1084. In other words, the right of the surety company to pursue the assigned judgment is dependent upon subrogation rather than upon the assignment, though the assignment in this case plays a considerable part in establishing the right of the surety to subrogation.

Appellant in great measure relies upon the case of Meyers v. Bank of America, etc., Ass'n, supra. In that case an office manager received certain checks, forged the name of the payee and negotiated with a third party who paid full value therefor; the third party deposited the checks in defendant bank which in turn received payment therefor from the respective drawees. The employer was indemnified by the surety company for the default of his office manager. The employer assigned the bond and any cause of action against the bank, together with the right to maintain such action in the name of the assignor. The surety company caused such an action to be instituted against the bank and the party who had originally paid the checks in full. It was held that the surety company was not entitled to be subrogated to any claim the employer might have against the bank. The theory of the Meyers' decision is that the bank was not a wrongdoer and had received no benefit from the transaction, and that the right to maintain such an action depended upon the respective equities of the parties.

[6] In the case at bar appellant Knapp was one of the principals who participated in the fraud perpetrated upon Painter, and in equity and good conscience should be primarily, with his tort feasor, responsible for the damages. The supreme court of Minnesota, in Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N.W. 265, 268, 4 A.L.R. 510, said: "The right to recover from a third person does not stand on the same footing as the right to recover from the principal. As to the latter, the right is absolute—as to the former, it is conditional." In the Estate of Whitney, 124 Cal.App. 109, 117, 11 P.2d 1107, 1110, it is said: "While section 2848 of the Civil Code provides that a surety, upon satisfying the obligation of his principal, is entitled to be subrogated to that extent to all remedies which the creditor has against the principal, the question whether the obligation which is satisfied is in fact the obligation of the particular principal is to be decided in accordance with the rules of law and principles of equity."

Section 709 of the Code of Civil Procedure provides in part as follows: "and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket."

On June 15, 1933, there was deposited with the bank in Berkeley certain documents, including the assignment and a draft dated June 14th signed by a representative of the surety company and drawn upon a bank in Chicago. Instructions were left with the Berkeley bank to deliver the documents to the surety company's attorney when the last named bank should be notified that the draft had been paid. Our attention has not been called to the precise date upon which Painter received the $1,400 but we assume that in the ordinary course of business the bank in Berkeley forwarded the amount on the same or a subsequent date to the attorney for Painter. The bank complied with the escrow instructions by forwarding the assignment and other papers to the attorney for the surety company on June 24, 1933. Five days later the assignment was filed and the county clerk endorsed upon the docket register "Assigned to Continental Casualty Company".

[7, 8] Section 709, supra, does not provide for a particular form of notice and does not specify that the notice shall be given or served upon anyone except the county clerk. A notice of assignment of the judgment having been filed and docketed within ten days after the surety had paid an amount which plaintiff accepted in full payment of the face of the judgment, the question arises, Was the notice sufficient and was the proper procedure adopted to entitle the surety company to subrogation? The purpose of section 709, supra, was to announce a convenient method of procedure to enable a debtor, who held the right of a judgment, to claim and execute for the whole or the proportion of the judgment to which such debtor might be entitled. The section gives to the codefendant or surety entitled to contribution or repayment, the remedy of using the judgment itself as a summary proceeding instead of seeking relief by slow and burdensome steps to the same end. Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 87 P. 24; Holmes v. Hughes, 125 Cal.App. 290, 14 P.2d 149; McIntosh v. Funge, 128 Cal.App. 70, 16 P.2d 1006. Execution is a process in an action to carry into effect the directions in a decree or judgment. Prior to the assignment by plaintiff to the surety the judgment was ripe for execution and plaintiff held a vested right to use the process of the court to satisfy the judgment. The rights of plaintiff were transferred to defendant surety company. The surety company, having satisfied plaintiff's claim for damages, also held rights of subrogation. The surety company was entitled to repayment from the insurees. Any objection raised by appellant Knapp is primarily based upon the procedure adopted.

[9-12] Under the surety's right of subrogation, the payment gave rise to an assignment by operation of law, and a formal transfer from plaintiff to the defendant surety company was not necessary, but the filing of the written assignment was, in the absence of statutory direction, a sufficient notice of payment and claim to repayment. In this case the surety paid the liability that it contracted to pay and was entitled to all the benefits of the doctrine of subrogation. It stood in the position of the plaintiff with the limitation that it could recover by execution upon the judgment only the amount paid, with interest and costs. Sec. 2848 of the Civ. Code. The surety company has not sought to speculate or profit by the payment to plaintiff of $1,400 in lieu of a judgment of the total sum of $1,689. Appellant Knapp was not injured by a reduction of the amount of the judgment.

Section 2847 of the Civil Code provides that the payment by the surety may be with or without legal proceedings, and section 2848 states: "A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they become such." Appellant contends that the word "remedy" as used in the section does not mean that the surety company had the right to obtain an execution; that an execution is not within the legal definition of "remedy". The words "action", "cause of action", "right", "remedy" and "redress" are often used in a legal sense so that one implies another; in fact they are so related that one at times, of necessity, includes the other. "For every wrong there is a remedy." Sec. 3523, Civ.Code. This maxim of jurisprudence bestows upon the person who may be wronged the right to seek redress in an action, and the basis or ground thereof is denominated the cause of action. The expression "cause of action" has been held to mean everything that is requisite to show that an action is maintainable, and where a conflict of authority is found on this question it generally arises in cases dealing with the subject of jurisdiction. The word "cause" is sometimes used synonymously with the terms "case" or "action". The word "action" has been defined as the legal demand of one's rights or as the instrument to obtain redress for wrongs. 1 Cor.Jur. 924 et seq. Section 20 of the Code of Civil Procedure provides: "Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this state." "Remedy" is a more extensive term and refers to the method by which the action is effectuated. Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53. "Remedy" is not redress nor relief, but is the means by which a wrong is redressed and relief obtained. A writ is an order in writing issued by a competent official in a judicial proceeding and, as applied to execution in civil cases, is part of the remedy to effectuate the action by the enforcement of the judgment.

[13, 14] The cases cited by appellant refer principally to choses in action not reduced to judgment, and are not controlling in a matter wherein execution after judgment has been resorted to as a proceeding under the doctrine of subrogation for the purpose simply of reimbursement. In the latter instance a separate action on the assignment or in assumpsit would be an idle act. Civ.Code, sec. 3532. The claim that the statute having run against the action on an implied assumpsit, the right to subrogation is barred, is without merit. The surety succeeded through subrogation to all the rights and remedies that the plaintiff held in relation to the judgment, including the remedy of execution within five years after the entry of the judgment. Code Civ.Proc. sec. 681.

The order is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

* * *

31 Cal.App.2d 52

PEOPLE v. CABALTERO et al.

Cr. 1974.

District Court of Appeal, First District,
Division 1, California.
Feb. 15, 1939.

1. Homicide 🔑18(1)

Under statute, one who kills another while committing or attempting certain felonies is guilty of first-degree murder, regardless of any question of intent. Pen. Code, § 189.

2. Homicide 🔑18(1)

The statute making a killing, committed in perpetration of certain felonies, first-degree murder, applies to all homicides so committed, and not merely to such as might be planned as part of execution of felony intended. Pen.Code, § 189.

3. Homicide 🔑29

If a homicide is committed by one of several confederates while engaged in perpetrating robbery in furtherance of common purpose, other confederates who did not actually do the killing are as accountable as though they, with their own hands, did the killing. Pen.Code, § 189.

4. Homicide 🔑18(5)

In prosecution of conspirators who attempted robbery, for murder of one conspirator who was shot by another conspirator during robbery, instruction that homicide would constitute first-degree murder, whether intentionally or accidentally done, was proper. Pen.Code, § 189.

5. Homicide 🔑18(1)

Any killing by one engaged in commission of any one of certain felonies constitutes first-degree murder. Pen.Code, § 189.

6. Homicide 🔑29

Where, while several conspirators were committing robbery, one conspirator fatally shot another, all conspirators who participated in perpetration of robbery were guilty of first-degree murder, regardless of whether conspirator who fired the shot did so intentionally or accidentally. Pen.Code, § 189.

7. Conspiracy 🔑41

If one conspirator departs from original agreed design and does an act not contemplated and not in furtherance of common purpose, and not the natural and probable consequence of anything connected therewith, such conspirator is alone responsible for the act.

8. Homicide 🔑29

The doctrine, that a conspirator who does an act unconnected with original agreed design is alone responsible therefor, is not available to coconspirators where a killing is done during perpetration of robbery in which they were all participating. Pen. Code, § 189.

9. Homicide ⚷29

Where several persons conspire to commit robbery and one conspirator commits murder in perpetration of the crime, fact that those who did not actually participate in killing did not intend that life should be taken in perpetration of the crime or had forbidden such killing does not exonerate coconspirators from guilt of first-degree murder. Pen.Code, § 189.

10. Homicide ⚷18(5)

A killing which was done while conspirators were attempting to flee from scene of robbery with fruits thereof in their possession was "committed in the perpetration of the robbery" within statute making such killing first-degree murder. Pen.Code, § 189.

[Ed. Note.—For other definitions of "Committed in Perpetrating Robbery," see Words & Phrases.]

11. Homicide ⚷234(5)

In prosecution of conspirators, who attempted robbery, for murder of one conspirator who was shot during robbery, evidence sustained finding that one particular conspirator fired fatal shot. Pen.Code, § 189.

12. Criminal law ⚷1171(1)

In prosecution of several Filipinos for murder committed during perpetration of robbery, district attorney's remarks to jury during argument concerning percentage of crime committed in county by Filipinos, although improper, was not reversible error, where evidence supported conviction. Pen. Code, § 189.

13. Criminal law ⚷1171(1)

Where evidence clearly supports conviction and jury in all probability would have rendered verdict of guilty even in absence of improper conduct of district attorney, a reversal on ground of such conduct is not justified.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

C. Cabaltero, Benny Flores, Marcella Avelino, Domingo Velasco, and Delmacio Dasalla, were convicted of first-degree robbery and first-degree murder, and Fred Avelino was convicted of first-degree robbery, and they appeal.

Affirmed.

D. C. Kirby, Chester Damico, Jr., and Louis J. Pasquinelli, all of San Jose, and James J. Scoppettone, of Santa Cruz, for appellants.

U. S. Webb, Atty. Gen., and F. Walter French and William F. Cleary, Deputy Attys. Gen., for the People.

KNIGHT, Justice.

The defendants, C. Cabaltero, Benny Flores, Marcella Avelino, Domingo Velasco, Delmacio Dasalla, and Fred Avelino, were accused jointly by an information containing two counts with having committed first degree robbery and first degree murder, it being alleged in the first count that armed with pistols they robbed one J. Nishida of about $1,300, and in the second count that while perpetrating said robbery they killed and murdered one Pedro Ancheta. They were tried together and all except Fred Avelino were found guilty of both crimes, the jury having fixed the punishment for the latter crime at life imprisonment. Fred Avelino was found guilty of first degree robbery but acquitted on the charge of murder. Motions for new trial were denied, and following the pronouncement of judgment on said convictions each defendant appealed.

There has been an abandonment, however, of the appeals from the robbery convictions. No brief has been filed in behalf of Fred Avelino, and the other defendants (hereinafter referred to as appellants) make no complaint whatever about those convictions. They seek reversal only of the judgments of conviction of murder; and in presenting their appeals therefrom they concede that the robbery was committed by them pursuant to a conspiracy to which all were parties; that each of them participated in the robbery, and that during the perpetration thereof Ancheta was shot and fatally wounded. Furthermore, all except Dasalla (who has briefed his case separately) concede that the shot that fatally wounded Ancheta was fired by Dasalla. The evidence shows, however, and it is admitted by all parties, that Ancheta also was a member of the conspiracy, and when shot was engaged with the others in perpetrating the robbery; and such being the case, appellants contend that the trial court gave certain instructions which were inappropriate to the facts presented and prejudicial in their effect; and that therefore the giving thereof calls for reversal. We find no merit in any of the points urged in support of such contention.

The robbery was committed on a farm near Campbell, in Santa Clara county. It was one of several farms operated in that county by Nishida, a Japanese, upon which he employed many Filipino laborers, among them being Fred and Marcella Avelino. Being so employed, the Avelinos knew that it was Nishida's custom to pay the wages of his men in cash about the noon hour on a certain day of the week, in a building on this particular farm near Campbell; and the Avelinos entered into a conspiracy with Dasalla, Flores, Velasco, Cabaltero and Ancheta (all being Filipinos and residents of San Francisco), to rob Nishida at that time and place; and the robbery was carried out as planned. Fred Avelino was not on the premises at the time of the robbery, but all of the others were present and actively participated therein, and all except Marcella Avelino were armed. Cabaltero waited nearby with an automobile to provide means of escape; Marcella Avelino entered the farm building with other Filipino laborers ostensibly to receive his wages, but in fact to start an altercation with Nishida, so that during the confusion the robbery could be perpetrated. Velasco and Ancheta stood guard at the outer door, while Dasalla and Flores entered the building, and with drawn pistols held up Nishida, forcibly taking from him approximately $1,200. After seizing the money Dasalla and Flores started for the outer door, but before reaching it two shots were fired from the outside, and as Dasalla made his exit through the door he shot and fatally wounded Ancheta. As a witness in his own behalf he denied having done so, but Nishida testified positively that he saw him fire the shot, and then saw Dasalla, Flores and Velasco assist Ancheta, who had fallen, to the waiting automobile in which they made their escape. From the scene of the robbery they drove to a ranch just north of Gilroy, where they left the wounded Ancheta. Later that same afternoon Cabaltero and Flores were arrested on the highway some little distance from the ranch, but Dasalla and Velasco succeeded in making their way back to San Francisco. Some time during the night Ancheta was removed to the county hospital, and about two weeks later he died from the effects of the gunshot wounds. Shortly after Ancheta's death Dasalla and Velasco were arrested in San Francisco. Part of the evidence introduced by the prosecution against Velasco consisted of a confession made by him to an officer shortly after his arrest, wherein he related the circumstances attending the shooting of Ancheta. In this regard he stated, so the officer testified, that while the robbery was being perpetrated, an automobile drove up in which were two Filipinos; that Ancheta commanded them to stay in the car, but they jumped out and started to run, whereupon Ancheta fired two shots at them; that immediately following the firing of the shots Dasalla emerged through the door of the building and exclaiming to Ancheta, "Damn you, what did you shoot for," fired a shot at Ancheta; that Ancheta fell wounded, and that they, Velasco, Dasalla and Flores picked him up and assisted him to the waiting automobile in which they fled.

[1-4] The murder charge was based on section 189 of the Penal Code, and all of the essential elements thereof were pleaded in the charge. Said section declares that "All murder which is * * * committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree * * *"; and it is well settled that one who kills another under such circumstances is guilty of murder of the first degree by force of the statute, altogether regardless of any question of intent. The killing may be wilful, deliberate and premeditated, or it may be absolutely accidental; in either case the slayer is equally guilty since the statute applies to all homicide so committed, not merely to such as might be planned as a part of the execution of the felony intended; and it is proper so to instruct the jury. People v. Milton, 145 Cal. 169, 78 P. 549; People v. Boss, 210 Cal. 245, 290 P. 881; People v. Reid, 193 Cal. 491, 225 P. 859; People v. Green, 217 Cal. 176, 17 P. 2d 730; 13 Cal.Jur. p. 600. Furthermore, it is well established that if a homicide is committed by one of several confederates while engaged in perpetrating the crime of robbery in furtherance of a common purpose, the person or persons engaged with him in the perpetration of the robbery but who did not actually do the killing, are as accountable to the law as though their own hands had intentionally fired the fatal shot or given the fatal blow, and such killing is murder of the first degree. The jury has no option but to return a verdict of murder of the first degree whether the killing was intentionally or accidentally done, and it is proper so to instruct the jury. People v. Perry, 195 Cal. 623, 638, 234 P. 890; Peo-

ple v. Boss, supra; People v. Raber, 168 Cal. 316, 143 P. 317; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193; People v. Olsen, 80 Cal. 122, 22 P. 125; People v. Denman, 179 Cal. 497, 177 P. 461.

In the present case the jury was instructed in conformity with the foregoing doctrines, and there is no claim made that any of the instructions given in that behalf incorrectly set forth any of the principles of law upon which those doctrines are founded. But appellants argue that because Ancheta, the person killed, was a party to the conspiracy to rob and was fatally shot while actively participating in the perpetration of the robbery, the killing did not fall within the operation of section 189 of the Penal Code; that the prosecution therefor should have been brought under section 187 of said code, and the question of whether the killing was accidental or intentional submitted to the jury under instructions such as they proposed, but which the court refused to give, to the effect that if the jury found that Ancheta was shot accidentally, all of them should be acquitted, notwithstanding the killing was done by one of them during the perpetration of the robbery which all conspired to commit, and in which all were actually participating at the time of the fatal shooting.

[5] It has long since been declared to be the law of the state, however, that *any killing* by one engaged in the commission of any of the felonies enumerated in said section 189 falls within the scope of that section, and constitutes murder of the first degree. As stated in California Jurisprudence (vol. 13, p. 601), "The moment one engages in the commission of one of the specified felonies, the law fastens upon him the intent which makes *any killing* in the perpetration of such offense * * * murder of the first degree." All of the cases, and there are many of them, declare to the same effect; and while none of them involved the killing of one conspirator by another, the unqualified language employed in the decisions therein in dealing with the question of the scope of said section 189, makes it clear that said section was designed to include and that its provisions apply to any killing by one engaged in the commission of any of the specified felonies, irrespective of the status of the person killed and regardless of whether the killing is accidental or intentional. Thus in People v. Bostic, 167 Cal. 754, 141 P. 380, 383, the court said: "The moment he (the defendant) entered that car with a deadly weapon in his hand, with the purpose of committing robbery, the law fixed upon him the intent which would make *any killing* in the perpetration of the robbery, or in the attempt to perpetrate it, a murder of the first degree. In such cases the law does not measure the delicate scruples of the robber with reference to shooting his victim. The law holds him highly guilty if he does kill, and it makes no difference whether he strikes down a man * * * presumably upon the theory that 'dead men tell no tales,' or slays the brave man who resists. * * * In either case he is a murderer subject to the finding of the jury upon trial, or of the court after a plea of 'guilty,' that he shall suffer death or imprisonment for life." So, also, in People v. Milton, supra, the court in speaking of the clause of said section 189 here involved, went on to say: "In this the law has said to the malefactor, 'If in your perpetration of or attempt to perpetrate, arson, rape, robbery, burglary, or mayhem you shall take the life of a fellow-being, intentionally or unintentionally, your crime is murder of the first degree. The killing may be willful, deliberate, and premeditated, or it may be absolutely accidental. In either case you are equally guilty. The elements of willfulness, deliberation, and premeditation are not indispensable to your crime. The murder, under section 187 of the Penal Code, is established, in that the killing is unlawful, it having been perpetrated in the performance or attempt to perform one of these felonies, and the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit.'" [145 Cal. 169, 78 P. 550.] The court then proceeded to review the history of said section 189 and in doing so quoted approvingly from a case from the state of New York [Buel v. People, 78 N.Y. 492, 34 Am.Rep. 555], from which our code section was drawn, wherein it was said: "The statute was aimed against *any killing* by a criminal while committing any of the felonies enumerated * * *." (All italics ours.) The same view is expressed in slightly different language in People v. Denman, supra, the court there saying: "We regard it as settled law in this jurisdiction that one who kills another in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is guilty of murder of the first degree by force of the provision of section 189, Penal Code, altogether regardless of

any question whether the killing was intentional or unintentional." And in the case of People v. Reid, supra, the court summarized the law upon the subject by saying that whenever one in doing an act with the design of committing one of said felonies "takes the life of another, this is murder. The law in such a case superadds the intent to kill to the original intent to commit the felony." [193 Cal. 491, 225 P. 861.] From the foregoing it will be seen that there is no intimation of an exception being made in the case of one coconspirator killing another. It is quite evident, therefore, that in order to remove such a case from the operation of said section 189, a modifying clause to that effect would have to be read into said section; and of course it is not within the judicial powers of the court so to do.

[6] In support of their position appellants cite People v. Ferlin, 203 Cal. 587, 265 P. 230, but an examination of the factual situation therein shows it is entirely different from the one here presented, for the reason that there the coconspirator killed himself while he alone was perpetrating the felony he conspired to commit; whereas, here the coconspirator was killed by one of his confederates while all were perpetrating the crime they conspired to commit. To be more specific, the facts of that case were these: The defendant Ferlin hired a young man named Skala to destroy an insured building by fire, and while starting the fire with gasoline (Ferlin not being present) Skala burned himself so severely he died shortly afterwards from the effects of the burns. Ferlin was charged with and found guilty of arson, murder, and destruction of an insured building. The trial court granted a new trial on the murder conviction, and in sustaining the order on appeal it was held in substance and effect that inasmuch as Skala killed himself Ferlin could not be held criminally responsible for his death. In the present case Ancheta did not kill himself and no one makes any such claim. The shot that killed him was fired, as the evidence shows, by Dasalla, a coconspirator, and the fatal shooting occurred during the perpetration of a robbery. Therefore the case falls clearly within the provisions of said section 189; and under the doctrine of the authorities above cited, not only Dasalla, who did the shooting, but all who participated with him in the perpetration of the robbery were guilty of first degree murder regardless of whether Dasalla fired the shot intentionally or accidentally. Nor is the case of People v. Garippo, 292 Ill. 293, 127 N.E. 75, cited in the Ferlin case and upon which the appellants also rely in point for the reason that there the evidence failed to show that the shot that killed the coconspirator was fired by any of his confederates. According to the opinion, it was fired by some person unknown, and the decision exculpating the coconspirators was apparently placed on that ground. Here, as stated, there was direct evidence to the effect that Ancheta was shot by Dasalla.

[7-10] The second major point presented by the appeals is made in behalf of Caballero, Flores, Marcella Avelino and Velasco, and is based on that portion of Velasco's confession wherein he is purported to have related the circumstances under which the shooting took place. In this connection it is contended that the statements so made by Velasco show that Dasalla shot Ancheta deliberately and with the intention of killing him or doing him great bodily harm; that consequently Dasalla alone is accountable for the killing; and in furtherance of such theory an instruction was proposed by them which the court refused to give, to the effect that if the jury found that Ancheta was a coconspirator and was shot intentionally by his confederate, each of the coconspirators other than the one who fired the shot should be acquitted, despite the fact that the shooting occurred while all were participating in the robbery. In other words, they seek to invoke the benefit of the doctrine that if one member of a conspiracy departs from the original design as agreed upon by all members, and does an act which was not only not contemplated by those who entered into the common purpose but was not in furtherance thereof, and not the natural and probable consequence of anything connected therewith, the person guilty of such act if it was itself unlawful is alone responsible therefor. People v. Kauffman, 152 Cal. 331, 92 P. 861. Such doctrine is not available, however, to coconspirators in cases such as this, where the killing is done during the perpetration of a robbery in which they were participating. As declared in People v. Boss, supra: "The law is also well settled that where two or more persons enter into a conspiracy to commit a robbery or burglary and one of the conspirators commits a murder in the perpetration of the crime, all of said conspirators are equally guilty with said co-

conspirator of murder of the first degree, and it is no defense that those who did not actually participate in the killing did not intend that life should be taken in the perpetration of the robbery, or had forbidden their associate to kill, or regretted that it had been done." [210 Cal. 245, 290 P. 883.] Some of the earlier cases cited by the court in support of the foregoing legal principle are People v. Raber, supra; People v. Milton, supra; People v. Lawrence, supra; People v. Perry, supra; People v. Witt, 170 Cal. 104, 148 P. 928, and People v. Denman, supra; the language used by the court in the last case being: "Nor is it of the slightest consequence that the conspirators may not have intended to bring about their victim's death. The killing, having occurred in the perpetration of robbery, was murder of the first degree." Here the killing was done while the conspirators were attempting to flee from the scene of the robbery with the fruits thereof in their possession. Therefore the homicide was committed in the perpetration of the robbery. People v. Boss, supra; People v. Dowell, 204 Cal. 109, 266 P. 807. As said in the former case, the escape of the robbers with the loot by means of arms necessarily is as important to the execution of the robbery as gaining possession of the property.

[11] Further contention is made on behalf of Dasalla that the evidence is legally insufficient to establish the fact that he shot Ancheta, and that therefore in any event he was entitled to an acquittal. As above pointed out, however, Nishida testified positively that he saw Dasalla fire the shot and saw Ancheta fall. Consequently, Dasalla's denial of the shooting and the circumstances relied upon by him in support of such denial at best raised but a conflict in the evidence.

[12, 13] With respect to the assignments of misconduct on the part of the deputy district attorney it may be said that we find nothing therein which demands a reversal. The remarks made by him during his argument to the jury concerning the percentage of crime committed in that county by Filipinos was doubtless improper. It is held, however, that where the evidence clearly supports the conviction and it appears that the jury in all probability would have rendered a verdict of guilty even in the absence of any dereliction on the part of the district attorney, a reversal is not justified. 8 Cal.Jur. p. 621; People v. Simons, 70 Cal.App. 143, 232 P. 772. In the present case Dasalla, as a witness in his own behalf, admitted that he and several other Filipinos held up and robbed Nishida as charged in the information, and that during the perpetration of the robbery Ancheta was killed; and as stated, affirmative evidence was introduced showing, and all of the appellants except Dasalla concede, that Dasalla did the killing. It is quite obvious, therefore, that while the remarks complained of are subject to censure, it cannot be said that the members of the jury were unduly influenced thereby to the extent of rendering an unjust verdict or one that is lacking in evidentiary support; that being so, no ground for reversal is shown. People v. Piazza, 84 Cal.App. 58, 257 P. 592. The second assignment of misconduct relating to the cross-examination of Dasalla does not appear to be of sufficient importance to require special notice; and the remaining points urged are merely incidental to those already decided.

It is ordered that each judgment of conviction and each of the orders appealed from be and the same is hereby affirmed.

We concur: TYLER, P. J.; CONLAN, Justice pro tem.

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31 Cal.App.2d 128

BALDRIDGE v. CUNNINGHAM et al.
DIXON v. SAME.

Civ. 12014.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1939.

Rehearing Denied March 14, 1939.

Hearing Denied by Supreme Court April 17, 1939.

1. Trial 🔑256(4)

Instruction on presumption of negligence from violation of statutes was not erroneous for failure to state quantum of evidence necessary to establish justification or excuse to rebut the presumption, in absence of request for further instruction on quantum of evidence.

2. Automobiles 🔑246(60)

In action arising out of automobile collision, instruction that defendant's violation of vehicle code was "presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances" was proper. St.1935, p. 93 et seq.

3. Appeal and error ⚷1064(1)

In action arising out of automobile collision, instruction that negligence was presumed from violation of "any of the foregoing provisions of the California Vehicle Code" was not prejudicially erroneous because of inclusion of the word "any." St. 1935, p. 93 et seq.

4. Trial ⚷244(4)

In action against automobile driver and others, arising out of automobile collision, instruction that driver's violation of Vehicle Code created presumption of negligence was not erroneous as improperly singling out driver from the other parties. St.1935, p. 93 et seq.

5. Negligence ⚷141(4)

An instruction that "it is not contributory negligence to fail to look out for danger where there is no reason to apprehend any" was proper.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Lena Baldridge, individually and as administratrix of the estate of Samuel Jackson Baldridge, deceased, against Ella E. Cunningham and others, for wrongful deaths, and by J. T. Dixon against Ella E. Cunningham and others, for injuries resulting from automobile collision. From judgments for plaintiffs, the named defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Claflin, Dorsey & Campbell, of Bakersfield, and Charles R. McCarty, of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from judgments in favor of plaintiffs after a trial before a jury in an action to recover damages for the wrongful death of plaintiff Baldridge's husband and minor son, and also for personal injuries to plaintiff Dixon, which deaths and injuries were the result of an automobile accident.

The essential facts are:

Defendant Cunningham was driving an automobile in a northerly direction on Fortieth street just south of its intersection with Tierra Bonita Road near Lancaster in the county of Los Angeles. At the same time decedent Samuel Jackson Baldridge was driving an automobile on Tierra Bonita Road in a westerly direction just east of the above mentioned intersection. Riding with him were his son, Freddie Baldridge, and plaintiff J. T. Dixon. The two cars collided at the intersection, with the result that Mr. Baldridge and his son were killed and plaintiff Dixon was seriously injured.

There was a conflict in the testimony as to the details of the accident which it is unnecessary for us to here set forth, since it is conceded that there was substantial evidence to sustain the judgments.

Defendant Cunningham relies for reversal of the judgments on this proposition:

The trial court committed prejudicial error in instructing the jury as follows:

(1) "The court instructs the jury that:

"(a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

"(b) When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.

"No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

"'Intersection' is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

"You are further instructed, ladies and gentlemen, of the jury, that if you should find from a preponderance of the evidence that the defendant, Ella E. Cunningham, has violated any of the foregoing provisions of the California Vehicle Code, such violation, if any, on the part of the said de-

fendant is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances. If you find, therefore, from a preponderance of the evidence that the said defendant violated any of the provisions of the California Vehicle Code, and that such violation, if any, on her part constituted negligence that was the sole proximate cause of the accident, and you further find from a preponderance of the evidence that neither the plaintiff Dixon nor the deceased, Mr. Baldridge, or either of them, were guilty of contributory negligence which proximately contributed to the happening of the accident and the death of the said Samuel Jackson Baldridge and Freddie Baldridge, and the resulting injuries to the plaintiff Dixon, if any, then your verdict must be against the said defendant and in favor of the plaintiff."

(II) "You are instructed that it is not contributory negligence to fail to look out for danger where there is no reason to apprehend any."

This proposition is untenable. It is contended that the instructions set forth in paragraph (I), supra, were erroneous for four reasons:

(1) The quantum of evidence necessary to establish justification or excuse to rebut the presumption of negligence was not stated herein.

(2) In stating that defendant Cunningham was guilty of negligence if she "violated any of the foregoing provisions of the California Vehicle Code", St.1935, p. 93 et seq., the instructions were too broad.

(3) The instructions improperly singled out defendant Cunningham from the other parties to the litigation in stating that a violation by her of the quoted provisions of the Vehicle Code constituted negligence as a matter of law.

(4) The instructions constituted a formula instruction and were erroneous for the reasons stated in objections (1) and (2), supra.

[1, 2] The first objection to the instructions is invalid. The statement in the instructions, "that if you should find from a preponderance of the evidence that the defendant, Ella E. Cunningham, has violated any of the foregoing provisions of the California Vehicle Code, such violation, if any, on the part of the said defendant is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances", is an accurate statement of the principle of law embodied therein. Berkovitz v. American River Gravel Co., 191 Cal. 195, 199, 215 P. 675; Mora v. Favilla, 186 Cal. 199, 202, 199 P. 17.

If defendant Cunningham desired a further elaboration upon the instruction relative to the quantum of evidence necessary to establish justification or excuse, and thereby rebut the presumption of negligence arising from a violation of the California Vehicle Code, it was her duty to propose the further instruction which she desired and request the court to give it. This she did not do. Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 629, 39 P.2d 209.

[3] The second objection is likewise invalid. In passing upon a similar contention our Supreme Court in Kelley v. Hodge Transportation System, 197 Cal. 598, 606, 242 P. 76, held that it was inconceivable that the jury was misled by the erroneous inclusion in the instruction of the word "any" and that accordingly the error was not prejudicial, and the judgment appealed from was affirmed.

[4] The third objection is without merit. The method followed by the trial court in presenting plaintiffs' theory of the law applicable to their case was a proper one, and the same method was employed by the trial judge in instructing the jury relative to the theories of defendants' case.

The fourth objection is also without merit. As we have heretofore demonstrated in answering defendant Cunningham's objections (1) and (2), the instructions were not vulnerable upon the two points now urged as error. Eliminating these objections, the instructions fully, fairly, and accurately stated the principles of law embodied therein.

[5] The instruction set forth in paragraph II of defendant Cunningham's proposition is a correct statement of the principle of law embodied therein. Robbiano v. Bovet, 218 Cal. 589, 597, 24 P.2d 466; Pinello v. Taylor, 128 Cal.App. 508, 513, 17 P.2d 1039.

For the foregoing reasons the judgments appealed from are affirmed.

We concur: CRAIL, P. J.; WOOD, J.

PEOPLE v. ADAMS.*

Cr. 3170.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1939.

Hearing Granted by Supreme Court March 17, 1939.

1. Criminal law 🔑1144(13)

On appeal from conviction, evidence was viewed most favorably to the people.

2. Infants 🔑20

Evidence sustained conviction for violation of statute penalizing crimes against children. Pen.Code, § 288.

3. Infants 🔑20

In prosecution for violating statute relating to crimes against children, that child involved has complained of outrage is admissible as exception to hearsay rule. Pen. Code, § 288.

4. Infants 🔑20

In prosecution for violating statute relating to crimes against children, testimony of mother that child had told her that accused had placed his hand on her body was admissible as exception to hearsay rule. Pen.Code, § 288.

5. Criminal law 🔑730(14)

In prosecution for violating statute relating to crimes against children, reference by district attorney in argument to other cases was not prejudicial, where objection thereto was promptly made and sustained with instruction that statement be stricken. Pen.Code, § 288.

6. Criminal law 🔑829(12)

In prosecution for violating statute relating to crimes against children, where court instructed that charge could easily be made but was difficult to disprove and that testimony of prosecutrix should be examined with caution, refusal to give instruction covering same principle of law was not error. Pen.Code, § 288.

7. Criminal law 🔑829(12)

Where court instructed that jury was to be governed solely by evidence introduced, refusal to instruct that jury was not to draw inference from court's ruling that certain witness was not competent was not error.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

John Adams was convicted of violating Pen.Code, § 288, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of violating section 288 of the Penal Code on two occasions. This appeal is from the judgment and order denying his motion for a new trial.

[1] Viewing the evidence most favorable to the People (respondent), the essential facts are:

July 1 and 2, 1938, respectively, defendant committed acts prohibited by section 288 of the Penal Code.

Defendant relies for reversal of the judgment on the following propositions:

First: The evidence is insufficient to sustain the judgments.

Second: The trial court committed prejudicial error in receiving in evidence, over defendant's objection that it was hearsay and no proper foundation had been laid, the following testimony of the prosecutrix's mother:

"Q. By Mr. Ferguson: Will you tell us what, if anything, Cornelia told you on a prior occasion?

"A. Cornelia was so small; I was sitting her on the toilet in the bathroom and she said that John Adams had taken his hand and put it on her body, as she called her privates. And I asked her how John was dressed and she said he was in his pyjamas. But Cornelia wasn't more than three years old at the time and I just—children always follow you around the house and into the bathroom, and I paid no further attention to it."

Third: The district attorney committed prejudicial misconduct in his argument to the jury.

Fourth: The trial court committed prejudicial error in refusing at defendant's request to give the following instructions to the jury:

(a) "By reason of the fact that charges of the nature involved in this case can easily be made and are often not easy to disprove, I instruct you that it is your duty to treat with great care and caution the

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*For subsequent opinion see 93 P.2d 146.

testimony of the prosecutrix Cornelia Clark. You are not to be moved by passion, sympathy, or prejudice to find a verdict of guilty on any count of the information and unless you are convinced beyond a reasonable doubt from the evidence that the defendant is guilty as charged on one or more of the several counts of the information, you should find the defendant not guilty."

(b) "That you are not to draw any inference whatsoever from the fact that the Court ruled as a matter of law that the witness Janet Stokes was not competent to testify in this case. This fact has no place whatsoever in your deliberations as to the guilt or innocence of the defendant, and you shall not surmise as to whether what the child's testimony might have been had she been allowed to testify in the case."

[2] Defendant's first proposition is untenable. We have examined the record and in our opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgments of guilty were necessarily predicated. The prosecutrix gave positive testimony as to each of the acts upon which the judgments of guilty were based, and no useful purpose would be subserved by setting forth the sordid details of such testimony.

[3, 4] Defendant's second proposition is likewise untenable. The law is settled that in a prosecution for violating section 288 of the Penal Code the fact that the child involved has made complaint of the outrage is evidence which is admissible as an exception to the hearsay rule. People v. Morcumb, Cal.App., 82 P.2d 714. In the present case the proper foundation for the admission of the testimony had been laid, and therefore the objections stated by defendant to the admission of this evidence (which objections are the only ones we will consider) are without merit.

[5] Defendant's third proposition is also without merit. During the course of the district attorney's argument to the jury the following occurred:

"Mr. Ferguson: You remember the Dyer case, the Northcott case—

"Mr. Cantillon: I am going to object to that as improper argument, inflammatory and ask that it be stricken from the record and the jury instructed to disregard it.

"Mr. Ferguson: I am willing that should be done your Honor.

"The Court: Very well. The last remark, whatever it was, is stricken.

"Mr. Cantillon: I move that the jury be instructed to disregard it, your Honor. He just mentioned the Dyer case, your Honor.

"Mr. Ferguson: Please forget the Dyer case. I don't claim it is proper in this case. I am not silly and I know none of you men and women are silly."

It will be seen from an examination of the record as set forth above that, upon defendant's objecting to the district attorney's statement, the latter consented that the statement be stricken from the record, which was promptly done. It is therefore evident that, though the remark was improper, its injurious effect, if any, upon the jury was eliminated by the prompt objection of defendant's counsel and the court's ruling thereon.

[6] It was not error to refuse the instruction set forth in paragraph (a) of defendant's final proposition, for the reason that the trial court did instruct the jury as follows: "That a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. The law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you examine her testimony with caution."

It is evident from a reading of the foregoing instructions that the principle of law set forth in the instruction requested by defendant and refused was covered in the instructions actually given by the court.

[7] It was likewise proper to refuse the instruction set forth in paragraph (b) of defendant's final proposition. During the course of the trial Janet Stokes, a five year old child, was called as a witness, but the trial court ruled that she was not qualified to testify. The substance of the instruction requested by defendant was given by the court, as will be seen from a reading of the instructions set forth supra. Among other instructions the trial judge

instructed the jury that, "You are to be governed therefore solely by the evidence introduced in this trial and the law as given you by the Court". It is obvious that this instruction in its effect upon the jury was identical with instructing the jury that, "You are not to base your verdict upon any evidence not introduced during the trial".

For the foregoing reasons the judgment and order are and each is affirmed.

I concur: CRAIL, P. J.

WOOD, Justice (concurring).

I concur in the judgment. In my opinion the trial court erred in receiving in evidence the testimony of the mother of the prosecutrix concerning statements of the child two years before the incidents which form the basis of the charges against defendant. The error, however, has not resulted in a miscarriage of justice and does not justify a reversal.

SILVA v. PROVIDENCE HOSPITAL OF OAKLAND.*

Civ. 10746.

District Court of Appeal, First District, Division 1, California.

Feb. 8, 1939.

Rehearing Denied March 10, 1939.

Hearing Granted by Supreme Court April 6, 1939.

1. Charities 🔑45(2)

One who accepts benefit of a public or private charity impliedly exempts the benefactor from implied liability for negligence of servants in administering the charity.

2. Charities 🔑45(2)

The purpose of a corporation and its manner of operating determine its charitable character.

3. Charities 🔑45(2)

In negligence action by recipient of charity against charitable institution, burden of proving that institution is not operated for profit but is in fact a charitable organization is upon the institution.

4. Charities 🔑45(2)

A patient entering a charitable hospital thereby waives right to damages for injuries occurring from negligence of hospital's servants, when due care has been used in selection of servants.

5. Charities 🔑45(2)

A patient, by entering a noncharitable hospital, does not waive right to damages for injuries occurring from negligence of hospital's servants, unless patient is recipient of charitable benefits.

6. Charities 🔑45(2)

A charitable institution is liable for torts committed in deriving funds wherewith to operate the charity as distinguished from torts committed in direct administration of charity.

7. Charities 🔑45(2)

In patient's action against hospital for injuries sustained when patient fell out of bed, evidence sustained finding that hospital was operated for profit notwithstanding general purposes might have been charitable, so that hospital was liable for negligence of its servants.

8. Evidence 🔑66

Individuals dealing with a corporation impliedly take notice of the charter provisions of corporation's management and purpose.

9. Charities 🔑45(2)

In determining whether hospital was charitable and consequently whether it would be liable to patient for negligence of hospital's servants, knowledge of patient as to conduct of hospital was not controlling.

10. Charities 🔑45(2)

Where question arises whether patient has entered charitable or noncharitable hospital or one wherein business is conducted from which funds are derived to be used for charitable purposes, evidence of knowledge of patient of character of hospital may be admissible in determining whether patient accepted advantages of charity from a benefactor.

11. Hospitals 🔑8

In patient's action against hospital for injuries sustained when patient fell out of bed, evidence concerning patient's knowledge and conduct did not justify exemption of hospital from liability for servant's negligence. Civ.Code, § 1621.

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*For subsequent opinion see 97 P.2d 798.

12. Appeal and error 🔑1013

Trial court's award of special damages for expense of housekeeper for eight months would not be disturbed where evidence actually showed housekeeper to be in attendance for over nine months, notwithstanding plaintiff's attending physician had stated that convalescent period was speculative and would continue perhaps three, four or five months.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Elizabeth Silva against the Providence Hospital of Oakland to recover for injuries sustained when plaintiff, while a patient in defendant hospital, fell out of bed. Judgment for plaintiff for $3,000, and defendant appeals.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, for appellant.

H. Raymond Hall and Edward J. Silver, both of Oakland, for respondent.

WARD, Justice.

Plaintiff, over seventy years of age, through her daughter sought and was granted care and treatment in a ward of defendant hospital at the agreed regular rate of $4 a day. Several days after her entry plaintiff fell out of bed. One of plaintiff's attending physicians instructed defendant to equip the bed with a side board. This order was obeyed except upon one occasion, about three and one-half weeks thereafter, when plaintiff again fell from the bed and fractured her right hip. Because of the latter injury plaintiff incurred expenses in the sum of $1,101.45. This action was brought and judgment given for total damages of $3,000. In support of the argument for reversal of the judgment appellant contends that the charity doctrine, which is an integral part of the jurisprudence of this state, exempts the corporation hospital from liability, and that the judgment therefore is without evidentiary support.

Appellant erected its first hospital on borrowed money, paid off the indebtedness from its income, acquired a new site, and is reducing the present indebtedness. The corporation hospital has received no endowments or donations and its source of income is from paying patients. It has no stock or stockholders, and its officers serve without remuneration; it accepts charity, semi-charity and full-pay patients; it maintains a free clinic for children and expectant mothers, and a free school for training nurses. It gives dole at its doors, free meals to indigent applicants, and assistance to poor families outside of the hospital. It becomes necessary, therefore, to determine whether, under all the circumstances of this case, it may be designated as a charitable institution and entitled to exemption from liability for the negligence of its servants.

[1-3] In some states the charity doctrine is not recognized. In other states legislation has endeavored to define the exemption. In a few states charitable institutions are exempt in every case. The early authorities are discussed in Basabo v. Salvation Army, 35 R.I. 22, 85 A. 120, 42 L.R.A.,N.S., 1144. Using the Basabo decision as a basis, California has declared "that where one accepts the benefit of a public or of a private charity, he exempts by implied contract the benefactor from [implied] liability for the negligence of the servants in administering the charity". Stewart v. California Medical etc. Ass'n, 178 Cal. 418, 422, 176 P. 46, 48. The purpose of the corporation, and its manner of operating, determine its charitable character. Hallinan v. Prindle, 220 Cal. 46, 29 P.2d 202; Stewart v. California Medical etc. Ass'n, supra. The burden of proof that the institution is not operated for profit, but has all the distinctive earmarks and is in fact a charitable organization, is upon the party alleging this affirmative defense. Lewis v. Y. M. C. A. Ass'n, 206 Cal. 115, 273 P. 580; England v. Hospital of Good Samaritan, 22 Cal.App.2d 226, 70 P.2d 692.

[4-6] The reason for the exemption rule in cases of this classification is public policy. If the organization and the method of operation are strictly nonprofitable, and the fundamental purpose is charity, the public is best served by the rule that the proceeds from donations and trust funds that aim to aid the sick and afflicted, who would be unable otherwise to obtain the advanced scientific care and treatment, is distinctly an expedient for the betterment of the welfare of the public. In a case where a charitable hospital is operated at a loss, and the deficit is met by resort to the proceeds of trust funds and donations, the law, in the interest of protecting the many as against the few, assumes that en-

try into such an institution is a waiver by the patient of rights for damages resulting from injuries occurring from the negligence of its servants when due care has been used in the selection of the servants. If the hospital is not dependent upon gifts, etc., for its usual upkeep, the waiver does not apply unless the patient is the recipient of charitable benefits, in which instance it would be against sound morals to sue the benefactor. There is a distinction between torts of charitable institutions committed in the direct administration of the charity, and torts committed in deriving funds wherewith to operate the charity. In the latter instance the hospital corporation is liable. Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S.W. 510, L.R.A.1916C, 875; Baker v. Board of Trustees of the Leland Stanford University, 133 Cal.App. 243, 23 P.2d 1071; Stewart v. California Medical etc. Ass'n, supra.

Appellant relies upon the cases of Hallinan v. Prindle, supra; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; and Shane v. Hospital of the Good Samaritan, 2 Cal.App.2d 334, 37 P.2d 1066. In the last case the decision rested upon the conclusion that the hospital was of a charitable nature. In his brief in that case appellant admitted the charitable character of the hospital. In the Hallinan case the hospital was completely endowed, and any deficit was met by private contribution. In the opinion in Armstrong v. Wallace, supra, many facts are recited common to the instant case, but the hospital in the Armstrong case was a gift, and the income from paying patients did not meet the operating expenses of the hospital. The deficit was overcome by public drives for funds, and private bequests for educational purposes, including the training of nurses. In the present case, the original hospital, and likewise the new hospital, were acquired through a loan, and maintained from profits in the operation of the pay-patient department. The corporation is not endowed and creates its own funds for charity; hence there is no possibility of a trust fund, donated as charity for many of the sick and afflicted, being diverted or depleted by an award of damages to one person.

[7] It is true that profits may not always be measured by an excess of receipts over disbursements, but if it appears that the excess can reasonably take care of interest on capital invested, and ordinary depreciation, and still a substantial fund remains, it is immaterial whether the fund is appropriated by the institution for further improvements, outside investments, dividends, or is set aside for charity. In this case the corporation hospital is a good business enterprise. The articles of incorporation provide that "Pecuniary profit is not and never shall be the object of this corporation", but in the paragraph outlining the purpose of the corporation, no mention is made of charity. The trial court found "that said hospital was operated by said defendant for profit even though the general purposes of said defendant may have been charitable". There is ample evidence to sustain this finding. The primary purpose of the organization was profit. From that profit, charity was dispensed. The charity was dependent upon and sufficiently distinct to indicate that first in importance was profit.

[8-11] Individuals dealing with a corporation impliedly take notice of the charter provisions of its management, and purpose, and therefore the knowledge of plaintiff as to the conduct of defendant corporation is not controlling. In a case wherein a question arises as to whether the patient has entered a non-charitable or a strictly charitable hospital, or one wherein a business is conducted from which funds are derived and the profits thereof used for charitable purposes, evidence of knowledge of the patient of the character of the institution may be admissible in determining whether or not the patient accepted the advantages of charity from a benefactor. England v. Hospital of the Good Samaritan, supra. The evidence shows that when plaintiff was admitted to the hospital she was ignorant of any claim that it was exempt for its negligence upon the theory that it was a charitable institution. Plaintiff was charged full rates for care, pharmaceutical supplies and all services rendered. Except in this one instance of negligence, she received so far as the record discloses all the advantages and all the benefits given to any patient who might have paid full rates in any hospital not claiming charitable exemption. There was no conduct manifested by plaintiff that she understood she would be without redress if injuries occurred due to negligence of employees of

the hospital. Civ.Code, § 1621. Considering all of the facts of the case there does not appear to be any justification for exempting the defendant from the liability incurred by other hospitals conducted for profit.

[12] The trial court found that plaintiff had incurred special damages in the sum of $520 for the expense of a housekeeper, at the rate of $65 per month for eight months. The evidence shows that the housekeeper was actually in attendance for a period of nine months and one week. Attention is called by appellant to the evidence of respondent's attending physician, who asserted that her convalescence period probably would continue three, four or five months. We are not prepared to modify the judgment upon the attending physician's testimony to which he added, "that is all speculative", in the face of positive evidence.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

31 Cal.App.2d 122

BROWN et ux. v. TRAVELERS INS. CO.

Civ. 12119.

District Court of Appeal, Second District.
Division 2, California.
Feb. 17, 1939.

Hearing Denied by Supreme Court
April 17, 1939.

Insurance 🔑437

Under automobile liability policy denying coverage when automobile is operated by person under age of 14 years or by person in violation of any state, federal or provincial law as to age applicable to such person, insurer was not liable for injuries resulting from accident where automobile was operated by an unlicensed person of the age of 14 years and 11 months, in violation of law, but who by reason of an exception in the general law as to age might have possessed all qualities to entitle him to driver's license but who had not obtained a license. St.1935, pp. 128, 129, §§ 250, 257; Civ.Code, § 1636.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action on public liability automobile policy by Fenton L. Brown and Juanita Brown, husband and wife, against Travelers Insurance Company, a corporation. From a judgment for the defendant, plaintiffs appeal.

Affirmed.

Wright, Monroe & Harden, of San Diego, for appellants.

Stearns, Luce, Forward & Swing and Fred Kunzel, all of San Diego, for respondent.

McCOMB, Justice.

From a judgment sustaining a demurrer to plaintiffs' complaint without leave to amend in an action to recover upon a public liability insurance policy, plaintiffs appeal.

The essential facts are:

Defendant issued a policy of public liability insurance covering an automobile belonging to the named assured. The policy extended coverage to those persons to whom the named assured gave permission either express or implied to drive the car, provided, however, that the extended coverage should not apply where the automobile was being driven "by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person".

Plaintiffs recovered a judgment against the named assured because of the negligence of the latter's son, aged fourteen years and eleven months, in operating the automobile. At the time of the accident he did not have a license from the state of California to drive an automobile. Since defendant herein refused to pay the judgment against the assured, plaintiffs brought this suit against defendant, the insurance carrier, to recover the amount of the judgment.

This is the sole question to be determined:

Does a provision in a public liability automobile insurance policy to the effect that the policy does not apply where the automobile is being operated "by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person" exclude liability in California *where the automobile is being operated by an unlicensed person of the age of fourteen years and eleven months who, by reason of an exception in the general law as to age, may possess all of the qualifications to entitle him to a driver's license?*

This question must be answered in the affirmative. At the time of the accident here involved it was unlawful to drive an automobile without a license, sec. 250, Vehicle Code, St.1935, p. 128, and no license could lawfully be issued to any person under the age of sixteen, except that the motor vehicle department might issue a license to a minor between the ages of fourteen and sixteen where a statement was made by some person other than the minor showing reasons for the issuance of the license *satisfactory to the motor vehicle department.* Sec. 257, Vehicle Code.

Though there is a conflict of authority as to the proper construction of the exclusion clause here under consideration, the weight of authority and the better rule, in our opinion, is that, where an insurance policy excludes liability when the automobile is being driven "by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person", and an accident occurs while the assured's automobile is being operated by a person over fourteen years of age and under sixteen years of age without a license in violation of a state law which prohibits such a person from operating an automobile without first obtaining a license, the exclusion clause above mentioned relieves the insurer from liability, for the reason that the operator of the car is driving in violation of a law as to age. Hudak v. Union Indemnity Co., 108 Conn. 598, 143 A. 885; Witzko v. Koenig, 224 Wis. 674, 272 N.W. 864, 866; Morrison v. Royal Indemnity Co., 180 App.Div. 709, 167 N.Y.S. 732, 733. For a case holding to the contrary see Bitzer v. Southern Surety Co., 245 Ill.App. 295.

This rule of law is consistent with the requirement of the Civil Code, section 1636, that a contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of the contract. There can be no doubt that the insurer intended to eliminate liability in such a case as the present one by inserting in its contract the exclusion clause here questioned. It is equally clear that the assured in reading the exclusion clause would have believed that she was not protected in the event she permitted her minor son to drive her automobile without obtaining a license, which is contrary to the provisions of the Vehicle Code. There is no valid reason why the loss occasioned by assured's permitting her son to violate a state law should be shifted to defendant.

Applying the foregoing rules to the present case, it is clear that, since the operator of the car was fourteen years and eleven months of age at the time of the accident and had not obtained a driver's license, he was driving the automobile in violation of the laws of this state, secs. 250, 257, Vehicle Code, and defendant was not liable by the terms of its policy.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

30 Cal.App.2d 733

Ex parte WILLIAMS.

Cr. 1656.

District Court of Appeal, Third District, California.

Feb. 9, 1939.

1. **Criminal law** 🔑1012

An order remanding a person to the state hospital for the insane after hearing upon an application for the restoration of sanity is not appealable but the remedy is by habeas corpus. Pen.Code, §§ 1026, 1026a.

2. **Insane persons** 🔑51

The power to discharge a patient in the state hospital for the insane otherwise than upon habeas corpus is vested exclusively in the officers of the hospital.

Appeal from Superior Court, Mendocino County.

Proceeding in the matter of the application of Forest R. Williams, a person committed to the Mendocino State Hospital pursuant to statute, for release from the Hospital. From an order denying his release, petitioner appeals. On the Attorney General's motion to dismiss the appeal.

Motion granted.

Gladys Towles Root, of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant had been adjudged not guilty of the crime of rape, by reason of insanity at the time of the commission of the offense, and was, on March 20, 1937, committed to the Mendocino State Hospital for the Insane, pursuant to the provisions of section 1026 of the Penal Code.

More than one year thereafter he filed, in the superior court of the county of Mendocino, a petition for his release, alleging therein that he was then sane and entitled to his discharge from the hospital.

[1, 2] After a hearing thereon, an order was made denying his release. An appeal was then taken to this court from that order. The attorney-general has appeared and moved to dismiss the appeal upon the ground that the order remanding petitioner to the hospital after a hearing upon an application for restoration of sanity (sec. 1026a, Pen.Code) is not an appealable order, and that the remedy is by a writ of habeas corpus. With this contention we are in accord. In People v. Lee, 97 Cal. App. 321, 275 P. 815, the court held that an order directing that defendant be confined in a state hospital is not an appealable order under section 1237 of the Penal Code, and that the remedy under section 1026 and 1026a of the Penal Code is by a proceeding in habeas corpus. The power to discharge a patient otherwise than upon habeas corpus is vested exclusively in the officers of the hospital. Kellogg v. Cochran, 87 Cal. 192, 25 P. 677, 12 L.R.A. 104.

On the authority of those cases the motion to dismiss the appeal is granted. It is so ordered.

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31 Cal.App.2d 144

WEISZ et al. v. McKEE et al.*

Civ. 2178.

District Court of Appeal, Fourth District, California.

Feb. 17, 1939.

Rehearing Denied March 16, 1939.

1. **Pleading** 🔑345(1)

A motion for judgment on the pleadings will only lie where complaint fails to state facts sufficient to constitute a cause of action against moving defendant.

2. **Pleading** 🔑345(1)

A motion by defendant for judgment on the pleadings tests sufficiency of complaint, and, where there is an entire absence of some essential fact constituting a cause of action, motion may properly be granted.

3. **Judgment** 🔑237(1)

In action against several defendants, if a several judgment is proper, court may, in its discretion, render judgment against one or more of them, leaving action to proceed against the others. Code Civ.Proc. § 579.

4. **Judgment** 🔑237(1)

Where no sufficient case is stated against one of several defendants, a final judgment may be entered disposing of the case as to him. Code Civ.Proc. § 579.

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*Rehearing denied 88 P.2d 200.

5. Judgment ⚷237(1)

An action for reformation of deed and to quiet title to real property and oil royalties was of type in which joint or several judgment could be rendered, so that, where allegation in complaint respecting interests of certain of defendants was admitted by their answer, court was authorized to enter decree adjudging such defendants owners of their admitted undivided interests, leaving the action pending as to remaining defendants. Code Civ.Proc. § 579.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by Michael M. Weisz and another against W. R. McKee, and others, for reformation of a deed and to determine, declare, and quiet title to real property and oil royalties. From a judgment adjudging the defendants Tarver Montgomery and others to be the owners of the undivided interest admitted in their answer and that plaintiffs had no right in such interest, but failing to determine the interest of plaintiffs and the remaining defendants in the remaining property, the plaintiffs appeal.

Affirmed.

Charles J. Katz and Alfred Gitelson, both of Los Angeles, for appellants.

Rutan, Mize & Kroese, of Santa Ana, Robert C. Mize, of Santa Ana (Harold H. Coyle, of Placentia, of counsel), for respondents.

GRIFFIN, Justice.

This action, as presented in the second amended complaint, was one for reformation of a deed and to determine, declare and quiet title to real property and oil royalties between plaintiffs and defendants and respondents. We will briefly state the facts as taken from the pleadings and about which there is no controversy.

The respondents acquired, on or before September 10, 1926, certain undivided interests in the property described in the plaintiffs' complaint. On August 8, 1933, a long time subsequent to the acquiring by respondents of their interests, defendants W. R. McKee and Julia S. McKee made a conveyance to the appellants of a two per cent interest in and to the real property above mentioned. Because of certain circumstances alleged in the complaint, the appellants claimed that this conveyance should have been for a 12 per cent interest instead of a 2 per cent interest as set forth in the deed. This action was commenced for reformation of this conveyance. The allegations of the amended complaint, as to the respondents, in reference to the title and ownership of the property, is as follows:

"XIV. That these plaintiffs are informed and believe and therefore allege that the defendants, Tarver Montgomery and Minnie Montgomery, are the owners of an undivided one-fourth (¼) interest in and to the said real property in this second amended complaint described.

"That these plaintiffs are informed and believe and therefore allege that the defendants, George W. Wells and Clara L. Wells, are the owners of an undivided one-fourteenth (1/14th) interest in and to the said real property hereinbefore described, and that the defendants, Ray C. Lambert and Clara Wells Lambert, are the owners of an undivided one-fourth (¼) interest in and to said real property hereinbefore described.

"That these plaintiffs are informed and believe and therefore allege, that these plaintiffs, together with said defendants, other than the defendant, First National Bank in Santa Ana, a national banking association, as Trustee, collection agents, escrow holder, and the defendant, Charles W. Camp, are the owners of said real property hereinbefore in this second amended complaint described. That plaintiffs are informed and believe and therefore allege, that said defendants claim some right, title, interest or estate, in and to said real property other than as hereinbefore alleged and contrary to and adverse to the interest of these plaintiffs in and to said real property. That said defendants should set forth their interests in and to said property, so that their interests may be determined and adjudicated and so that the right of these plaintiffs to their respective proportions of the royalties being paid under the oil lease hereinbefore alleged, shall be established."

The answer of these respondents to the amended complaint admits the allegations of the amended complaint in the following language: "Answering the allegations of paragraph XIV of said complaint, admit these answering defendants respectively are now, and at all times since September 10th, 1926, have been, the owners of the respective undivided interests in the real property referred to in said paragraphs as alleged in said paragraph, allege they claim no other right, title, interest or estate in or to said real property, and that they claim no interest therein or to any royalty adverse to the alleged interest of plaintiffs."

Respondents, on September 18, 1936, made a motion for judgment on the pleadings. At the same time, appellants made a similar motion. Both motions were simultaneously presented and argued. Thereafter, the court entered a decree adjudging that respondents were the owners of the undivided interests as admitted in the answer; that appellants had no right, title or interest in or to the undivided interests above described; that the rights, titles and interests of appellants and the remaining defendants therein and to the remaining 9/14ths interest in the property were not determined by the present judgment by reason of the fact that the action as to the remaining defendants was still pending.

Appellants claim that the judgment is contrary to law in this, that the cause of action alleged being undetermined as to all other defendants, the judgment from which this appeal is perfected is premature and that only one judgment should be entered in a cause and no judgment should have been entered until the determination and adjudication of the entire cause. Secondly, that the judgment should have granted to appellants, as against the respondents, the relief sought by the second amended complaint, i. e., it should have decreed and established and adjudicated the title of appellants as against the respondents.

[1, 2] A motion for judgment on the pleadings on behalf of a defendant will only lie where the complaint fails to state facts sufficient to constitute a cause of action against the moving defendant. Hibernia Savings & Loan Soc. v. Thornton, 117 Cal. 481, 49 P. 573; Elmore v. Tingley, 78 Cal.App. 460, 248 P. 706. A motion by a defendant for judgment on the pleadings tests the sufficiency of the complaint, and where there is an entire absence of some essential fact or facts constituting a cause of action, the motion may be properly granted. Heinsbergen v. Jenking, 113 Cal. App. 394, 298 P. 104; Gross v. Bank of America, 4 Cal.App.2d 353, 41 P.2d 178; Hibernia Savings & Loan Soc. v. Thornton, supra.

[3-5] The complaint in the instant action was wholly insufficient on which to base a finding of ownership of the property contrary to the judgment entered. The allegation of ownership in respondents is alleged in the amended complaint. We see no merit to the above-mentioned claim of appellants.

In an action against several defendants, the court may, at its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper. Code Civ.Proc. sec. 579. If no sufficient case is stated against one of several defendants, a final judgment may be entered disposing of the case as to him. Rocca v. Steinmetz, 189 Cal. 426, 208 P. 964. The present action is unquestionably of the character in which a joint or several judgment could be rendered.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

30 Cal.App.2d 734

McGRATH et al. v. BUTTE COUNTY et al.

Civ. 6130.

District Court of Appeal, Third District, California.

Feb. 9, 1939.

Hearing Denied by Supreme Court April 10, 1939.

1. Mandamus 🔑172

In proceeding by holders of bonds issued by county under County Improvement Act for writ of mandate to compel county to levy special tax to pay for lands purchased at delinquent tax sale, court was concerned only with amount for which property was sold to state for benefit of county. St.1921, p. 1658.

2. Limitation of actions 🔑34(2)

A proceeding by holders of bonds issued by county under County Improvement Act of 1921 to compel county to levy special tax to pay for lands purchased at delinquent assessment sale was not barred by three-year statute of limitations applicable to action on liability created by statute, since proceeding was not on "liability created by statute" but was to compel performance of continuing duty as part of contract created by bonds. Code Civ.Proc. § 338, subd. 1; St.1915, p. 1441.

[Ed. Note.—For other definitions of "Liability Created by Law," see Words & Phrases.]

3. Limitation of actions 🔑1

The purpose of the statute of limitations is to prevent stale demands.

4. Limitation of actions 🔑5(3)

Where question whether case is within statute of limitations pleaded is doubtful court should not indulge in strained construction in order to support plea.

5. Mandamus 🔑96

Holders of bonds issued by county under County Improvement Act of 1921 were entitled to writ of mandate to compel county to levy special tax to pay for lands purchased at delinquent assessment sale. St. 1921, p. 1658.

◆

Original proceeding for a writ of mandate by Norma V. McGrath and others, copartners transacting business under the firm name and style of Lord & Bishop, against Butte County and others, to compel the respondent to levy a special tax in the sum of $12,828.03 to pay for lands purchased at a delinquent tax sale.

Writ issued.

White & Harber, of Sacramento, for petitioners.

Joseph R. King, Jr., of Oroville, Grayson Price, of Chico, and Ralph O. Marron, of Monterey, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

By this writ of mandate, directed to the County of Butte, and to the members of the Board of Supervisors of that county, it is sought to compel them to levy a special tax in the sum of $12,828.03, to pay for lands purchased at a delinquent tax sale.

From the pleadings it appears that in 1930 a subdivision for summer home sites was laid out in the county of Butte. In order to construct a causeway over a lake to be created as a part of this project, the promoters of this tract solicited the board of supervisors to create an improvement district under the County Improvement Act of 1921 (Stats.1921, p. 1658), to be known as Butte County Improvement District No. 1. The board agreed and published its resolution of intention, designating the work proposed to be done, fixed the boundaries of the district to be benefited by the proposed improvements, described the proposed bond issue, and set forth other matters required by the County Improvement Act of 1921. Thereafter the proposed plan was adopted, bids were solicited and Lord & Bishop submitted a bid acceptable to the board. A contract was entered into between the County of Butte and Lord & Bishop, and bonds were issued to them when the work was completed according to specifications.

The first of the bonds matured on July 2, 1933. Assessments had been made for the payment of the bonds in the fiscal year 1932–33, but the owners of the lands affected failed to pay the assessments, and on August 30, 1933, there being no other holders, the tax collector of the county of Butte duly sold the property to the state on behalf of the county for $12,828.03, exclusive of interest and penalties. Since that time there has been paid into the redemption fund certain moneys, but far short of the amount for which the property was sold to the state.

This proceeding is now taken to compel the board to levy a tax sufficient to pay for the lands so purchased at the delinquent sale.

In answer to the petition respondents contend that these proceedings are based upon a liability created by statute and are barred by section 338, subdivision 1, of the Code of Civil Procedure.

In their memorandum of authorities respondents state: "It is unnecessary for this court to determine any of the issues raised by the pleadings save and except whether petitioners' alleged cause of action is barred by the statute of limitations," so we have restricted our consideration to that issue alone.

[1] Petitioners concede that we are not concerned with any amount other than $12,828.03, that being the sum for which the property was sold to the state of California for the benefit of the county of Butte. Hammond v. City of Burbank, 6 Cal.2d 646, 59 P.2d 495; Union Safe Deposit Bank v. City of Clovis, 23 Cal.App.2d 358, 73 P.2d 242. By this concession of petitioners and the foregoing authorities we are here concerned with the levy of a tax sufficient only to cover the balance due on the original

sale, and not for the total amount of the bond issue.

[2] Turning now to a consideration of the application of the statute of limitations, we do not find that the attempt of the petitioners to compel the board to levy a tax to pay for the lands purchased by the county is a liability created by statute, but is rather a proceeding to compel the performance of a duty as part of the contract created by the bond.

This matter appears to have been passed upon and determined by our Supreme Court in several proceedings. In Union Safe Deposit Bank v. Menlo Park, 3 Cal.2d 264, 43 P.2d 811, 812, petitioner set forth in its petition for a writ of mandate certain facts, among them the issuance of the bonds, and default in the payment of the assessments levied; the sale of the property against which the bonds were made a lien, and the refusal of the city to take the necessary legal steps to levy a tax to the extent and at the rate fixed by law, to apply on said bonds. The court there held that a mandatory duty rested upon the city to levy and collect the tax, holding that the failure to levy the tax in any year did not preclude the levy at a later date since the "duty * * * is a continuing obligation", for it was the duty of the city, under the Improvement Bond Act of 1915 (Stats.1915, p. 1441) to levy a tax, and if the city failed in any past year to make such levy, that duty continued, so as to enable the court in a subsequent proceeding to compel the same.

In Southern California Roads Co. v. San Luis Obispo County, 4 Cal.2d 220, 48 P.2d 34, the supervisors of that county had authorized bonds under the County Improvement Act of 1921 and the Improvement Bond Act of 1915 to pay for work on certain streets. The county refused to levy a tax to meet the obligation. The court there held (citing authorities) that "a mandatory and continuing duty exists to levy a tax, not exceeding 10 cents on each $100 for the assessed valuation, to pay overdue principal and interest on the bonds".

In Hammond v. City of Burbank, supra, it was held the duty to levy the tax is a continuing duty so long as the obligation to levy the same is shown to exist.

In that case the city of Burbank, in 1924, pursuant to the provisions of the Improvement Act of 1911, proceeded to improve certain streets, and bonds were issued to the contractor in payment of the work. Beginning with 1925 the first of the assessments for the payment of these bonds became delinquent, and in 1926 were sold by the county tax collector to the state of California. The same procedure was followed for each succeeding year as the bonds matured. In 1932 the tax collector made a demand upon the city that it provide funds for the payment of the delinquent assessments as required by the Improvement Bond Act of 1915.

The petition for a writ of mandate to compel the city to act in this matter was filed in July, 1935. The answer of the city to the petition pleaded laches, and that the action was barred by the provisions of sections 337, 338 and 339 of the Code of Civil Procedure. This point is extensively argued in the respective briefs, although not passed upon by the court in its opinion. Petitioners argue that the bondholders, having no right of action against the lot owners, are dependent upon the city for relief, and that the city, by the issuance of the bonds, has pledged itself to make and collect the assessments and to pay the same into a redemption fund, and not until this is done does the statute of limitations apply, the city becoming in effect a trustee. Sawyer v. Colgan, 102 Cal. 283, 36 P. 580, 834; Frechill v. Chamberlain, 65 Cal. 603, 4 P. 646.

Replying specifically to the application of section 338 of the Code of Civil Procedure, petitioners there point out that a writ of mandate brought before the city had refused to perform its duty would have been premature, as the right of action depended upon the refusal of the city to perform. Merril on Mandamus, sec. 226; City of Bisbee v. Cochise County, 44 Ariz. 233, 36 P.2d 559; State v. Bailey, 99 Mont. 484, 44 P.2d 740.

In reply, the city claimed, as do respondents here, that as against the right of petitioners to compel payment of his bonds out of the redemption fund no limitation has attached, and would not until there was money in the bond fund to pay for the bonds, but insist that this is an action to compel the city to buy and pay for property, and, therefore, the right of action arose at the time of the delinquency, citing Barnes v. Glide, 117 Cal. 1, 48 P. 804, 59 Am.St.Rep. 153; Brownrigg v. De Frees, 196 Cal. 534, 238 P. 714.

[3, 4] We do not believe the facts here justify the application of the plea of the statute of limitations. In California Savings & Loan Society v. Culver, 127 Cal.

107, 59 P. 292, it is stated that the purpose of the statute of limitations is intended to prevent stale demands, but when the facts relied upon leave it clearly in doubt whether the case is within the statute pleaded, courts should not indulge in a strained construction in order to support it.

In Kerr Glass Manufacturing Corp. v. San Buena Ventura, 7 Cal.2d 701, 62 P.2d 583, 586, the petitioner therein sought, by writ of mandate, to compel respondents to levy a tax sufficient to pay for all lands purchased which had been sold for delinquent improvement district assessment instalments. It also appeared that during the years, as the assessment instalments became due and remained unpaid, the city became the purchaser of the property but had not paid into the bond redemption fund the purchase price of such lands. Although the question there was as to the power to compel the bondholders to accept payment on a pro rata basis, the court did say, however, in approving Hammond v. City of Burbank, supra, "that the duty of the city to levy and collect the 10-cent tax is continuing only so long as advances to the redemption fund on account of the purchase price of lands sold to the state have not been made * * *."

In that case also respondent claimed petitioner was barred by section 338 of the Code of Civil Procedure, but the court failed to comment upon this defense. Inasmuch as the bar of the statute would have been a complete answer to the contention of respondents in both the Burbank and Kerr Glass cases, it seems reasonable to infer that the court was not impressed by the defense of the statute of limitations, and did not consider it applicable.

In Tillman Co. v. City of Seaside, 145 Or. 239, 25 P.2d 917, 921, facts somewhat similar to those at bar were presented and the question was whether or not the three-year statute of limitations barred the action. The court there held that the statute did not bar the bonds as to principal or interest, and that it would logically follow that it did not therefore bar the remedy. The statute not having run against the claim itself, "the exclusive remedy by which it may be enforced ought not to be barred. * * * It was a continuing duty on the part of officials of the city of Seaside to provide the funds with which to pay these warrants."

[5] Both reason and authority seem to hold that the relief here sought by petitioners is not barred, and it is therefore the order of this court that the writ issue requiring the respondent members of the Board of Supervisors of the County of Butte to ascertain the required amount, and to levy, in the manner provided by law, a special tax to pay for the lands purchased at the delinquent sale heretofore described, in an amount sufficient to place in the delinquent bond fund the purchase price of said lands.

I concur: THOMPSON, J.

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31 Cal.App.2d 111

JOHNSON v. SUPERIOR COURT IN AND FOR YUBA COUNTY et al.

Civ. 6166.

District Court of Appeal, Third District, California.

Feb. 16, 1939.

1. Divorce 🔑163

Trial court would have right to amend final divorce decree to correct apparent mistake in calculating amount of money judgment, awarded wife in settling property rights between parties, remaining unpaid at time of entry of final decree, or to correct any other clerical mistake in language of decree, though time for appeal or motion for new trial had lapsed. Code Civ.Proc. § 473.

2. Judgment 🔑321

A court has no jurisdiction to modify its judgment after time for appeal or motion for new trial has lapsed, except to correct clerical mistakes. Code Civ.Proc. § 473.

3. Certiorari 🔑7

Where appeal from amended final divorce decree was pending before Supreme Court, certiorari to Court of Appeal on ground that superior court did not have jurisdiction to modify decree after it became final would not lie.

4. Courts 🔑472(2)

Court of Appeal has no jurisdiction over proceedings pending in Supreme Court.

Petition by J. W. Johnson for writ of certiorari, against the Superior Court of the State of California, in and for the County of Yuba, and Warren Steel, Judge thereof, to cancel an amended final decree of divorce on ground that respondents were without jurisdiction to modify decree after it became final.

Petition for writ of certiorari dismissed.

Manwell & Manwell, of Marysville, for petitioner.

Loyd E. Hewitt, of Yuba City, Reuel Pomeroy, of San Francisco, and Morgan & Morgan, of Sacramento, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of review to cancel an amended final decree of divorce on the ground that the trial court was without jurisdiction to modify the decree after it became final.

April 8, 1937, Alice M. Johnson was granted an interlocutory decree of divorce from this petitioner, J. W. Johnson, on the ground of extreme cruelty. That decree determined, in accordance with findings which were adopted, that a previous purported agreement settling property rights between the parties, dated February 1, 1933, was procured by fraud and therefore void. The decree also awarded to Mrs. Johnson in settlement of her property rights the sum of $25,000 to be paid at the rate of $150 per month for the period of one year and thereafter $250 per month until the entire sum was fully paid, together with 5 per cent interest on the unpaid portion of the principal sum, payable annually. Upon the ex parte application of Mrs. Johnson, a final decree of divorce was entered on May 11, 1938, in which it was provided with respect to the award of money to be paid to her that this petitioner pay to his wife said sum of $25,000, less the sum of $8,662 which had been previously paid, leaving a balance of $16,348 with 5 per cent interest thereon from February 1, 1932, amounting to the aggregate unpaid balance of $19,771.99 as of April 8, 1937, to be paid according to the terms of the interlocutory decree at the rate of $150 per month until February 1, 1938, and at the rate of $250 per month thereafter until said balance is fully paid, together with 5 per cent interest on the unpaid balance of the principal sum, payable annually.

No appeal from that final decree was taken. Thereafter, on motion of Alice M. Johnson, and upon notice thereof, at which the respective parties were present in open court, when evidence was adduced in behalf of both parties, the court rendered what is termed "Decree Amending Final Decree of Divorce", on June 13, 1938, purporting to change merely the language of the original final decree awarding to Mrs. Johnson the payment of $25,000 and providing for the unpaid portion thereof. The specified instalments to be paid appear to be the same as those provided for in the original final decree.

From the last-mentioned order and amended decree this petitioner gave notice of appeal to the Supreme Court on July 14, 1938. That appeal is now pending in the Supreme Court.

[1] Upon this petition for a writ of certiorari, we are not directed to any material change in the provisions of the final amended decree different in effect from the final decree. It appears that the amended decree merely computed specifically the amount of money remaining unpaid at that time, pursuant to the terms of the interlocutory decree. Both parties appear to concede that fact. The respondents in this proceeding say in that regard that the original decree "was identical in form and which purported to do exactly what the order here complained of purports to do". The petitioner also says in that regard: "It is clear that this does not change in any way or modify the provisions of the Interlocutory Decree. It merely makes more definite and certain the provisions in the Interlocutory Decree."

If it be true that the amended decree does not change the material determinations of the court pursuant to the findings adopted, but merely more specifically computes the balance of the award of money remaining unpaid, or corrects mere clerical errors in the figures specified in the decree, the court on motion, or upon its own initiative, had a right to make such change under the provisions of the fourth paragraph of section 473 of the Code of Civil Procedure, which provides that: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

In the present proceeding, if the court merely corrected an apparent mistake in calculating the amount of the money judgment remaining unpaid at the time of the entry of the final decree, or if it merely corrected any other clerical mistake in the language of that decree, it had jurisdiction and was authorized to do so under the preceding section of the code.

[2] It is true that a court has no jurisdiction to modify or change its judgment after the time for presenting a motion for new trial has elapsed and the time for appeal therefrom has expired, except as provided in section 473 above cited. Lankton v. Superior Court, 5 Cal.2d 694, 55 P.2d 1170; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Wylie v. Wylie, 26 Cal.App.2d 167, 79 P.2d 152. But we are directed to no such substantial change of the final decree in this case.

[3, 4] Moreover, it appears an appeal from the amended final decree is now pending in the Supreme Court. While that proceeding is pending it is clearly improper for this court on certiorari or otherwise to interfere with that appeal. If for any reason that appeal is ineffectual we assume that upon proper motion it will be dismissed by the Supreme Court. This court has no jurisdiction over proceedings pending in the Supreme Court.

For the reasons stated we are of the opinion the proceedings in this certiorari matter should be dismissed. It is so ordered.

We concur: PULLEN, P. J.; TUTTLE, J.

WEST KEY NUMBER SYSTEM

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31 Cal.App.2d 71

FRIEDMAN v. RENZ.

Civ. 10796.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1939.

1. Trover and conversion 🔑49

Where property involved in action for conversion is of a fluctuating value, highest market value therefor between date of conversion and trial is proper measure of recoverable damages, provided one seeking damages has acted with reasonable diligence. Civ.Code, § 3336, as amended by St. 1931, p. 1358.

2. Trover and conversion 🔑49

Where plaintiff acted with reasonable diligence in bringing action for conversion of shares of stock, proper measure of damages was highest price stock would have commanded in open market between date of conversion and trial of action. Civ.Code, § 3336, as amended by St.1931, p. 1358.

3. Corporations 🔑123(15)

Stock was converted on date pledgee failed and refused to return stock after tender of principal and interest due him.

4. Trover and conversion 🔑40(6)

In action for conversion of stock, evidence established that highest market value of stock between date of conversion and trial was $4 per share and did not warrant conclusion that stock could have been sold for $7 per share. Civ.Code, § 3336, as amended by St.1931, p. 1358.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Action by J. Friedman against Walter J. Renz to recover damages for the conversion of shares of stock. Judgment for plaintiff, and defendant appeals.

Judgment modified, and as modified, affirmed.

J. G. Moser and Moser, Duncan, Seaman, Jackson & Gardiser, all of San Francisco, for appellant.

W. M. Collins and Theodore Tamba, both of San Francisco, for respondent.

GEARY, Justice pro tem.

Plaintiff and respondent, as the assignee to William D. Spruance, brought this action against defendant and appellant to recover damages for the conversion of 1,203 shares of stock of Fotoloid Company, a Nevada corporation. It appears from the complaint, and the court found, that on or about August 27, 1936, in San Francisco, Spruance assigned the stock in question, together with other stocks, to appellant Walter J. Renz, as collateral to secure the payment of twenty-two hundred ($2,200) dollars and interest. Thereafter, on or about December 31, 1936, Spruance tendered the above sum, with the interest due thereon, to appellant and demanded the return of the stock. Appellant refused to return the stock, claiming that shortly before that date he had disposed of the same for six hundred ($600) dollars. No notice of the intended sale of the stock, nor of the sale thereof, was ever given to Spruance. Shortly thereafter Spruance for a valuable consideration assigned all of his right, title and interest in said stock to respondent, who thereupon filed this action, seeking damages in the sum of seven thousand two hundred and eighteen ($7,218) dollars. The court, finding substantially in accordance with the allegations of the complaint, determined the highest market value of the stock between the date of the conversion and the trial of the action was eight thousand four hundred and twenty-one ($8,421) dollars or seven ($7) dollars per share, and deducting the sum due to appellant gave judgment for six thousand one hundred sixty-eight and 34/100 ($6,168.34) dollars.

Appellant contended upon the trial and in his briefs filed herein that the complaint did not state a cause of action for conversion; that under the facts there had been no conversion, and assuming there had been a conversion, the recoverable damage was the value of the stock upon the date the appellant sold the same, namely, six hundred ($600) dollars. Appellant now admits the conversion of the stock, but contends there is no evidence in the record to support the finding that the stock at any time between the date of the conversion and the trial, or any other time, was worth seven ($7) dollars per share, or any sum in excess of the sum of six hundred ($600) dollars.

The evidence herein discloses that on or about August 27, 1936, at the time the stocks were pledged to appellant, the stock in question was of uncertain value, the estimate thereof ranging from fifty cents (50c) per share, by appellant, to about two ($2) dollars per share, by Spruance. At all events there was very little activity in the stock and the same was not upon the market.

It is admitted, and there is evidence to establish, that on or about December 31, 1936, the market value of the stock was four ($4) dollars per share. Thereafter two blocks of stock of 3,000 shares each were sold by the corporation at $6 and $7 a share. These shares were sold under so-called "closed" permits issued by the corporation commissioner on February 9, 1937, and April 22, 1937, respectively, which imposed the following conditions: That the first lot of stock be sold to a certain named individual at $6 a share, all shares to remain in escrow with the corporation commissioner; and that the second lot be sold to four named individuals at $7 a share, all shares to remain in escrow with said commissioner. There was never a permit for nor a sale of the stock at public sale.

[1, 2] In so far as the same is applicable here, Civil Code, § 3336, as amended by St.1931, p. 1358, provides that the recoverable damages for a conversion of personal property is presumed to be the value of the property at the time of the conversion with interest, or such sum as will indemnify for the natural, reasonable and proximate result of such conversion and which a proper prudence could not have averted. In a proper case, and where the property in question is of a fluctuating value, the recovery of the highest market value therefor between the date of the conversion and the trial of the action will doubtless be the measure of damages, providing one seeking damages has acted with reasonable diligence. Page v. Fowler, 39 Cal. 412, 426, 2 Am.Rep. 462; Potts v. Paxton, 171 Cal. 493, 497, 153 P. 957; Bell v. Central Bank, 89 Cal.App. 551, 557, 265 P. 551. We deem this to be the proper measure of damages herein, and means the price the stock would command in the open market. Dean v. Hawes, 29 Cal.App. 689, 693, 157 P. 558.

[3, 4] The stock was converted on or about December 31, 1936, when appellant failed and refused to return the stock after the tender of the principal and interest due him. Thompson v. Toland, 48 Cal. 99, 116; Scrivner v. Woodward, 139 Cal. 314, 316, 73 P. 863; Vuich v. Smith, 140 Cal.App. 453, 455, 35 P.2d 365; McCoy v. Northwestern C. & S. Co., 3 Cal.App.2d 534, 537, 538, 39 P.2d 864. At that time there was a demand for the stock and at least two bids were made for it at four ($4) dollars per share. The evidence herein, including the testimony of appellant, not only establishes the market value of the stock at the time of conversion as being four ($4) dollars per share, but that is the highest market value established by the evidence. The price at which a thing is sold may be either some indication of its value or of faulty judgment upon the part of the purchaser. In view of the testimony of the circumstances surrounding the sales at six and later at seven dollars per share, the evidence falls far short of establishing the prices paid thereat as the market value of the stock. Marriner v. Dennison, 91 Cal.

555, 559, 27 P. 927, 1091; Fairchild, etc., Co. v. Southern Refining Co., 158 Cal. 264, 271, 110 P. 951; Murray v. Southern P. Co., 112 Cal.App. 150, 155, 296 P. 667. There is no evidence whatsoever warranting the conclusion that Spruance could have disposed of his stock for either six ($6) dollars or seven ($7) dollars per share.

Respondent herein is entitled to recover damages pursuant to his election at the trial, upon the basis of the highest market value of the stock between the date of conversion and trial, namely, at four ($4) dollars per share, less the sum of twenty-two hundred and fifty-two and 66/100 ($2,252.-66) dollars heretofore tendered the appellant. It is ordered, therefore, that the judgment be modified by reducing the amount thereof to $2,559.34 and as so modified the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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31 Cal.App.2d 39

GREER v. GREER.

Civ. 6097.

District Court of Appeal, Third District, California.

Feb. 14, 1939.

1. Divorce 🔑245(3)

Where appellant appeared at motion to modify divorce decree and through her counsel opposed motion and produced evidence, an issue of fact was raised, although appellant did not file counter affidavit or other pleading to notice of motion.

2. Divorce 🔑285

Whether such changed conditions in circumstances of respective parties to divorce proceedings were shown by evidence taken at hearing to modify decree as to justify modification by termination of payments for support and maintenance was not presented for consideration on appeal on the judgment roll where appellant failed to show findings of fact were not waived.

3. Appeal and error 🔑931(9)

On an appeal on judgment roll, when record presents a judgment without findings, presumption in its favor is that findings were waived, and appellant must overthrow presumption by embracing in his record on appeal an affirmative showing by bill of exceptions, statement or other appropriate methods, that findings were not waived.

4. Appeal and error 🔑1071(6)

The failure to find on a material issue will not warrant a reversal of judgment, if findings omitted must have been adverse to appellant.

5. Divorce 🔑286

Where issue on motion to modify decree of divorce was whether there was a change in circumstances of husband warranting modification of payments for support, and trial court ordered termination of payments, on appeal, wife could not complain of failure to make written findings, since findings would have been adverse.

6. Divorce 🔑245(1)

Where decree of divorce awarded payments for support to wife, a subsequent order permanently relieving husband from future payments was authorized under statute granting power to trial court to modify alimony allowances. Civ.Code § 139.

7. Divorce 🔑245(1)

The power granted to trial court to modify alimony allowances includes a right in proper cases to terminate finally the obligation to pay alimony. Civ.Code, § 139.

8. Divorce 🔑245(4)

Where divorce decree awarding payments for support to wife was subsequently modified by order relieving husband from future payments, order did not vacate or annul the divorce decree, which had become final. Civ.Code, § 139.

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Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Proceeding between Walter P. Greer and Zelma Greer, wherein Zelma Greer appeals, on the judgment roll alone, from an order modifying a decree of divorce by terminating payments to her for support and maintenance.

Order affirmed.

Gilford G. Rowland, of Sacramento, for appellant.

Chester F. Gannon and John B. Heinrich, both of Sacramento, for respondent.

ROSS, Justice pro tem., delivered the opinion of the court.

In an action for divorce appellant was granted a divorce from respondent on her cross-complaint, and respondent was ordered to pay $70 per month for her support for a period of 12 months, and thereafter $60 per month.

A motion was made by respondent in May, 1935, asking modification of the decree, but this was denied. In June, 1936, a second such notice was made, on proper notice, and submitted after hearing and argument. On this hearing testimony was heard in behalf of both parties. On July 9, 1936, the trial court made the following order:

"The motion of the plaintiff and cross-defendant herein to modify the final decree of divorce herein having come on regularly for hearing on Monday, the 20th day of June, A. D., 1936, and the plaintiff and cross-defendant appearing in person and by his attorney at law, Chester F. Gannon, and the defendant and cross-complainant appearing in person and by her attorney-at-law, Gilford G. Rowland, and oral and documentary evidence having been taken, and good cause appearing therefore,

"It Is Hereby Ordered, Adjudged and Decreed that the judgment of divorce herein made on the 7th day of March, 1934, and entered on the 7th day of March, 1934, in Book 72 of Judgments at page 68 thereof, be and the same is hereby modified by striking therefrom the order heretofore made and wherein plaintiff and cross-defendant was ordered to pay to the defendant and cross-compl*aint* herein the sum of $60.00 per month thereafter, and the plaintiff and cross-defendant is hereby relieved from the payment to defendant and cross-complainant herein of any sum whatsoever for defendant and cross-complainant's support and maintenance, after the 22nd day of December, A. D., 1936. That the said payment of $60.00 per month hereinbefore referred to shall continue until the said 22nd day of December, A. D., 1936, at which time all monthly payments shall be at an end and cease."

This appeal is taken from said order of July 9, 1936, and is on the judgment roll alone.

The appellant makes two main points:

First: That there was not sufficient, nor any, findings of fact to support the order, and that, there having been a trial of an issue of fact, findings were necessary;

Second: That the trial court does not have power to completely and permanently terminate the payments for support which had been included in the decree.

[1] Although appellant filed no counter-affidavit or other pleadings to the notice of motion of June, 1936, she did appear at the time set in the notice of motion and through her counsel opposed the motion and produced evidence. There was an issue of fact.

[2] The question whether such changed conditions in the circumstances of the respective parties were shown by the evidence taken at the hearing as to justify the modification made by the order of July 9, 1936, does not arise in this appeal on the judgment roll, but appellant claims there should be a definite finding of such changed conditions.

[3] "[On an appeal on the judgment roll], when the record presents a judgment without findings the presumption in its favor is that findings were waived. This presumption the appellant must overthrow by embracing in his record on appeal an affirmative showing by bill of exceptions, statement, or other appropriate method, that findings were not waived." Hutton v. Newhouse, 41 Cal.App. 689, 183 P. 276. This rule would seem to apply in the instant case. The only showing is the assertion of counsel, and the fact that no waiver appears in any of the minutes of the trial court which are included in the record on appeal.

[4] Regardless of any waiver of findings in the trial court, however, it would seem that appellant was not so aggrieved by any failure to file findings that she can object for the first time on appeal. Quoting, In re Connors' Estate, 110 Cal. 408, at page 413, 42 P. 906, at page 908: "Conceding, without deciding, that in a case of this kind findings are necessary, still the appellant was in no way 'aggrieved' by the failure of the court to make findings. The rule is that the failure to find on a material issue will not warrant a reversal of the judgment if the findings omitted must have been adverse to the appellant."

[5] In the instant case the sole issue was whether there was a changed condition in the circumstances of health, finances, etc., of the respondent, and it is apparent

from the order of modification that the trial court decided that there was such change, and any written finding would have therefore been adverse to appellant herein.

[6] As to the power of the trial court under section 139 of the Civil Code to permanently relieve a husband from future payments of alimony, we think the case of McClure v. McClure, 4 Cal.2d 356, 49 P. 2d 584, 100 A.L.R. 1257, is decisive of the question, and the holding in that case on the point in question does not appear to be dictum, as the point was directly in issue before the Supreme Court.

[7] Without quoting from that case at length, it is sufficient to say that the rule there laid down is that the power granted to the court to "modify" alimony allowances includes a right in proper cases to terminate finally the obligation to pay alimony.

[8] The order in the instant case does not vacate or annul the divorce decree, which concededly had become final, but merely strikes therefrom the provision for payments of alimony as applicable to a period in the future, which follows closely the approved procedure in the McClure case.

The order appealed from is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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31 Cal.App.2d 125

PURDY v. MAREE.

Civ. 12042.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1939.

1. Limitation of actions 🔑155(3)

Payment by principal obligor will not toll statute of limitations as to guarantor in suit on guaranty by obligee, in absence of provision in contract to that effect.

2. Limitation of actions 🔑155(3)

Under contract of guaranty that guarantor would be responsible for indebtedness of corporation to bank arising on notes, acceptances, drafts, renewals, indorsements, or other obligations, payment by corporation on indebtedness did not toll statute of limitation as to guarantor.

3. Limitation of actions 🔑163(1)

Under Michigan law, part payment on obligation prior to time statute of limitations has run tolls statute.

4. Limitation of actions 🔑163(3)

Under Michigan law, effect of part payment prior to time statute of limitations has run is to vitalize the old debt for another statutory period dating from time of part payment and payment does not create new obligation but action to collect debt is predicated upon original obligation.

5. Limitation of actions 🔑163(3)

Under Michigan contract of guaranty guaranteeing among other indebtednesses of principal "other obligations" of principal to bank, part payment by principal on obligation prior to time statute of limitations had run thereon did not create a new obligation for which guarantor was liable.

6. Limitation of actions 🔑46(10)

The liability of guarantor on Michigan contract of guaranty executed April 2, 1928, was barred by California statute of limitations August 1, 1935.

7. Pleading 🔑225(1)

Where action on contract of guaranty was not filed until after defendant's liability was barred by statute of limitations trial court properly sustained demurrer without leave to amend.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by C. Henry Purdy, as receiver of the First State Savings Bank of Birmingham, Mich., against A. M. Maree, Jr., on contract guaranteeing payment of indebtedness of a corporation to the First State Savings Bank of Birmingham, Mich. From a judgment sustaining a demurrer to the complaint without leave to amend, the plaintiff appeals.

Affirmed.

Aaron Levinson, of Los Angeles, for appellant.

Eckman & Lindstrom, Ralph G. Lindstrom, and Arthur W. Eckman, all of Los Angeles (R. L. Moore, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

From a judgment sustaining a demurrer to plaintiff's complaint without leave to amend, plaintiff appeals.

The essential facts alleged in the complaint are:

(1) On April 2, 1928, at Birmingham, Michigan, for the purpose of inducing the bank of which plaintiff is receiver to extend credit to Murphy, Rosborough and Maree, Inc., a corporation, defendant executed an agreement, which was substantially as follows:

Defendant, E. H. Murphy and A. J. Rosborough, in consideration of the extension of credit by the bank of which plaintiff is receiver to Murphy, Rosborough and Maree, Inc., jointly and severally guaranteed the payment to the bank of any indebtedness of Murphy, Rosborough and Maree, Inc., that remained unpaid, and that they would remain liable for any money loaned directly to the corporation by the bank to the amount of $7,500, and would be liable to the bank for a sum not exceeding $5,000 upon credit extended by the bank to the corporation as an endorser or guarantor of the obligations of others, together with interest thereon, whether the indebtedness of the corporation to the bank arose upon notes, acceptances, drafts, renewals, endorsements or other obligations. They further waived notice of the acceptance of the guaranty and of any and all indebtedness at any time covered by the same and of demand and notice of protest on all notes and other obligations representing any indebtedness.

(2) Thereafter the bank loaned money to said corporation aggregating the sum of $7,595, and prior to the time the statute of limitations had run (April 23, 1937) payment was made on the notes by the corporation.

These are the questions to be determined:

First: Will payments by a principal obligor toll the statute of limitations as to his guarantor in a suit by the obligee upon the contract of guaranty against the guarantor, in the absence of a provision in the contract of guaranty that the statute of limitations is to be tolled as to the guarantor by such payments?

Second: Did the part payment by the principal obligor on its obligation prior to the time the statute of limitations had run upon the same create a new obligation for which the guarantor was liable by the terms of his contract of guaranty, wherein he guaranteed among other indebtednesses of the principal obligor "other obligations" of the principal obligor?

[1, 2] The first question must be answered in the negative. Though there is authority to the contrary, the clear weight of authority in the United States, and we believe the better law, is that a payment by a principal debtor will not operate to toll the statute of limitations as to a guarantor. Corbyn v. Brokmeyer, 84 Mo.App. 649, 653; Broadway Bank & Trust Co. v. Longley, 116 Conn. 557, 165 A. 800, 802; Northwest Thresher Co. v. Dahltorp, 104 Minn. 130, 116 N.W. 106; Wachovia Bank & T. Co. v. Clifton, 203 N.C. 483, 166 S.E. 334, 84 A.L.R. 725, 729. Since the guaranty in the present case was that defendant would be responsible for the indebtedness of the corporation to the bank arising "upon notes, acceptances, drafts, renewals, endorsements or other obligations", it is evident that there was no provision in the guaranty providing that a payment by the principal debtor would toll the statute of limitations as to defendant, a guarantor.

[3, 4] The second question must also be answered in the negative. The law is established in states such as Michigan, where part payment upon an obligation prior to the time the statute of limitations has run tolls the statute of limitations, that the effect of the part payment is to vitalize the old debt for another statutory period dating from the time of the part payment and an action to collect the debt is predicated upon the original obligation. No new obligation is created by the part payment upon which the obligee may predicate a cause of action. 37 Cor.Jur. (1925) 1171, sec. 651; 16 Cal.Jur. (1924) 595, sec. 192, note 16; 7 Cal.Jur. Ten Year Supp. (1936) 644, sec. 192; Dixon v. Bartlett, 176 Cal. 572, 573, 169 P. 236; Maurer v. Bernardo, 118 Cal.App. 290, 293, 5 P.2d 36; National C. Mfg. Co. v. San Diego C. Co., 9 Cal.App. 111, 113, 98 P. 64.

[5] Applying the foregoing rules to the instant case, since a new obligation was not created by the payment by the principal obligor, defendant is not liable because of his guaranty to pay "other obligations" of the bank.

[6, 7] It is conceded that, unless the part payment by the principal debtor on April 23, 1937, either tolled the statute of

limitations as to the guarantor or created a new obligation, defendant's liability in California was barred by the statute of limitations on August 1, 1935. Therefore, since the present action was not filed until June 2, 1938, the trial court properly sustained the demurrer interposed by defendant without leave to amend.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

30 Cal.App.2d 725

AVALOS v. GRIMALE.

Civ. 10653.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1939.

1. Automobiles 🔑245(80)

In action arising out of automobile collision at intersection which constituted an obstructed highway, plaintiff's contributory negligence was for jury under evidence that plaintiff saw defendant's automobile approaching at excessive speed, but continued to cross intersection because he had the right of way and believed defendant was slowing down. St.1935, p. 93.

2. Automobiles 🔑206

Where intersection was an "obstructed highway" within terms of statute, driver entering the intersection first had the right of way and right to assume that approaching driver would yield the right of way and slow down. St.1935, p. 93.

3. Automobiles 🔑245(80)

Whether a plaintiff, after observing approach of an automobile, its position and speed, was justified in proceeding upon his rightful way across an intersection, presents a jury question.

4. Automobiles 🔑206

One entering an intersection who observed automobile approaching at excessive speed was not bound to keep a continuous outlook in such automobile's direction nor to anticipate that such automobile would increase speed, but was entitled to assume that driver would slow down and yield the right of way.

5. Negligence 🔑136(9)

Contributory negligence is usually a fact question and becomes a question of law only when evidence is of such character that it will support no other legitimate inference.

◆

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Frank Avalos against Stanley Grimale for injuries suffered in automobile collision. From a judgment on a verdict for plaintiff, defendant appeals.

Affirmed.

Benjamin F. Curtaz and Carroll B. Crawford, both of San Francisco, for appellant.

William M. Malone, of San Francisco (Raymond L. Sullivan, of San Francisco, of counsel), for respondent.

TYLER, Presiding Justice.

This is an appeal by defendant from a judgment for plaintiff in the sum of $5,000 for personal injuries and property damage caused by the collision of two automobiles. From the judgment on the verdict defendant has taken this appeal, contending that plaintiff was guilty of contributory negligence as a matter of law.

There was evidence to show that the collision occurred at the intersection of Sixteenth and Valencia streets in the city and county of San Francisco, which intersection is an obstructed highway within the meaning of the California Vehicle Act (St.1935, p. 93). There were no arterial stop signs on any corner and no automatic traffic signals in operation at the time. The plaintiff was operating his Ford coach automobile in a general easterly direction along Sixteenth street. Proceeding at a speed of about twenty miles an hour throughout most of the block between Guerrero and Valencia streets, he began to retard his speed when about fifty or seventy-five feet back from the corner of Valencia street, so that the speed of his Ford car was about eight to ten miles per hour at the west building line of Valencia street. When the Ford entered the westerly boundary of the intersection its speed had slackened to four or five miles an hour. Upon entering the intersection, and at a point about four feet east of the westerly property line of Valencia street, plaintiff made a traffic observation to the south along the latter street. He saw the defendant's automobile at a distance of about one hundred fifty feet south of the south curb line of Sixteenth street, traveling in a northerly direction at a speed of about 40 miles per hour. After this observation, and somewhere between the west property line and the west curb line of Valencia street, plaintiff shifted into second gear and thereafter traveled in the same gear up to the time the collision occurred. He entered the intersection and shortly thereafter made another observation to the south, whereupon he saw defendant's automobile about seventy-five feet south of the south curb line of Sixteenth street, its speed reduced to about twenty-eight to thirty miles an hour. Plaintiff thereupon, thinking the defendant was going to slow down, continued across the intersection at a speed of about eight or ten miles an hour, making observations for traffic in other directions. When the front of his Ford automobile was approximately ten feet away from the easterly curb of Valencia street, he saw the jitney bus, operated by defendant, for the third time, going about forty miles per hour, and about two feet south of the south curb of Sixteenth street. Plaintiff then turned sharply to the left to avoid the impending collision. The front part of the jitney came into collision with the right rear fender of the Ford, pushing the Ford northerly across the intersection for twenty feet, when it tipped over. Plaintiff's left hand was crushed between the side of the Ford and the pavement. He suffered fractures and pronounced dislocation of the metacarpal bones, the destruction of the palmar fascia and the loss of the palmar arch, all causing deformity, shortening of the hand and permanent limitation of function. Plaintiff underwent two operations; was hospitalized for a total period of five weeks and received medical attention for about seven months, during which time he was obliged to remain away from his work. The injury to his hand is permanent and will prevent him from doing any hard labor in the future.

[1-3] Under these facts there is no merit in the claim that plaintiff was guilty of contributory negligence as a matter of law. The evidence shows that plaintiff used ordinary care in approaching, entering and traversing the intersection. The rule governing situations like the instant case, where the plaintiff has used due care and caution in making traffic observations and proceeding across the intersection, is well established. Plaintiff, having entered the intersection first, had the right of way over defendant's car. Furthermore, the plaintiff, as a reasonable and prudent person, had the right to assume that defendant would obey the law and yield the right of way at the intersection. Nor is the plaintiff required to yield the right of way to one a considerable distance away, whose duty it is to slow down in crossing an intersection. Whether or not a plaintiff, after observing the approach of a car, its position and the rate of speed at which it is traveling, is justified in proceeding upon his rightful way across an intersection in advance of defendant, presents a question upon which reasonable minds might differ and is therefore one for the jury to determine. Couchman v. Snelling, 111 Cal. App. 192, 295 P. 845; Page v. Mazzei, 213 Cal. 644, 3 P.2d 11.

[4, 5] Nor is there any merit in the contention that plaintiff, having positive knowledge that the jitney was exceeding the speed limit, was guilty of contributory negligence as a matter of law in proceeding across the intersection. In the instant case, although plaintiff on the first observation saw the defendant one hundred fifty feet south of the intersection, approaching at a speed of forty miles an hour, he later, after he had entered the intersection, saw the jitney seventy-five feet away traveling at a decreased speed. Plaintiff thought the driver of the jitney would slow down. Under the authorities he was entitled to assume that he would. He was not bound to anticipate that defendant would increase his speed as he did, and enter the intersection at an unlawful speed of forty miles per hour. The jury, having established these and all other facts bearing upon the conduct of plaintiff, resolved the implied finding of absence of contributory negligence in favor of plaintiff. This finding is fully supported by the evidence. The isolated fact that defendant, when seen on the first two occasions by plaintiff, was traveling at an unlawful speed, cannot take the issue of contributory negligence from the hands of the jury. Neither was plaintiff bound to look continuously in the direction of defendant when about to cross the medial line of Valencia street. Plaintiff was not obligated to keep a continuous outlook in his

direction. Moreover, seeing him slow down, he was entitled to assume he would yield the right of way to plaintiff. Briggs v. Koyer, 138 Cal.App. 487, 32 P.2d 649. One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, and it is not negligence to fail to anticipate danger which can come only from a violation of law or duty on the part of another. We can not say, therefore, that plaintiff was guilty as a matter of law of contributory negligence if he failed to keep a continuous watch of defendant's car. There were pedestrians on the corners of the intersection, which it was plaintiff's duty to observe. It can seldom happen that the question of contributory negligence is so clear from doubt that the court can undertake to say as a matter of law that the jury could not fairly and honestly find for the plaintiff. The question is usually one of fact and becomes a question of law only when the evidence is of such a character that it will support no other legitimate inference. Couchman v. Snelling, supra.

The judgment is affirmed.

We concur: KNIGHT, J.; WARD, J.

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30 Cal.App.2d 722

WESTERN COOPERATIVE DAIRYMEN'S UNION v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

Civ. 6192.

District Court of Appeal, Third District, California.

Feb. 8, 1939.

1. Prohibition ⇨4, 10(1)

Issuance of writ of prohibition to restrain further proceedings in action pending before superior court rests largely in discretion of District Court of Appeal, and will only issue where superior court is proceeding in excess of its jurisdiction.

2. Prohibition ⇨10(2)

Prohibition would not lie to restrain further proceedings in action in superior court to enforce provisions of Bovine Tuberculosis Act, wherein an injunction restraining violation of the act was issued, where superior court had jurisdiction to issue the injunction, the act was constitutional, and there was no reason to assume that superior court would commit any act in excess of its jurisdiction. St.1933, pp. 97–105, §§ 221–254.

3. Prohibition ⇨5(1)

A writ of prohibition, interfering with the exercise of the functions of a superior court, should not lightly be issued.

Original proceeding by the Western Cooperative Dairymen's Union against the Superior Court of the State of California, in and for Merced County, and the Honorable E. N. Rector and the Honorable H. S. Shaffer, Judges thereof, for writ of prohibition to restrain the respondents from taking any further proceedings in an action pending before them.

Application for peremptory writ of prohibition denied.

J. L. Royle, of Fresno, for petitioner.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and F. A. Silveira, Dist. Atty., of Merced, for respondents.

PER CURIAM.

By this petition for a writ of prohibition the Western Cooperative Dairymen's Union seek to restrain respondents from taking any further proceedings in an action now pending in the county of Merced, entitled "People of the State of California v. Western Cooperative Dairymen's Union, etc., et al.," No. 12242 in the records of said county.

Briefly that complaint sets forth the efforts on the part of the People to enforce the provisions of the Bovine Tuberculosis Act (Agricultural Code, div. II, chap. 3, art. III, secs. 221–254, St.1933, pp. 97–105), and the acts and conduct of the defendants named therein tending to interfere with and impede the carrying out of the terms of said act, and asked for an order restraining those defendants from resisting the administration and enforcement of said act. Based upon such complaint a preliminary injunction was issued, wherein it was ordered:

"* * * that the said defendants Western Co-operative Dairymen's Union, a nonprofit Co-operative Agricultural Marketing Association, C. J. Espinola, W. J. Espinola, Augustine L. Ferreira, Joe C. Gracia, Rollin F. Laurence, Joaquin Oliveira, Joe R. Oliveira, Antone J. Pimentel, Frank C. Robeiro, Antonio F. Silva, George A. Silveira, Bernard Souza, Saverino M. Souza, John Toledo, Joseph V. Lawrence, and each of them, their officers, agents, members, attorneys, servants, employees, or anyone acting for or on behalf of them, or any of them, are hereby enjoined from in any manner, or at all, directly or indirectly, refusing to permit or allow, or resisting the administration of the tuberculin test, under and by virtue and otherwise the administration and enforcement of Article 3, Chapter 3, Division II of the Agricultural Code of the State of California, or aiding, abetting, exhorting, advising, counseling or persuading other owners of dairy cattle within the State of California and subject to the aforesaid provisions of said Code from doing likewise."

In reply to this petition for a writ of prohibition now before us, respondents have demurred on the ground that the petition failed to allege facts sufficient to state a cause of action for the issuance of the writ, and also answered alleging that the matters set forth in the petition had been heretofore considered by this court in Affonso Bros. v. Brock et al., Cal.App., 84 P.2d 515; that a similar proceeding has been heretofore presented to the Supreme Court and there denied; that the preliminary injunction is neither uncertain nor ambiguous, and that petitioner has a plain, speedy and adequate remedy at law.

[1, 2] The issuance of such a writ as here sought rests largely in the sound discretion of the court, and will only issue where the court is proceeding in excess of its jurisdiction. There is no question but what the court had jurisdiction in the instant case to issue the injunction complained of, and while there may have been some uncertainty as to the constitutionality of the act in question, the same has now been declared constitutional, and the rights of this petitioner and others affected by the restraining order are now more clearly defined, and undoubtedly many of the points formerly in dispute will not again arise.

Inasmuch as prohibition is not concerned with proceedings already had, it would be necessary to anticipate that the superior court would commit some act in excess of its jurisdiction. There is here no foundation for such assumption.

[3] An order interfering with the exercise of the functions of a superior court should not be lightly issued. If a question should arise in the future as to the interpretation of the terms of the preliminary injunction, undoubtedly relief can be obtained by a writ of review, which will adequately protect petitioner and its members.

For those reasons the application for the peremptory writ should be denied. It is so ordered.

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31 Cal.App.2d 104

SHEDD v. DOWNIE.

Civ. 6067.

District Court of Appeal, Third District, California.

Feb. 16, 1939.

1. Trial ⚷404(4)

Finding that all of plaintiff's injuries and damages "were directly and proximately caused by the carelessness and negligence of the plaintiff" necessarily included a determination that plaintiff was guilty of contributory negligence proximately contributing to the accident, notwithstanding failure to adopt specific finding to that effect.

2. Automobiles ⚷244(6)

Evidence that automobile driver saw lights of truck parked on wrong side of highway on dark night, but believed that truck was approaching on proper side of highway, authorized finding that driver was not negligent in attempting to pass the truck and striking truck driver who was crossing highway.

3. Automobiles ⚷244(50)

In action by driver of milk truck for injuries suffered when struck by automobile at night while crossing highway between truck and cart, evidence justified denial of recovery on ground that driver was guilty of contributory negligence in parking truck on paved portion of highway, which contributed to the accident. St.1935, p. 190, §§ 582, 583.

* * *

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Harry W. Shedd, true name Harry H. Shedd, against Hubert Downie, also known as Hubert Downey, true name

C. H. Downie, for injuries suffered in automobile accident. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hjelm & Hjelm, of Turlock, for appellant.

Yale S. Kroloff, of Oakland, and Griffin & Boone, of Modesto, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him in a suit for damages for injuries sustained in an automobile casualty.

At 8 o'clock at night, February 15, 1937, the plaintiff was engaged in collecting milk products along a route which he had traveled for five years. It was a very dark night. He was driving his milk truck easterly on a country road called Doersken avenue four miles north of Denair in Stanislaus county. The highway was paved with asphalt 14½ feet in width, with seven-foot shoulders on either side gradually sloping down to a shallow ditch. He drove his truck across the highway to the northerly side and parked at the premises of a customer named Wheatley to procure some cans of milk. Water stood in the ditches at various points, but it does not appear there was any water opposite the Wheatley place. At that point there was a cart containing cans of milk standing near the property line about twelve or fifteen yards from the place where he stopped his machine, which cans he intended to transport to his truck. The bed of the truck was six feet, ten inches in width. He parked the truck on the northerly side of the paved portion of the highway, as the defendant said. At least it extended over the paved portion a distance of four feet, with scant space between it and the cart for a machine to pass. His truck was headed easterly and it was left with the lights burning and the engine running. He had observed the headlights of a machine approaching from the east, at a distance of about a quarter of a mile, just as he crossed the highway to the wrong side. He paid no further attention to the approaching automobile, but got out of his truck and proceeded to cross the intervening space to obtain the milk cans from the cart. It was unusually dark at that point. Trees which grew along the margin of the highway in that vicinity helped to increase the darkness. There were no lights except the headlights from the two machines involved in the casualty.

As the defendant approached, driving his automobile at a rate of 25 or 30 miles an hour, he first observed the lights of the parked truck when he was 400 or 500 feet away, but he was unable to locate the position it occupied on the highway or to determine that it was stationary. He supposed it was a machine approaching on its proper side of the roadway. The defendant testified that he did not realize the truck was on the wrong side of the highway until he reached a point about 25 feet from the parked truck. He said he did not then realize the truck was stationary, but assumed the driver would guide his machine so as to pass him on the proper side and avoid a collision. The defendant thought he removed his foot from the accelerator to decrease the speed of his car. He did turn to his right hand until his machine was entirely off the paved portion on the graveled shoulder of the highway. His purpose was to pass the truck on the proper side and to avoid a collision in the emergency which confronted him. Not until his car was within a few feet of the parked truck did he realize that the machine was stationary on the highway. The headlights of the parked truck blinded him so that he did not appreciate the real situation, and he was therefore not able to see the plaintiff who was then crossing the intervening space to the milk cart near the rear end of his truck. The defendant promptly applied his brakes when he saw the plaintiff, but was unable to stop his machine in time to avoid striking him. The plaintiff was hit and injured. The defendant stopped immediately and went to his assistance.

The plaintiff brought this suit for damages for injuries sustained as the result of alleged negligence on the part of the defendant. The answer denied negligence on the part of the defendant and affirmatively alleged that the accident occurred solely as a result of the contributory negligence of the plaintiff. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the defendant. The court determined that the defendant was free from negligence, and that the accident occurred solely as a result of the plaintiff's own negligence. A judgment was rendered to the effect that the plaintiff take nothing by his action. From that judgment this appeal was perfected.

This appeal presents two questions, namely: Is there substantial evidence to support the finding that the defendant was free from negligence? Secondly, if the defendant was guilty of negligence in failing to observe the truck on the wrong side of the highway, and in failing to stop his machine, was the plaintiff also guilty of contributory negligence which precludes him from recovering damages in this suit?

It is asserted the court failed to adopt a specific finding that plaintiff was guilty of contributory negligence. But it did determine: "That it is true that all of the alleged injuries and damages sustained by the plaintiff as set forth in plaintiff's complaint were directly and proximately caused by the carelessness and negligence of the plaintiff, and that the carelessness and negligence of the plaintiff was the sole and only cause of all the injuries and damages alleged to have been sustained by the plaintiff."

[1] The preceding finding necessarily includes a determination that the plaintiff was guilty of contributory negligence which proximately contributed to the accident.

[2] We are of the opinion there is substantial evidence to support the finding that the defendant was free from negligence. While it does seem strange the defendant did not observe the fact that the truck was parked on his side of the highway until he reached a point less than 25 feet away, the following facts furnish adequate support of that assertion by the defendant. We may not hold as a matter of law that he did not act as a reasonable person, under the circumstances of this case. It was unusually dark in the vicinity where the accident occurred. Overhanging trees on either side of the highway helped to increase the darkness. The black asphalt pavement made it difficult to locate the roadway or the position of a machine with relation thereto. The glaring of the headlights of the truck prevented a clear view of surrounding objects. It was impossible for the defendant to see the plaintiff immediately behind the glare of his headlights. There was no light on the milk cart opposite the truck. The defendant had a right to assume that a machine would not be parked on the wrong side of the pavement. When he reached a point less than 25 feet from the truck, traveling at a rate of 25 or 30 miles an hour, and seeing no obstruction on the right shoulder of the highway, in the emergency which confronted him he may not be charged with negligence in attempting to pass the truck on the proper side. He did not see the plaintiff until his machine was so close it was impossible for him to stop his car. We may not say, under such circumstances, that the defendant was guilty of negligence as a matter of law.

The case of Yates v. Morotti, 120 Cal. App. 710, 8 P.2d 519, upon which this appellant relies, is not in conflict with the distinguishing facts of the present action. The judgment in that case was affirmed. The question which was there involved was whether there was substantial evidence to support the finding of the defendant's negligence. In that case the plaintiff's automobile was also parked on the wrong side of a street in Stockton, contrary to an ordinance of that city. The evidence disclosed the fact that the defendant saw the parked car and knew of its location on the wrong side of the street while his machine was 75 feet away. The street was not obstructed with other vehicles and it was well lighted in that vicinity. The defendant was running along a city street at a high rate of speed contrary to the law. His car was zigzagging from one side of the street to the other. He had ample warning to enable him to stop his car or to direct his course so as to avoid the collision. That judgment was affirmed on the specific ground that the defendant had the last clear chance of avoiding the collision. That case is readily distinguishable from the facts of the present case in several material respects.

Likewise, the case of Bauhofer v. Crawford, 16 Cal.App. 676, 117 P. 931, upon which the appellant also relies, is clearly distinguishable from the facts of this suit. In that case an order granting a nonsuit was reversed on appeal. The plaintiff was driving a milk wagon in the night time. He had parked on the wrong side of a street in the city of Alameda. The wagon stood within two feet of the curbing, with its lamps burning. The street was well lighted and there were no other vehicles in sight. The defendant was driving his automobile down the street at the slow rate of 10 or 15 miles an hour. He saw the wagon in ample time to have stopped his car. He attempted to drive his machine between the wagon and the curbing. It was evident there was not room to pass the wagon. A collision occurred and the plaintiff was injured. Since that case was decided in 1911, the statutory provisions regarding the parking of vehicles on the highway have been adopted. The facts of that case were vitally different from those of the present case.

[3] We are also of the opinion the evidence in this case indicates that the plaintiff was guilty of contributory negligence in parking his machine on the paved portion of the highway contrary to the provisions of Sections 582 and 583 of the Vehicle Code, St.1935, p. 190, and that his violation of the statutes contributed to the accident which caused his injuries, precluding him from recovering damages in this suit.

Section 582 of the Vehicle Code provides that: "Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway."

The following section of that Code provides: "In no event shall any person stop, park or leave standing any vehicle, whether attended or unattended, upon any highway outside of a business or residence district unless not less than fifteen feet of the width of the paved or improved or main traveled portion of the highway opposite such stopped, parked or standing vehicle is left clear and unobstructed for the free passage of other vehicles."

Clearly the plaintiff in this case violated the first of the above quoted sections by parking on the paved portion of the highway when apparently it was practicable for him to have driven off the pavement on the graveled shoulder which was seven feet in width with ample room and opportunity to have done so. In support of the finding adopted by the court to the effect that it constituted contributory negligence for him to have parked on the paved portion of the highway under the circumstances of this case, there is substantial evidence the plaintiff could and should have parked on the graveled shoulder of the highway, and not on the paved portion. We are also of the opinion there is adequate proof that his parking on the paved portion with the intervening available space of at least seven feet of shoulder on the northerly side was an inducement for an approaching automobile from the east to attempt to pass on its proper side, and that the conduct of the plaintiff in so parking on the pavement contrary to the inhibition of the statute contributed to the accident which resulted in the plaintiff's injuries. It follows that the evidence supports the finding of plaintiff's contributory negligence which precludes him from recovering damages in this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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31 Cal.App.2d 75

KELLY v. LIDDICOAT et al.

Civ. 10868.

District Court of Appeal, First District,
Division 1, California.

Feb. 16, 1939.

1. Appeal and error 🔑786

A motion to dismiss appeal, on ground that appeal was taken for delay only, should not be granted where it appears after examination of opening brief and papers filed in support of motion that appeal cannot be decided without examining entire record. Rules for the Supreme Court and District Courts of Appeal, rule 5, § 3.

2. Appeal and error 🔑786

Where appellants' opening brief was directed to sufficiency of answer and respondent contended that procedure pursuant to motion for summary judgment excluded consideration of answer's sufficiency, examination of record was required and hence motion to dismiss appeal as being taken for delay was required to be denied. Code Civ. Proc. § 437c; Rules for the Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action on three notes by V. Kelly against W. J. Liddicoat and another. From a summary judgment for plaintiff, defendants appeal. On motion to dismiss the appeal or affirm the judgment on ground that appeal was taken for delay only.

Motion denied.

A. D. Schaffer, of San Francisco, for appellants.

Frank V. Campbell and Harvey C. Miller, both of San Jose, for respondent.

KNIGHT, Justice.

This is a motion, presented under the authority of section 3 of rule V of the Rules for the Supreme Court and District Courts of Appeal, to dismiss the appeal or affirm the judgment on the grounds that the appeal was taken for delay only and that the questions upon which the decision of the case rests are so unsubstantial as not to need further argument.

[1] It has been repeatedly held, however, that such a motion should not be granted where it appears, after an examination of the opening brief and the papers filed in support of the motion, that the appeal cannot be decided without examining the entire record. Rasmussen v. Fresno Traction Co., 11 Cal.App.2d 357, 53 P.2d 1038; Brown v. Gow, 126 Cal. App. 113, 14 P.2d 322; Ross v. Mahoney, 134 Cal.App. 199, 25 P.2d 268; Barr v. Hall, 9 Cal.App.2d 426, 49 P.2d 1124; Birkhofer v. Krumm, 24 Cal.App.2d 372, 75 P.2d 82, and cases cited therein. Obviously this is such a case.

[2] The action was one to recover on three promissory notes given by the defendants to one F. J. McSherry, and subsequently assigned to and sued upon by the plaintiff Kelly. Defendants' third amended answer to the complaint admitted the execution, delivery and non-payment of said notes, but alleged that plaintiff was not the holder thereof in due course, or for value, or before maturity; and by way of set-off they pleaded these facts: that they were copartners with F. J. and Joseph McSherry in operating a public food market; that they purchased the McSherrys' interests in said copartnership, and in payment thereof gave said notes; that subsequently they discovered that the McSherrys had collected and received certain sums of money belonging to the copartnership, which were retained by them for their own use and benefit; and that therefore defendants were entitled to have said sums applied as a set-off against the amount called for by said notes. Plaintiff demurred to said answer upon the grounds that the facts pleaded were insufficient to constitute a defense; that recovery thereunder was barred by the statute of limitations, and that the allegations of the special defense were uncertain, ambiguous and unintelligible, for the reasons set forth in the demurrer. The demurrer was sustained by a general order, and twelve days later plaintiff served and filed notice of motion "to strike out the answer * * * and to enter judgment in favor of plaintiff on the ground that there is no defense to the action". The motion was granted, and a summary judgment was entered against defendants for the full amount sued for, together with attorney's fees. Section 437c of the Code of Civil Procedure authorizing the entry of summary judgments provides that "a judgment entered under this section is an appealable judgment as in other cases". Defendants took such an appeal, and their opening brief is directed principally to the question of the legal sufficiency of the third amended answer. Plaintiff contends, however, in support of his present motion, that the proceedings had pursuant to the motion for summary judgment are such as to exclude from consideration any question of the sufficiency of said third amended answer. Necessarily a determination of the points urged by him in this behalf, as grounds for affirmance of the judgment, will require an examination of the entire record. The motion is therefore denied.

I concur: TYLER, P. J.

31 Cal.App.2d 30

PORTMAN et ux. v. KEEGAN.

Civ. 5984.

District Court of Appeal, Third District,
California.

Feb. 10, 1939.

Hearing Denied by Supreme Court
April 10, 1939.

1. Trial 🔑345

Any error committed by jury with respect to form of verdict or failure of jury to find on certain issues was waived, where there was no objection to form of verdict when it was brought into court and announced. Code Civ.Proc. § 619.

2. Trial 🔑345

Where verdict indicated that only issues adjudicated were those raised by cross-complaint and answer thereto, plaintiffs who waived error committed with respect to its form did not waive right to have issues raised on complaint subsequently submitted for an adjudication. Code Civ.Proc. § 619.

3. Malicious prosecution 🔑56

A plaintiff suing for malicious prosecution must show that defendant acted without probable cause and that he was actuated by malice.

4. Malicious prosecution 🔑31

The existence of malice may be inferred by jury in malicious prosecution action from acts or declarations of malicious prosecution defendant expressing or indicating prejudice, ill will, or malicious motive in the matter of the prosecution.

5. Malicious prosecution 🔑32

Although malice is not presumed to exist from malicious prosecution defendant's want of probable cause as a matter of law, it may be inferred therefrom by the jury.

6. Malicious prosecution 🔑64(2)

In action for assault, wherein defendant filed cross-complaint for malicious prosecution, evidence sustained judgment for defendant on cross-complaint on ground that prosecution of defendant for assault with attempt to murder plaintiffs was instituted by plaintiffs maliciously and without probable cause.

7. Malicious prosecution 🔑18(4), 31

The bringing of a charge of assault with attempt to murder without grounds for such a charge would establish want of probable cause and support finding of malice in a subsequent malicious prosecution action.

8. Trial 🔑295(1)

Instructions must be read as a whole, and, if jury is fully and fairly instructed, one instruction, which may not embody all legal phases of case, cannot be urged as prejudicial error.

9. Trial 🔑296(2)

An instruction that if malicious prosecution defendant knew that her only remedy against malicious prosecution complainant was in civil action, and willfully and maliciously commenced criminal proceeding against complainant, and that criminal proceeding terminated in complainant's favor, jury should find for complainant, which omitted question of want of probable cause, did not require reversal, where jury was otherwise fully instructed.

10. Malicious prosecution 🔑22

In malicious prosecution action, proof that defendant in malicious prosecution action in instituting prosecution, acted in good faith on advice of justice of peace after making full, fair, and complete disclosure of all facts before him, would constitute a defense.

11. Malicious prosecution 🔑71(4)

Whether defendants in malicious prosecution action, who allegedly instituted prosecution on advice of justice of peace, made fair, full, and complete disclosure of facts to the justice of peace, was for jury.

12. Malicious prosecution 🔑69

An award of $2,870 for malicious prosecution was excessive by $1,400, where there was no evidence that complainant, after his arrest, was confined in jail or subjected to any real hardship or act of oppression, or injured in his business or social standing.

◆

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by W. N. Portman and wife against M. J. Keegan for physical assault, wherein the defendant filed a cross-complaint. From an adverse judgment, the plaintiffs appeal.

Affirmed on condition of remittitur.

Huston, Huston & Huston, of Woodland, for appellants.

H. W. McGowan, of Willows, and E. Vayne Miller, of Colusa, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Plaintiffs, who are husband and wife, brought this action to recover damages alleged to have been inflicted upon them by defendant through a physical assault. The latter filed a cross-complaint containing several causes of action, and the jury brought in a verdict in favor of the cross-complainant for damages in the sum of $12, arising out of the breaking of a window in the door of his automobile, and also allowing him damages in the sum of $2,870 on a cause of action based upon malicious prosecution.

The jury rendered the following verdict:

"We, the jury, duly impaneled in the above entitled action, do find for the cross-complainant, M. J. Keegan, against cross-defendant, Elizabeth Portman, and assess his damages as follows:

"On the first cause of action for assault upon his person:

"First: Actual damages in the sum of $ None;

"Second: Exemplary and punitive damages in the sum of $ None;

"Third: Total damages $ None.

"On the second cause of action for injury to his automobile:

"First: Actual damages in the sum of $12.00;

"Second: Exemplary and punitive damages in the sum of $ None;

"Third: Total damages $12.00

"On the third cause of action for malicious prosecution: Damages in the sum of $2870.00.

"E. L. Betterton, Foreman."

Judgment was entered by the clerk in exact conformity with the verdict.

It appears that for a number of years plaintiffs and defendant owned adjoining ranches. They were neighbors, however, only in the matter of proximity. In all other respects the record shows that they lived in a state of constant belligerency. Ill-will and bad faith were engendered by numerous petty occurrences which took place between them, and which finally culminated in the episode which gave rise to this controversy. Defendant testified that at one time plaintiffs caused his son to be arrested; that plaintiffs cut his telephone service, and that plaintiffs continually impounded his cattle when they were loose upon the public highway. On the day when the alleged assault took place, defendant testified that his cattle were missing from his ranch. He thereupon telephoned to plaintiffs' home, and Mrs. Portman informed him that the cattle were in the Portman corral. Defendant thereupon went to plaintiffs' home, and was met by Mrs. Portman, who informed him that the cattle were in their corral, but that no charges would be made by the Portmans for looking after them. Defendant was accompanied by a friend, who went across the field and started to open the gate of the corral and drive the cattle out on the highway, when they were met by plaintiffs, who refused to allow the cattle to be taken away. At this point defendant went over to the corral and got into a verbal altercation with Mr. Portman. Without further ceremony defendant struck Mr. Portman with his fist and knocked him to the ground. After this there was a general melee, in which Mrs. Portman joined, and also the friend of defendant. After it was all over it appeared that Mrs. Portman received a black eye and suffered from shock; defendant lost his hat and broke his pipe. Just as defendant was about to leave the premises in his automobile, Mrs. Portman hurled a rock at him, breaking the glass in one door. Defendant stated that at no time did he have a knife in his hand. Plaintiffs, a short time thereafter, proceeded to the office of the local justice of the peace and swore to a complaint charging defendant with assault with attempt to commit murder. In relating their story to the justice of the peace, plaintiffs made the statement that defendant, during the altercation, had an open knife in his hand, and stated that he would kill them. Mrs. Portman then swore to a complaint charging defendant with the crime of assault with intent to commit murder. A warrant was issued and defendant was arrested. He was immediately released on bail. A preliminary examination was held, and it terminated in the dismissal of the charge.

[1] It is first contended by plaintiffs that the verdict is fatally defective on account of the fact that it failed to make any adjudication of the issues raised by the complaint. An inspection of the verdict shows that the only issues adjudicated were those raised by the cross-complaint and answer thereto. We do not believe, however, that this in any way invalidates the finding of the jury with respect to those matters. If there was any

error committed with respect to the form of the verdict, or the failure of the jury to find on certain issues, we are of the opinion that such error was waived by the failure of the plaintiffs to make any objection to the form of the verdict when it was brought into court and announced. The code expressly provides for the sending out of the jury where the verdict announced fails to determine the issues submitted. Sec 619, Code Civ.Proc.

[2] In the case of Benson v. Southern Pacific Co., 177 Cal. 777-780, 171 P. 948, the jury failed to bring in a verdict for or against the employee of the defendant company. The court held that it was the duty of the defendant to call the attention of the court to the matter at the time the verdict was returned, in order that it might have been corrected before the jury was discharged, and that under such circumstances the defendant would not be heard to urge the point for the first time on appeal. This leaves the instant case in the situation where there has been no adjudication of the issues raised on the complaint, and the plaintiffs are therefore entitled to have the trial of those issues set down and heard before a court or jury in the usual course. The effect of the waiver under these circumstances is simply to estop the plaintiffs from questioning the validity of the verdict as far as it went, but it does not affect the right of the plaintiffs to have the issues raised on their complaint submitted for an adjudication. It will be further noted that the judgment entered by the clerk goes no further than the verdict, and it cannot be said, so far as the record goes, that the issues raised by the complaint were ever adjudicated.

In view of the foregoing, we deem it unnecessary to consider the other points raised by appellants with reference to the conclusive character of the evidence introduced in plaintiffs' case, because those issues were, as we have stated, never finally adjudicated.

[3–7] It is contended by appellants that the verdict based on malicious prosecution is not supported by the evidence. It is the elemental rule, in cases of this character, that plaintiff must prove malice and want of probable cause. Perry v. Washington National Ins. Co., 14 Cal.App.2d 609, 58 P.2d 701, 59 P.2d 158. First, as to malice: "The existence of malice may be inferred by the jury from acts or declarations of the defendant expressing or indicating prejudice, ill-will or malicious motive in the matter of the prosecution. And while malice is not presumed to exist from want of probable cause as a matter of law, it may be inferred therefrom by the jury." 16 Cal.Jur. 746, sec. 15. We are of the opinion that there is sufficient evidence here to justify the jury in finding that the prosecution was inspired by malice. In addition to the acts of plaintiffs testified to by defendant and mentioned above, there is the fact that the jury could have concluded that the story of the knife, as related to the justice of the peace, was untrue, and that it was inspired by ill-will and bad faith toward defendant. This matter is fully discussed later. Bringing a charge of assault with attempt to murder, when (if the jury believed defendant), there was absolutely no grounds for such a charge, goes to establish want of probable cause, and would support a finding of malice.

As to the evidence of want of probable cause, it would seem to be sufficient to support the verdict. What we have said on the question of malice, and our observations later on the subject of good faith, is applicable to this contention.

One instruction is questioned by appellants. It reads as follows:

"(Defendant's instruction.) The court instructs the jury that if the cross-defendant Elizabeth Portman knew that her only remedy was in civil action and that she wilfully and maliciously commenced the criminal proceeding against the cross-complainant, M. J. Keegan and the said criminal proceeding terminated in favor of the cross-complainant M. J. Keegan, then you will find for the cross-complainant, M. J. Keegan. (Murphy v. Davids, 181 Cal. 706 [186 P. 143])"

[8, 9] It is true, as stated by appellants, that this formula instruction omits the question of want of probable cause. It appears, however, that the jury were fully instructed to the effect that no recovery could be had unless want of probable cause was proven, and that such element was indispensable in an action of this character. It is an elemental rule that the instructions must be read as a whole, and if the jury is fully and fairly instructed on the law of the case, one instruction, which may not embody all the legal phases of the case, cannot be singled out and urged as prejudicial error. We find that such rule is applicable here. Furthermore, an examination of the entire record fails to disclose

that any prejudice resulted from the giving of the above instruction.

[10, 11] It is contended by appellants that they acted in good faith on the advice of the justice of the peace, after making a full, fair and complete disclosure of all the facts before him. While this is a well-recognized defense in an action of this character bearing on the question of good faith and want of probable cause, the question whether or not such disclosure was made in a fair, full and complete manner was one for the jury. Starkweather v. Eddy, 210 Cal. 483, 292 P. 467; Seabridge v. McAdam, 108 Cal. 345, 41 P. 409.

In the Starkweather case plaintiff was occupying a cabin on premises claimed by defendant. The latter proceeded to the building. Plaintiff was inside. He saw defendant approaching with a box of dynamite and some fuse, and heard the latter state that he was going to explode the dynamite under the cabin in order to dislodge plaintiff. The latter came out of the cabin armed with a revolver, and "covered" defendant, who thereupon left the premises and proceeded to the district attorney, to whom he related his story. He then, on the advice of the officer, swore to a complaint charging plaintiff with the crime of assault with a deadly weapon. Plaintiff was tried on the charge and found not guilty. He then brought an action for malicious prosecution. The trial court found that defendant fairly and truly related the facts to the district attorney. The latter took the witness-stand at the trial and testified that defendant had *failed to mention the dynamite incident.* The Supreme Court held that the finding mentioned was not supported by the evidence. In the case of Robinson v. McKnight, 103 Cal.App. 718–729, 284 P. 1056, 1062 the following quotation is pertinent here: "Appellants also claim protection from the fact that they acted on the advice of the district attorney. But if, as the jury must have found, they falsely stated the facts, that advice was no protection." Citing Murphy v. Davids, 181 Cal. 706, 186 P. 143; Franzen v. Shenk, 192 Cal. 572-576, 221 P. 932.

The justice of the peace gave the following version of what took place when appellants applied to him for a criminal complaint: "They both came and they said they wanted to get a warrant—warrant of arrest out for Mr. Keegan; I am not sure if they called him by his first name or not, Mat. Keegan; anyway they meant Mr. Keegan; so I says, what is the charge; and if I remember right he said, he beat up on my wife; and Mrs. Portman at that time raised her hat up and showed me a lump on her forehead; then, I says, I think I told them at that time that it could be a battery charge; then they informed me that Mr. Keegan had a knife in his hand at the time he made that assault, and I think that Mrs. Portman made the statement—I am not sure whether it was Mr. or Mrs. Portman; Mr. Portman did most of the talking at that time—said he threatened to kill Mrs. Portman at the same time."

After hearing respondent's testimony, where he stated positively that at no time did he have a knife in his hand, or attempt to use a knife, the jury could reasonably have concluded that the statement made to the justice of the peace by appellants that respondent had a knife in his hand and threatened to kill Mr. Portman, was untrue. Advice, under such circumstances, is no protection. We cannot say, as a matter of law that the jury was compelled to find for appellants on this question of fact. Having obviously found that defendant was unarmed, and that there was no reasonable or probable cause for charging him with assault with intent to murder, and there being sufficient evidence to support such finding, we are not at liberty under such circumstances to disturb it.

[12] It is finally contended by plaintiffs that the damages are excessive, in that the evidence is insufficient to support an award of $2,870 damages. With this contention we agree. There is no evidence that defendant, after his arrest, was confined in jail, or subjected to any real hardship or act of oppression, or injured in his business or social standing. After considering the entire record, it does not appear that the verdict in this case was the result of a sober and dispassionate judgment, but rather, that the jury was moved by facts and circumstances extraneous to the case, and not appearing in evidence. 8 Cal. Jur. 834.

It may be pointed out that, while at first blush it might be inferred that there is some inconsistency in allowing damages for the malicious prosecution and permitting plaintiffs to pursue their action for damages, in reality there is none. The cause of action stated by plaintiffs is based upon a simple assault upon them. It may be true, as plaintiffs contend with considerable justification, that the assault was not made by them, but by the defendant. If such be the fact, there would still be no justification for the prosecution of defendant upon a charge of assault with intent to commit murder, and there would be no inconsistency in a finding by the jury to that effect. It is obvious that if plaintiffs had brought a charge of simple assault against defendant, an entirely different situation would have been presented.

We have examined other points raised by appellants, but none of them appears to have any substantial merit.

It is therefore ordered that if, within fifteen days from the date of the filing of this opinion, the defendant file a written remission of the sum of $1,400 from the amount of said judgment, that the judgment be affirmed. Otherwise, the judgment will be reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

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30 Cal.App.2d 729

OSBORNE et al. v. ABELS.

Civ. 12155.

District Court of Appeal, Second District. Division 2, California.

Feb. 9, 1939.

1. Pleading 🔑350(1)

A motion for "judgment on the pleadings" is in substance both a motion and a demurrer since it attacks the sufficiency of the pleadings as a demurrer and is an application for an order for judgment as a motion.

[Ed. Note.—For other definitions of "Motion for Judgment on Pleading," see Words & Phrases.]

2. Pleading 🔑350(3)

In passing on a motion for judgment on the pleadings every allegation affirmatively set up in the answer must be deemed true.

3. Pleading 🔑350(3)

Party moving for judgment on the pleadings admits the untruth of his own allegations in so far as they have been controverted.

4. Quieting title 🔑22

A suit to determine adverse claims to property cannot be maintained by one without title or interest in the property. Civ. Code, § 3412.

5. Quieting title 🔑22

In action to determine adverse claims to property, plaintiff must recover upon the strength of his own title and not upon the weakness of defendants. Civ.Code, § 3412.

6. Pleading 🔑345(2)

In suit to cancel trustee in bankruptcy's deed, a declaration of ownership under the deed, and a claim for judgment lien, where answer denied every allegation of complaint and specially denied that plaintiffs owned property described and set up title in defendant, plaintiffs were not entitled to judgment on the pleadings, since by making the motion, they admitted that they did not own title to the property. Civ.Code, § 3412.

◆

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Jennie E. Osborne and others against Gerard Abels to set aside a trustee in bankruptcy's deed, a declaration of ownership under the deed and a claim of judgment lien. From a judgment against plaintiffs upon their own motion for a judgment upon the pleadings which motion was joined in by the defendant, plaintiffs appeal.

Affirmed.

J. E. Light, of Los Angeles, for appellants.

Halverson & Halverson, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment against the plaintiffs upon their own motion for a judgment upon the pleadings, which motion was joined in by the defendants. The action was under section 3412 of the Civil Code of California for the purpose of setting aside and declaring of no effect three instruments—a trustee in bankruptcy's deed, a declaration of ownership under said deed and a claim of a judgment lien. The question for this court to determine on appeal is whether the answer set up any valid defense.

[1-3] "A motion for judgment on the pleadings is in the nature of a demurrer. It is in substance both a motion and a demurrer: A demurrer for the reason that it attacks the sufficiency of the pleadings, and a motion for the reason that it is an application for an order for judgment." 49 C.J. 668, sec. 945. "It is elementary that on a motion for judgment on the pleadings every allegation affirmatively set up in the answer must be deemed true. Hill v. Moore, 47 Cal.App. 353, 190 P. 651; McGowan v. Ford, 107 Cal. 177, 40 P. 231; Bradford Investment Co. v. Joost, 117 Cal. [204] 211, 48 P. 1083. As the answer sets up a good defense and denies material allegations of the complaint, it was sufficient as against a general demurrer, and the plaintiff was not entitled to judgment on the pleadings. Neale v. Morrow, 174 Cal. 49, 54, 161 P. 1165." Cuneo v. Lawson, 203 Cal. 190, 193, 263 P. 530, 532. "On plaintiff's submission on the pleadings without evidence, the allegations of the answer are to be taken as true. And where a case is submitted on a verified petition and answer, and no testimony is adduced, the allegations of the answer are to be taken as true." 49 C.J. 670, sec. 946. The party moving for judgment on the pleadings also admits the untruth of his own allegations in so far as they have been controverted. Coe v. Bennett, 39 Idaho 176, 226 P. 736.

[4, 5] One without any title or interest in the property cannot maintain such an action. 22 Cal.Jur. 113, sec. 6. "It is a cardinal doctrine that the plaintiff in an action to determine adverse claims must recover upon the strength of his own title and not upon the weakness of the defendant's." 22 Cal.Jur. 167, sec. 42. Want of title in the plaintiff is a defense to such an action. 22 Cal.Jur. 122, sec. 11; President, etc., of City of San Diego v. Allison, 46 Cal. 162.

[6] The plaintiffs allege that the defendant for a consideration of $100 purchased a deed from the referee in bankruptcy and made a copy of said deed a part of the complaint as "Exhibit A"; that thereafter the defendant made an affidavit and declaration of ownership under said deed, which he had recorded in the county recorder's office, and said declaration is attached as plaintiffs' "Exhibit B" and made a part of the complaint; that thereafter the defendant made an affidavit and claim of lien under and by virtue of two judgments, which they made a part of the complaint as plaintiffs' "Exhibit C"; that the defendant, knowing that he had no title or interest in any of the property described in said declaration of ownership, executed and recorded the same for the purpose and with the intent to place a cloud upon the property described therein and to annoy and harass the owner of said property and to prevent the free and proper sale and conveyance of any of said property; that the plaintiffs and each of them owns property described in said declaration of ownership; that the defendants at the time of procuring said deed well knew that said bankrupt estate owned no property or interest in said property and said deed was procured for the purpose of blackmailing the title to said property by means of the declaration of ownership set forth in plaintiffs' "Exhibit B"; and that plaintiffs have suffered damage by reason thereof; wherefore plaintiffs prayed judgment that the three instruments set forth in the complaint be adjudged and declared to be null and void.

The answer denies each and every allegation of the complaint not thereinafter expressly admitted or otherwise denied, and it does not admit any title or ownership of any of the property referred to in the plaintiffs. Again, under paragraph VIII, it specifically "denies that the plaintiffs or either of them own any of the property described in said declaration of ownership". The answer then sets up title to the lands described in "Exhibit B" by purchase through a deed regularly executed and delivered by the trustee in bankruptcy. It is apparent that the answer set up a valid defense and that the plaintiffs were not entitled to a judgment on the pleadings.

The plaintiffs make three contentions: First, that the deed sought to be cancelled and annulled of record is invalid and for two reasons conveys no title; second, that the action under section 3412 of the Civil Code is a correct remedy and not an action to quiet title; and, third, that an action to quiet title is so cumbersome, when addressed to so formidable a number of parties and properties, as to be impossible under the ordinary machinery of the court. These contentions may all be true, but they are all beside the point on this appeal for the reason that the plaintiffs, for the purposes of this motion, admitted that they did not own any title to the properties.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

31 Cal.App.2d 42

WEAVER et ux. v. GRUNBAUM et al.

Civ. 10628.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1939.

As Corrected March 16, 1939.

Rehearing Denied March 17, 1939.

Hearing Denied by Supreme Court April 13, 1939.

1. Corporations 🔑573(3)

Agreement by corporation's officers that inasmuch as stockholders consented to reorganization of corporation, officers would protect stockholders from any loss, and that if, after sale of corporation's property, there should not be enough to repay stockholders for amount of investment, officers would do so, and would use all efforts to dispose of corporation's property as soon as possible, was so ambiguous as to require resort to fundamental rules of interpretation to ascertain parties' true intent.

2. Evidence 🔑461(1)

Where indemnity agreement was ambiguous, evidence was properly received as to situation of parties and circumstances surrounding execution of agreement, to enable court to ascertain true intent. Civ.Code, § 1647; Code Civ.Proc. § 1860.

3. Indemnity 🔑6

In construing ambiguous indemnity agreement, court was required to give effect to each portion of agreement.

4. Corporations 🔑573(3)

Ambiguous indemnity agreements by corporation's officers that inasmuch as stockholders consented to reorganization of corporation, officers would protect stockholders from any loss, and that if, after sale of corporation's property, there should not be enough to repay stockholders for amount of investment, officers would do so, when considered with circumstances surrounding execution of agreement, meant that officers would protect stockholders against any loss on investments, and that if, after sale, enough assets should not be available to repay stockholders, officers would reimburse stockholders. Civ.Code, § 1647; Code Civ. Proc. § 1860.

5. Contracts 🔑170(1)

Where contract's language is reasonably susceptible of more than one interpretation, evidence of subsequent conduct of parties thereunder is important in revealing to court construction parties themselves placed on it.

6. Appeal and error 🔑1008(3)

Where there was no evidence in record warranting different construction of ambiguous indemnity agreement than was made by trial court, its judgment was binding on appeal.

7. Indemnity 🔑6

Where uncertainty of indemnity agreement was eliminated by application of statutes providing that contracts may be explained by circumstances, statute providing that words are to be taken most strongly against party causing uncertainty in contract had no application. Civ.Code, §§ 1647, 1654; Code Civ.Proc. § 1860.

8. Indemnity 🔑11

Under ordinary rules of interpreting indemnity agreements, unless contrary intention appears, persons indemnified against claims, demands or damages are not entitled to recover without first paying them. Civ. Code, § 2778.

9. Indemnity 🔑11

Rule that unless contrary intention appears, persons indemnified against claims, demands, or damages are not entitled to recover without first paying them, was inapplicable, where agreement expressed contrary intent, and, if rule were invoked, it would nullify entire purpose of agreement. Civ.Code, § 2778.

10. Corporations 🔑573(3)

Where corporation's officers agreed to repay amount of stockholders' investments should sale of corporation's property be insufficient to do so, and that they would use all reasonable efforts to dispose of corporation's property, officers were obligated to sell property, or at least use all efforts to do so, and indemnify stockholders for their loss, if any, and could not avoid obligation by willfully neglecting to use every effort to sell property.

11. Indemnity 🔑9(1)

Right to payment under indemnity agreement and amount thereof are generally measured by same rules as apply to other contracts.

12. Contracts 🔑317

The law does not sanction breach of contract as method of escape from contract's burdensome terms, nor will it reward party in default.

13. Corporations 🔑573(3)

Where agreement, whereby corporation's officers were to indemnify stockholders for their investment should sale of corporation's property be insufficient to do so, failed to state when property should be sold, law would imply covenant to effect sale within reasonable time. Civ.Code, § 1657.

14. Trial 🔑136(1)

What constitutes reasonable time is question of law or fact to be determined by trial court from evidence presented in each case.

15. Evidence 🔑11

Though there was no evidence as to general business conditions about the year 1931, trial court would be deemed to have had judicial notice thereof.

16. Limitation of actions 🔑197(1)

In action on indemnity agreement, evidence sustained finding that action was not barred by limitations. Code Civ.Proc. §§ 337, 339, 343.

◆

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Chester N. Weaver and Elsie S. Weaver, husband and wife, against Leo P. Grunbaum and John S. Parker to recover loss on stock under indemnity agreement. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment affirmed.

Hearing denied by Supreme Court; LANGDON and EDMONDS, JJ., dissenting.

Pillsbury, Madison & Sutro, Marshall P. Madison, and Gerald S. Levin, all of San Francisco, for appellants.

Cooley, Crowley & Supple, of San Francisco (H. Rowan Gaither, Jr., of San Francisco, of counsel), for respondents.

GEARY, Justice pro tem.

On January 4, 1926, respondents Chester N. Weaver and Elsie S. Weaver, husband and wife, invested $40,000 in Merchants Security Company, a California corporation, and upon that date there was issued to each of them certificates for two hundred shares of the preferred and for two hundred shares of the common stock of said corporation. Appellant Grunbaum was president and appellant Parker was vice-president of said corporation. Thereafter, it was deemed advisable by those guiding the corporate affairs to effect a reorganization thereof. The plan of reorganization contemplated a disposal of certain assets of the company the proceeds therefrom to be used to take up the stock of the smaller stockholders. This would leave the corporation possessed of certain real estate situated in Oakland, Alameda county, as its sole asset, which was to be sold for the benefit of the remaining stockholders. Respondents were loath to agree to the proposed reorganization. On December 19, 1928, for the purpose of securing their consent thereto appellants executed an agreement of indemnity prepared by respondent Chester N. Weaver, as follows:

"December 19, 1928

"Chester N. Weaver & Elsie S. Weaver,
San Francisco, Cal.

"Inasmuch as this day you have signed a certain agreement as stockholders of the Merchants Security Company, consenting to a reorganization of the company and a division of assets, which reorganization and division is made to facilitate the handling of the business of the company; and inasmuch as there is some question in your mind as to this division, we jointly and severally agree to protect you against any loss on your invested capital on account of this division and reorganization.

"We recognize Chester N. Weaver and Elsie S. Weaver as each having invested in the Merchants Security Company $20,000, or a total of $40,000.

"If after a final sale of the real estate, which is the property of Merchants Security Company, there shall appear to be not enough assets in the company so you will realize the above mentioned $40,000 we jointly and severally agree to reimburse you for any loss that may occur, it being understood that we will use all efforts to dispose of the real estate in question as soon as possible.

"Respectfully yours,
"John S. Parker
"Leo P. Grunbaum."

Following the execution of the indemnity agreement respondents from time to time made inquiry of appellants regarding their progress in effecting a sale of the real property and were advised efforts to that end were being made. On April 22, 1931, the directors of Merchants Security Company sent out a letter to the stockholders advising that they believed they had a bona fide offer of $125,000 cash, for the remaining assets which would net the stockholders 25 cents on the dollar. The stockholders were requested to promptly advise what course they desired the directors to take in the matter. Thereupon respondents wrote appellants as follows:

"April 22, 1931

"Messrs. L. P. Grunbaum and John S. Parker, Care Merchants Security Co., 142 Sansome Street, San Francisco, Cal.

"Gentlemen: I am in receipt of a circular letter dated April 22, 1931, addressed to the stockholders of the Merchants Security Company and signed by four of its directors.

"You will recall that you executed a guarantee under date of December 19, 1928, to Mrs. Weaver and myself in consideration of our agreeing to the reorganization of the company. We are of course relying upon that guarantee and do not care to take any action that may be considered a waiver of it. Therefore, if you will request that we send you a proxy and state in your request that the giving of the proxy shall not in any way affect your guarantee to us, we should be glad to send you a proxy or power of attorney, which will enable you to take such action as you see fit in connection with the matters set forth in the circular letter of April 22nd. Yours very truly."

Thereafter and in response to a letter (not in evidence) respondents wrote appellants as follows:

"San Francisco, April 27, 1931

"Mr. Leo P. Grunbaum & Mr. John S. Parker, Mercantile Acceptance Corporation, 142 Sansome Street, San Francisco, Cal.

"Gentlemen: I want to acknowledge receipt of your letter of the 24th inst. in regard to the offer on the property in Oakland, and under the circumstances I do not want to make any suggestion as to how the transaction should be handled, although I do not believe the offer represents the value of the property.

"Yours very truly

"Chester N. Weaver."

The proposed sale was not consummated. Respondents thereafter made inquiry from time to time concerning the sale of the property and were informed that appellants were trying to dispose of it. Subsequently respondents were called upon to pay stock assessments totaling about $2,100 in order to save the Oakland property from foreclosure. On or about February 1, 1936, respondents learned that the corporation was insolvent; that the real property was worth less than $200,000; that it was encumbered in sums in excess of $500,000; that neither taxes nor interest had been paid for over two years; that the monthly income from the property was some $1,300 per month less than the costs and that appellants had abandoned all efforts to sell the same. Thereupon, on April 30, 1936, respondents instituted this action to recover their loss upon their stock under the indemnity agreement. The trial court found that the value of the remaining asset of the corporation was $162,500, and the mortgage indebtedness thereon $540,890.70; that respondents' stock was worthless; that appellants had represented to respondents from time to time that they were trying to effect a sale of the property and in January, 1936, respondents had learned for the first time that appellants had abandoned their efforts to sell the same. The court further found respondents had suffered a loss of $40,000 upon their stock which was covered by the indemnity agreement and for which they were entitled to recover and gave judgment accordingly.

Appellants assail the judgment upon the grounds:

That respondents failed to prove they suffered loss on their invested capital on account of the division and reorganization of the Merchants Security Company;

That the sale of the real property is a condition precedent to recovery under the terms of the indemnity agreement, and in the absence of such sale there is a total lack of proof of loss or damage to respondents;

That the action having been commenced more than five years from the last date when appellants made any efforts to sell the property, the action is barred by the provisions of Code of Civil Procedure section 337;

That the evidence does not support certain of the findings.

[1, 2] Appellants assert the instrument sets forth in paragraph 1 the primary terms of the indemnity, and the remaining paragraphs merely serve to define or limit the principal obligation of indemnity as contained in the first paragraph. Respondents, on the other hand, contend that paragraph 1 of the agreement is a mere recital of circumstances attending its execution and that the substantive terms are thereafter set forth. Unexplained, the agreement might be construed as supporting either contention without violating the plain import of the language used. A reading of the indemnity agreement readily reveals such ambiguity and uncertainty therein as requires a resort to fundamental rules of interpretation to ascertain the true intent of the parties. Evidence was properly received, therefore, of the situation of the parties and of the circumstances surrounding the execution of the agreement to enable the court to ascertain their true intent. Civ.Code, sec. 1647; Code Civ.Proc., sec. 1860; Balfour v. Fresno C. & I. Co., 109 Cal. 221, 225-226, 41 P. 876; First National Bank v. Bowers, 141 Cal. 253, 262, 74 P. 856; Stein v. Archibald, 151 Cal. 220, 223, 90 P. 536; Shelley v. Byers, 73 Cal.App. 44, 55, 238 P. 177; Gilde v. Schuster, 83 Cal.App. 537, 541, 257 P. 121.

Before the indemnity agreement was executed respondents had made inquiry and learned that the value of the Oakland property was around $625,000; that it was mortgaged for an amount in excess of $400,000 and that the corporation claimed to have put over $400,000 into the property in addition to the mortgage. On December 19, 1928, when appellants called upon respondent Chester N. Weaver, they stated it was advisable from their standpoint to change the structure of the corporation. Respondent testified in connection with this meeting, "I didn't understand what the change was, and finally told Mr. Grunbaum, who was the principal in the matter and who did the talking that I didn't know anything about it, that I bought the stock from him and if he would indemnify me in case of loss on the stock I would sign the paper, the agreement, and he agreed to do it." Respondent further testified without objection, "* * * I couldn't see where that [there] was at that time an equity in the property to take care of this stock. That is the reason I asked them to indemnify me and went no further into the matter." Respondent's testimony in this regard was not disputed.

[3, 4] Giving effect to each portion of the agreement as the law requires and the evidence herein warrants, the parties agreed in effect; in consideration of respondent's acquiescence in the reorganization plan whereby the Oakland property would become the sole remaining asset and would be liquidated as soon as possible the appellants would protect them against any loss upon their investment of $40,000 by reason thereof; and if after sale enough assets should not be available to repay respondents the $40,000 invested appellants would reimburse them to the extent of that sum.

[5-7] It is apparent that the proposed reorganization of the corporation, mentioned in the agreement and as understood by the parties, contemplated not only the elimination of the small stockholders and the disposal of all assets of the corporation except the Oakland property, but the sale of the latter as soon as possible. That respondents so construed the agreement and thereafter relied upon it as so construed, is evidenced by their letters above set forth, and the testimony of respondent Chester N. Weaver. Nor was their interpretation of the agreement disputed by appellants at any time prior to the filing of the action. Where the language of a contract is reasonably susceptible of more than one interpretation, evidence of the subsequent conduct of the parties thereunder is important in revealing to the court the construction which the parties themselves placed upon it. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 521, 153 P. 951; Ghirardelli v. Students' Express and Transfer Co., 175 Cal. 427, 429, 166 P. 16; Fairchild v. Cartwright, 39 Cal.App. 118, 123, 178 P. 333. Nor is there evidence in the record warranting a different construction of the agreement by the trial court. In view of the total absence of testimony to the contrary in this regard, the judgment of the trial court as to the facts was proper and is binding upon this court. Woodard v. Glenwood Lumber Co., supra, page 519, 153 P. page 951. The appellants seriously contend that any ambiguity in the agreement must be construed against the parties responsible therefor, in this case respondents, as Chester N. Weaver prepared the agree-

ment. Civ.Code, sec. 1654. However, since the rules of interpretation set forth in the preceding code sections when properly applied eliminate the uncertainty of the agreement, the provisions of the section mentioned have no application.

[8, 9] The evidence herein conclusively establishes that Merchants Security Company is hopelessly insolvent. In so far as respondents are concerned their loss is definite and, by reason of the assessments paid by them, in excess of the sum for which they were to be indemnified under the agreement. Under ordinary rules of interpreting indemnity agreements, unless a contrary intention appears, persons indemnified against claims, demands or damages are not entitled to recover without first paying the same. Civ.Code, sec. 2778. Such a rule is not applicable here, however, as the instrument itself expresses a contrary intent, and, if invoked, would nullify the entire purpose of the agreement. The agreement was that appellants would indemnify respondents for loss upon their investment, and no payment, as mentioned in the code, was required.

[10-12] The evidence shows that in the spring of 1929 the Oakland property was listed for sale with three real estate brokers without result. Thereafter, no further efforts were made to sell the property. Appellant Parker testified in this regard: "Well, after I found out that I couldn't get an offer on the property (in the spring of 1929) then I quit, because I couldn't get enough out of it to satisfy the bank. * * * I then quit, because you know the depression was on and there was no chance of realizing the amount of the mortgage at that time." Appellants were obligated to sell the property, or at least use "all efforts" to sell the same, and indemnify respondents for their loss, if any. They cannot avoid their obligation of payment to respondents by wilfully neglecting their obligation to use every effort to sell the property. Nor does the fact that their obligation to respondents was contingent upon a selling of the property and the inadequacy of the sum received therefor to protect respondents' investment alter the situation. We are cited to the case of Watchorn v. Roxana Petroleum Corporation, 10 Cir., 5 F.2d 636, 641, 642, in support of the contention that since appellants' obligation to respondents was contingent upon the sale of the real property, no liability could possibly be created until that event occurred. We have no quarrel with the rule therein enunciated; we hold, however, that it is not determinative of the question presented here. Every agreement to indemnify another is dependent upon the happening of some event or events before the indemnity is payable. Although the right to payment and the amount thereof are necessarily uncertain, such contracts and the duties of the parties thereunder are generally measurable by the same rules as apply to other contracts. First Nat. Bank v. Spalding, 177 Cal. 217, 221, 170 P. 407; citing First Nat. Bank v. Bowers, supra; 6 Cal.Jur. 247. Appellants cannot by their own admitted conduct prevent the performance of the first condition—the sale of the real property—and thus absolve themselves from their liability to make up the loss upon respondents' stock. Wallace v. Carlin, 92 Cal.App. 31, 34, 267 P. 596; Earle v. Sunnyside Land Co., 150 Cal. 214, 225, 226, 88 P. 920; Taylor v. Simi Const. Co., 23 Cal.App. 308, 310, 137 P. 1095; Rosenheim v. Howze, 179 Cal. 309, 312, 176 P. 456; Williston v. Perkins, 51 Cal. 554, 555. The law does not sanction the breach of a contract as a method of escape from its burdensome terms, nor will it reward the party in default.

[13-16] Since the agreement is silent as to when the Oakland property should be sold, the law implies that appellants covenanted to effect the sale within a reasonable time. Civ.Code, sec. 1657; Gazos Creek Mill etc. Co. v. Coburn, 8 Cal.App. 150, 158, 96 P. 359; Wallace v. Carlin, supra; Earle v. Sunnyside Land Co., supra; Rapp v. Rapp, 218 Cal. 505, 507, 508, 24 P.2d 161. What constitutes a reasonable time is a question of law or fact, to be determined by the trial court from the evidence presented in each case. Giberson v. Fink, 28 Cal.App. 25, 29, 38, 151 P. 371; Greenberg v. California B. R. Co., 107 Cal. 667, 671, 40 P. 1053; California W. D. Co. v. California M. O. Co., 178 Cal. 337, 341, 343, 177 P. 849; Hoppin v. Munsey, 185 Cal. 678, 684, 198 P. 398. Appellants plead, and now assert that the action was commenced more than four years after they abandoned their efforts to sell the real property, hence that the action was barred by sections 337, 339 and 343, Code of Civil Procedure. The court expressly found that the action was not barred by the provisions of said code sections. There is evidence in the record to support the find-

ing. Respondent Chester N. Weaver testified without objection that in conversations with appellants from time to time he was advised they were endeavoring to dispose of the property; that he learned they had abandoned their efforts in January, 1936. The testimony in this regard is slight, as counsel point out, yet the conversations are not denied. Furthermore, it was alleged in the complaint that five years was a reasonable time for appellants to effect a sale of the real property. There is some evidence in the record of conditions affecting the sale of real estate in Oakland during the period in question. And even though there were no evidence upon this point, general business conditions throughout the country were so generally known and recognized that the court must be deemed to have had notice thereof. People v. Tossetti, 107 Cal.App. 7, 13, 289 P. 881; San Francisco v. Collins, 216 Cal. 187, 189, 13 P.2d 912. The finding of the court that the action was not barred is a sufficient finding in this respect and supported by the evidence. Woodhead v. Wilkinson, 181 Cal. 599, 602, 185 P. 851, 10 A.L.R. 291; Hertel v. Emireck, 178 Cal. 534, 535, 174 P. 30; Hollenbach v. Schnabel, 101 Cal. 312, 317, 35 P. 872, 40 Am.St.Rep. 57; 24 Cal.Jur. 947.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

WEST KEY NUMBER SYSTEM

STOCKBURGER v. DOLAN et al. *

DOLAN et al. v. STOCKBURGER et al.

Civ. 12061, 12060.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1939.

As Modified on Denial of Rehearing March 14, 1939.

Hearing Granted by Supreme Court April 17, 1939.

1. Pleading ⇨1

"Pleadings" are the machinery by which an issue or issues are brought to the attention of the trial court.

[Ed. Note.—For other definitions of "Plead; Pleading," see Words & Phrases.]

2. Appeal and error ⇨193(1)
Pleading ⇨404

A failure to raise objection to pleadings, other than objection that complaint fails to state cause of action or that trial court lacks jurisdiction, at earliest opportunity, waives objection, and reviewing court will not entertain objection for first time on appeal.

3. Appeal and error ⇨173(9)

Defendants who failed to call to trial court's attention fact that subject matter of action might have been pleaded as counterclaim to action previously filed by defendants against plaintiff were not entitled on appeal to raise objection that cause of action was barred for such reason. Code Civ. Proc. § 439.

4. Evidence ⇨397(1)

Parol evidence is inadmissible to alter or contradict terms of written contract in absence of mistake or imperfection in writing put in issue by the pleadings, or showing that validity of agreement itself is fact in dispute. Code Civ.Proc. § 1856; Civ. Code, § 1625.

5. Evidence ⇨441(4)

In actions consolidated for trial by stipulation wherein lessee sought to recover amount paid as consideration for mineral lease and lessors sought to recover rent allegedly due thereunder, evidence as to conversation between one of lessors and lessee relative to clause in lease, taking place prior to signing of lease, was properly rejected. Code Civ.Proc. § 1856; Civ.Code, § 1625.

6. Contracts ⇨1

Parties capable of contracting, their consent, a lawful object, and sufficient consideration, are essential elements of a contract. Civ.Code, § 1550.

7. Contracts ⇨137(1)

Where a contract has for its purpose a single object, which object is unlawful, the entire contract is void. Civ.Code, § 1598.

8. Landlord and tenant ⇨213(5)

Where a lease is void, the lessee is entitled to return of consideration which he has paid therefor.

9. Mines and minerals ⇨59, 79(1)

Where drilling for oil on property covered by mineral lease was illegal under ordinance, lease was void and lessee was not obligated to pay rent thereunder but was entitled to return of consideration paid for its execution. Civ.Code, §§ 1550, 1598.

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*For subsequent opinion see 94 P.2d 33.

10. Contracts ⚿134, 136

A contract which is void because stipulating for doing what the law prohibits cannot be ratified and cannot serve as basis for an estoppel.

11. Mines and minerals ⚿58

Where mineral lease was void because covering property which under ordinance could be used only for family dwellings, lease could not be ratified by act, or failure to act, of lessee, nor could lessee be estopped by conduct from asserting its invalidity.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by R. R. Stockburger against Francis H. Dolan and another to recover amount paid as consideration for a mineral lease, consolidated for trial by stipulation with an action by Francis H. Dolan and another against R. R. Stockburger to recover a sum alleged to be due as rent under the same lease. From judgments for R. R. Stockburger in both actions, Francis H. Dolan and another appeal.

Affirmed.

Edward C. Purpus, of Los Angeles, for appellants.

A. L. Abrahams, of Los Angeles, for respondent.

McCOMB, Justice.

After trial before the court without a jury in two actions, consolidated for trial by stipulation, judgments were entered in favor of respondent.

The essential facts are:

June 1, 1936, an oil and gas lease was entered into between appellants and respondent by the terms of which appellants leased certain property to respondent for the sole purpose of using the same to drill for, produce, extract, take and remove oil, gas, asphalt, and other hydrocarbonates, and to erect and maintain tanks, machinery, buildings and other structures upon the demised property for the lessee's use in carrying on the business of drilling for oil, etc. The leased land, situated in the city of Los Angeles, was located in an area which under ordinance No. 77,000 of that city could be used for no other purpose than single family dwellings. The lease contained, among others, these provisions:

"5. Commencing with the fourth month of the term hereof, if the Lessee has not theretofore commenced drilling operations on said land or terminated this lease as herein provided, the Lessee shall pay or tender to the Lessor monthly in advance, as rental, the sum of One Thousand Dollars until drilling operations are commenced or this lease terminated as herein provided."

"13. The obligations of the Lessee hereunder shall be suspended while the Lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, action of the elements, accidents, rules and regulations of any Federal, State, Municipal or other governmental agency, or other matters or conditions beyond the control of the Lessee, whether similar to the matters or conditions herein specifically enumerated or not."

At the time the lease was executed and as consideration therefor respondent paid to appellants the sum of $5,000. Subsequently respondent sought to obtain a permit from the city planning commission for permission to drill an oil well on the leased property. This permission was denied, and on September 3, 1936, respondent wrote appellant Francis H. Dolan a letter reading as follows:

"Dear Mr. Dolan:

"On July 24, 1936, I made application to the City Planning Commission for a permit to drill an oil well on the property I leased from you in Tract 6735. Enclosed is a copy of their letter to me dated August 21st, in which they disapproved my request. You are, of course, at liberty to check the proceedings with the Planning Commission.

"Since I am prevented from going ahead with the drilling of a well by the City, which is a matter beyond my control, there is no rental due under my lease during the continuance of such prevention by the City. This condition is covered in paragraph 13 of our lease."

July 16, 1937, respondent served a purported notice of rescission of the lease upon appellants.

September 8, 1937, appellants filed an action (superior court No. 419,992) against respondent seeking to recover a sum alleged to be due as rent pursuant to the terms of the lease above mentioned.

September 28, 1937, respondent filed an action (superior court No. 420,633) against appellants in the form of a common count for money had and received for the recovery of the sum of $5,000.

These are the sole questions necessary for us to determine:

First: May an appellant for the first time on appeal raise the objection that a cause of action which has been set forth in a complaint is barred for the reason that the plaintiff in such suit is defendant in another suit between the same parties, and that the cause of action in the second suit could have been pleaded as a counterclaim to the prior suit?

Second: Did the trial court commit prejudicial error in sustaining an objection to appellants' offer to prove a conversation between appellant Francis H. Dolan and respondent relative to clause 13 of the lease as set forth above, which conversation took place prior to the time the lease was signed by the parties?

Third: Does a lease of real property for purposes which are forbidden by a valid municipal ordinance create any legal obligation?

Fourth: Did respondent by his conduct ratify the lease?

Fifth: Was respondent by his conduct estopped from asserting the invalidity of the lease?

[1, 2] The first question must be answered in the negative. Pleadings are merely the machinery by which an issue or issues are brought to the attention of the trial court, and it is the established rule in this state that an objection thereto (except an objection that a complaint fails to state a cause of action or that the trial court is without jurisdiction) must be raised at the earliest opportunity and in the trial court if possible. It is likewise settled that a failure to comply with this rule constitutes a waiver of the objection, and this court will not entertain the same for the first time on appeal. In the present case appellants failed to call to the trial court's attention the fact that the subject-matter of the second suit might have been pleaded as a counterclaim to the action previously filed.

[3] Therefore, applying the rules of law above stated we will not consider appellants' contention that respondent's cause of action as set forth in the suit (No. 420,633) filed by him was barred under the provisions of section 439 of the Code of Civil Procedure by respondent's failure to plead it as a counterclaim to the prior action (No. 419,992) filed against him by appellants.

[4, 5] The second question must also be answered in the negative. The law is established that parol evidence is inadmissible to alter or contradict the terms of a contract which has been reduced to writing, in the absence, as in the instant case, of (1) a mistake or imperfection in the writing put in issue by the pleadings, or (2) a showing that the validity of the agreement itself is the fact in dispute. Sec. 1856, Code Civ.Proc.; sec. 1625, Civ.Code; Blackledge v. McIntosh, 85 Cal.App. 475, 483, 259 P. 770; First Federal Trust Co. v. Stockfleth, 98 Cal.App. 21, 24, 276 P. 371.

[6-8] The third question likewise must be answered in the negative. It is essential to the creation of any legal obligation by contract that the following elements exist: (1) Parties capable of contracting; (2) their consent; (3) a lawful object; and, (4) sufficient consideration. Sec. 1550, Civ.Code; Industrial D. & L. Co. v. Goldschmidt, 56 Cal.App. 507, 509, 206 P. 134.

It is also established that where a contract has for its purpose a single object, which object is unlawful, the entire contract is *void.* Sec. 1598, Civ.Code; 6 R.C.L.(1929) 694, sec. 100, 699, sec. 105. In California it is the law that if a lease is *void* the lessee is entitled to a return of the consideration which he has paid therefor. Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 39, 53 P.2d 127.

[9] Applying the foregoing rules to the facts of the instant case, it is conceded that at the time the lease was executed it was illegal to drill for oil upon the property which was the subject of the lease. Therefore, the third essential of a valid contract as set forth supra was absent, to-wit, a lawful object. Hence, no obligation upon the part of respondent, the lessee, to pay rent was created by the lease, and judgment was properly entered in favor of respondent upon the cause of action alleged in the first suit filed, No. 419,992.

Likewise, since the lease was *void,* respondent, the lessee, was entitled to a return of the consideration paid for its execution, and judgment was properly rendered in his favor in the suit which he filed, No. 420,633.

[10, 11] The fourth and fifth questions must be answered in the negative. The law is established in California that a contract, *void,* because it stipulates for doing what the law prohibits, is incapable of either (a)

being ratified, or (b) creating the basis for an estoppel. Wood v. Imperial Irrigation District, 216 Cal. 748, 759, 17 P.2d 128; Silverthorne v. Percey, 120 Cal.App. 83, 87, 7 P.2d 746; Butterfield Construction Co. v. Federal L. V. Ins. Co., 5 Cal.App.2d 16, 20, 41 P.2d 958; 10 Cal.Jur. (1923) 623, sec. 11; 5 Cal.Jur.Ten Yr.Supp. (1936) 537, sec. 11. In the present case the alleged contract was *void* from its inception. Therefore, applying the rules just stated no act or failure to act upon the part of respondent could give it validity. It could not be ratified nor could respondent be estopped by his conduct from asserting its invalidity.

For the foregoing reasons the judgments are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

31 Cal.App.2d 133

CRESCENT CITY v. GRIFFIN, City Clerk.

Civ. 6208.

District Court of Appeal, Third District, California.

Feb. 17, 1939.

1. Statutes 🔑174

A "liberal construction" of a statute is one which expands meaning to meet cases which are clearly within spirit or reason thereof or within evil which statute was designed to remedy, provided interpretation is not inconsistent with language used. St. 1937, p. 1471, § 7.

[Ed. Note.—For other definitions of "Liberal Construction," see Words & Phrases.]

2. Municipal corporations 🔑918(2)

General obligation bonds which city of sixth class proposed to issue for purpose of raising funds with which to purchase securities of certain acquisition and improvement districts were not invalid because ordinance calling election provided for issuing only $167,000 worth of bonds, whereas proposition submitted to electors called for issuance of $175,000 worth of bonds. St. 1901, p. 27; St. 1917, p. 79, § 6½; St.1937, pp. 1469, 1471, §§ 3, 7, 8.

3. Municipal corporations 🔑918(2)

General obligation bonds which city of sixth class proposed to issue were not invalid because ordinance calling bond election recited that purpose of issue was to secure funds with which to purchase bonds of a designated acquisition and improvement district, whereas another section of same ordinance recited that bonds of two districts were to be purchased where preamble of ordinance correctly stated amount of outstanding bonds of each district which it was proposed to acquire and no elector could have been prejudiced or deceived. St.1901, p. 27; St.1917, p. 79, § 6½; St.1937, pp. 1469, 1471, §§ 3, 7, 8.

4. Municipal corporations 🔑918(2)

Under statute requiring that ordinance calling bond election be adopted at meeting subsequent to meeting at which resolution of public interest and necessity is adopted, general obligation bonds which city of sixth class proposed to issue were not invalid because ordinance calling election was read at same meeting at which resolution of public interest and necessity was passed and adopted, where ordinance was not adopted until subsequent meeting. St.1901, p. 27, § 2.

5. Municipal corporations 🔑918(2)

General obligation bonds which city of sixth class proposed to issue was not invalid because ordinance calling bond election recited that resolution of public interest and necessity had been adopted on 28th day of July, whereas in fact resolution was adopted on 26th day. St.1901, p. 27, § 2.

Mandamus proceeding by Crescent City, petitioner, against E. R. Griffin, as City Clerk of Crescent City, to compel the clerk to countersign certain general obligation bonds of the city.

Peremptory writ granted.

T. F. Peterson, of Eureka, for petitioner.

Orrick, Dahlquist, Neff & Harrington, of San Francisco, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an original proceeding in mandamus instituted by petitioner, the City of Crescent City, a municipal corporation, against the respondent, E. R. Griffin, as City Clerk of said City of Crescent City, for the purpose of compelling the respondent to countersign certain general obligation bonds of the City of Crescent City alleged to have been authorized by the qualified electors of said city at an election held on the 28th day of September, 1937. An alternative writ of mandate was issued by this court, and the agreed facts follow.

Petitioner, City of Crescent City (hereinafter for convenience sometimes designated as the "City"), is a city of the sixth class, and was incorporated as a municipal corporation under the Municipal Corporation Bill of 1883, and is located in the county of Del Norte, state of California.

The respondent, E. R. Griffin, is now, and was at all times herein mentioned, the duly elected, qualified and acting city clerk of said city.

Under and pursuant to the terms of the Acquisition and Improvement Act of 1925 (St.1925, p. 849), there were formed in the City of Crescent City two districts, respectively known as "Acquisition and Improvement District No. 1" and "Acquisition and Improvement District No. 2". Acquisition and Improvement District No. 1 comprises approximately 89 per cent of the City of Crescent City, and contains property of the assessed value of approximately $1,500,000, and as of July 1, 1937, had issued and outstanding bonds of the aggregate face amount of $68,000, and interest thereon delinquent in the amount of $10,728.66. Acquisition and Improvement District No. 2 comprises the entire City of Crescent City, and contains property of the assessed value of approximately $1,600,000, and as of July 1, 1937, had issued and outstanding bonds of the aggregate principal amount of $163,000, and interest thereon delinquent in the amount of $12,590.

Many of the assessments levied upon the lands in said districts were delinquent, and said city deemed it advisable to readjust the burden of said assessments, and to that end instituted and took the proceedings hereinafter set forth under the provisions of that certain act of the legislature of the state of California entitled: "An act for the relief of certain assessment districts, and for that purpose empowering incorporated cities to render financial aid to such districts and to declare the urgency of this act, to take effect immediately." Approved June 21, 1937. Stats.1937, ch. 494, p. 1468.

Proceeding under said act, the city council of the City of Crescent City (hereinafter for convenience sometimes designated as the "Council"), at an adjourned regular meeting thereof held on the 26th day of July, 1937, by the affirmative vote of all of the members of the council, adopted a resolution designated "Resolution No. 142", entitled: "Resolution determining that the public convenience and necessity demand, and that the general interest of the City of Crescent City will be served and promoted by, the incurring of said City of Crescent City of bonded indebtedness by the issuance and sale of bonds to be known as General Obligation Bonds of the City of Crescent City, in the amount of $175,000, the proceeds from the sale of which shall be used for the purchase at a discount of securities of certain assessment districts known as Acquisition and Improvement District No. 1 and Acquisition and Improvement District No. 2."

In said resolution the city council determined and declared that the cost of purchasing at a discount the securities of Acquisition and Improvement District No. 1 and Acquisition and Improvement District No. 2 therein mentioned would be too great to be paid out of the ordinary annual income and revenue of the city. Subsequently, at an adjourned regular meeting of the council held on the 2d day of August, 1937, the council finally passed and adopted ordinance No. 282, entitled: "An Ordinance of the City of Crescent City calling a special municipal election to be held in said City on Tuesday, the 28th day of September, 1937, for the purpose of submitting to the voters of the City of Crescent City the proposition of incurring a bonded indebtedness for the purpose of purchasing at a discount the bonds, and unpaid coupons thereon, of certain assessment districts known as 'Acquisition and Improvement District No. 1' and 'Acquisition and Improvement District No. 2' and situated in the City of Crescent City."

Said ordinance No. 282 was given its first reading at an adjourned regular meeting of the council held on the 26th day of July, 1937, and read and adopted at an adjourned regular meeting of the council held on the 2d day of August, 1937, in each case by the vote of more than two-thirds of the members of the council. Thereafter, to-wit, on the 6th, 13th, 20th and 27th days of August, 1937, said ordinance No. 282 was published in the Del Norte Triplicate, a weekly newspaper of general circulation published in said city.

Pursuant to said ordinance No. 282, a special election was held in the City of Crescent City on the 28th day of September, 1937. Subsequently, at an adjourned regular meeting of the council held on the 5th day of October, 1937, the council proceeded to canvass the returns of said election, and, after completing the canvass of said returns, the council passed and adopted resolution No. 147, entitled: "Resolution declaring result of election", in which the council set forth as the result of said election that 625 electors voted in favor of said proposition, and in favor of the issuance of said bonds of said city in the amount of $175,000, in accordance with the provision of the ordinance calling said election, and that 85 electors voted against said proposition and against the issuance of said bonds of said city, and that more than two-thirds of all the electors voting on said proposition at said special election voted in favor thereof and in favor of the issuance of said bonds authorized to be issued pursuant thereto, and that said proposition carried.

Thereafter the council passed and adopted by the affirmative vote of all of its members an ordinance designated as ordinance No. 287, entitled: "An ordinance of the City of Crescent City directing and providing for the issuance of municipal improvement bonds of said city to represent a bonded indebtedness of said city in the sum of $175,000 authorized at a special election held in said City on the 28th day of September, 1937, specifying the form of said bonds, providing for a tax levy for the payment of the principal and interest thereof, and creating a municipal bond fund."

Thereafter, the council, at a special meeting thereof held on the 16th day of January, 1939, by the affirmative vote of more than two-thirds of the members of the council, adopted a resolution designated "Resolution No. 176", entitled: "Resolution declaring that the public convenience and necessity demand, and that the general city interest of the City of Crescent City will be served and promoted by, the expenditure by the City of Crescent City of the proceeds from the sale of $166,500 principal amount of general obligation bonds of the City of Crescent City for the purchase at a discount of securities of certain assessment districts known as Acquisition and Improvement District No. 1 and Acquisition and Improvement District No. 2, specifying in detail the maximum amount to be expended or contributed for said Districts, the manner in which the same is to be used and the facts and circumstances showing the manner in which, and the reason why the general city interest and welfare will be served and promoted by the expenditure to be made."

Said City of Crescent City is ready and willing to execute, sell and deliver said bonds, but respondent herein, as City Clerk of said City of Crescent City, has refused and still refuses, to countersign said bonds, and none of said bonds have been executed or delivered; respondent alleges, as the ground for his refusal to countersign said bonds, that said bonds, if issued, would be invalid because of defects in the preliminary proceedings leading up to the issuance of said bonds.

[1] At the outset we wish to observe that in considering the objections raised by respondent as to the legality of the proceedings, we are guided and controlled to a considerable extent by the provisions of act of 1937, relating to the manner in which such proceedings should be construed. The provision referred to reads as follows:

"This act and all of its provisions shall be liberally construed to the end that the purposes hereof may be made effective." Section 7.

A liberal construction has been defined as "one which expands the meaning of the statute to meet the cases which are clearly within the spirit or reason of the law or within the evil which it was designed to remedy, provided that such an interpretation is not inconsistent with the language used". (12 C.J., p. 1302.)

We also have in mind that the statute mentioned was an emergency measure, and we quote from some of the facts constituting such emergency: "Many hundreds of properties in these districts are being deeded to the State and to cities in this State for delinquent taxes and assessments and unless the financial aid of the city is immediately made available to assist these overburdened districts thousands of parcels of land will be stricken from the tax rolls this year; thousands of property owners will lose their homes, millions of dollars in governmental revenue will be uncollectible and at the same time thousands of bondholders will be unable to realize any return upon their investments." Section 8.

It is true that the proceedings were based upon the statute of 1901 (St.1901, p. 27), but this is for the reason that in section 3 of said act of 1937 it is expressly provided that bonds of this character may be issued under said act of 1901. By adopting the method of procedure in the latter act, the legislature, in the act of 1937, virtually made the act of 1901 a part of the act of 1937.

[2] The first objection made is that the ordinance calling the election provides for issuing only $167,000 principal amount of bonds, whereas the proposition submitted to the electors is for the incurring of the bonded indebtedness of $175,000.

We first call attention to the fact that the city council later on passed ordinance No. 300, which provides that the limit of bonds to be issued under said proceedings shall be $166,500. Such limitation appears to be permissible under the provisions of the act of 1901, section 6½ (as added by St.1917, p. 79). The facts appear to be that while the first paragraph of section 2 of said ordinance states that the principal of the indebtedness proposed to be incurred is $175,000, the second paragraph of said section enumerates the number of annual payments and the amount thereof. A computation of the aggregate of these latter amounts as given in this second paragraph shows that the total is $167,000. It is urged by respondent that the provision in paragraph 2 for the specific serial maturities became an integral part of the proposition voted on by the electors, and it cannot be said that the proposition would have carried except for this specific provision under which only $167,000 principal amount of bonds was authorized. We cannot say that any prejudice arose because of the discrepancy mentioned. The city council, under authority of law, passed a subsequent ordinance which limited the amount of the issue to $166,500, which is a sum below the total of the serial maturities of $167,000. If the council had attempted to issue bonds under these proceedings in the sum of $175,000, we would have no hesitation in saying that such action would result in invalidating the bonds. Certainly, no elector could object to the issuance of bonds below either amount specified in the ordinance calling the election, and therefore no substantial prejudice resulted from this alleged defect. The decisions cited by respondent are not in point. In O'Farrell v. County of Sonoma, 189 Cal. 343, 208 P. 117, the question involved was the right of the board of supervisors to spend money for highway construction upon a short piece of road, under such circumstances that there would not be enough money left to complete the work authorized by the voters when they approved the bond issue. It was held that such action by the board was unlawful and would be restrained by the courts.

In Peery v. Los Angeles, 187 Cal. 753, 203 P. 992, 19 A.L.R. 1044, the city sought to sell the bonds at less than their par value, in contravention of the statute.

In Skinner v. City of Santa Rosa, 107 Cal. 464, 40 P. 742, 29 L.R.A. 512, the council, being unable to sell its bonds under the terms fixed in the ordinance calling the election, and in the proposition submitted to the voters, passed an ordinance by which the place of payment was changed from Santa Rosa to New York; by which the interest was made payable semi-annually instead of annually; and by which the interest was made payable in gold coin rather than in lawful money. It was held the council was without such authority, and that bonds issued pursuant to the new ordinance would be void, because the burden upon the taxpayers would be increased.

In City of San Diego v. Millan, 127 Cal. App. 521, 16 P.2d 357, cited by respondent, a writ was sought to compel the city treasurer to invest surplus city funds in certain city bonds, known as El Capitan dam bonds. The treasurer refused to make the investment, claiming the bonds were void. It is interesting to note that the questions raised were in part the same as in Skinner v. Santa Rosa, supra, O'Farrell v. County of Sonoma, supra, Peery v. Los Angeles, supra, and Murphy v. City of San Luis Obispo, infra. In effect, the decision overrules Skinner v. Santa Rosa and O'Farrell v. County of Sonoma, supra, in that it approved the validity of the bonds where the proceeds were not to be used for the precise purpose for which the bonds were originally issued. The decision reconciled its holding with previous cases in stating that the true purpose was the same, —namely, the building of a dam to impound the waters of the San Diego river; that a new and different dam was to be built, it was true, but it was to be built for the same purpose, and its cost would not exceed the original estimate. It reiterated the true rule, that unless the defect complained of would result in an increased burden on the taxpayers, it would be disregarded. It also cited with approval the case of Town of Martinez v. Johnson, 201 Cal. 397, 257 P. 853. The writ prayed for was accordingly granted.

[3] It is contended that the proposition submitted to the electors was not the proposition for the submission of which said election was called. It appears that in enumerating the purposes for which the election was called, section 1 of the ordinance stated that the election was called "for the purpose of submitting to the qualified electors of said city a proposition of incurring a bonded indebtedness of said city in the sum of $175,000.00, for the purpose of purchasing, at a discount, the bonds and unpaid coupons thereon, of Acquisition and Improvement District No. 2". In section 4 of said ordinance it is stated that the proposition submitted to the electors was as follows: "Shall the City of Crescent City incur a bonded indetedness of $175,000.00 for the purpose of purchasing at a discount the bonds, and unpaid coupons thereon, of Acquisition and Improvement District No. 1, and Acquisition and Improvement District No. 2, as particularly specified in Resolution No. 142 passed and adopted by the City Council of the City of Crescent City on the 26th day of July, 1937."

It is urged that this ordinance is contradictory in that it calls for submitting a proposition for the purpose of purchasing securities of Acquisition and Improvement District No. 2, while, as stated in another section of said ordinance, which specifies the proposition to be submitted to the electors, that the purpose of incurring the bonded indebtedness was that of purchasing securities of Acquisition and Improvement District No. 1 and Acquisition and Improvement District No. 2. It is pointed out by respondent that the purposes and objects for which the indebtedness is proposed to be incurred are not sufficiently definite to be reasonably understandable. Section 2 of the act for which the proceedings were conducted requires that the ordinance calling the election "shall recite the objects and purposes for which the indebtedness is proposed to be incurred". St. 1901, p. 27. Petitioner points out that the preamble of the ordinance correctly stated the amount of the outstanding bonds of each district which it was proposed to acquire, and that therefore no elector could possibly be misled under such circumstances. A reading of the ordinance which fully sets forth the details with reference to the bonds to be paid off in connection with both of these districts leads us to conclude that no elector could have been prejudiced or deceived by reason of the situation urged by respondent, and we therefore hold that this objection is untenable. The cases cited by respondent do not support this contention. The case of City of Los Angeles v. Hance, 130 Cal. 278, 62 P. 484, is not in point, since the difficulty there lay in the fact that there were two propositions to be submitted to the electors; that they were exactly reversed upon the ballots, and it could not be ascertained which proposition the electors intended to adopt. In the case at bar, the proposition as stated on the ballot clearly indicated to the voters that they were voting to issue bonds to retire the old bonds of both acquisition and improvement districts.

In the City of San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 P. 699, the ballots furnished the voters failed to indicate that the voter had any choice other than to vote "yes" on the question of issuing bonds. Under these circumstances the election was held void.

In Murphy v. San Luis Obispo, 119 Cal. 624, 51 P. 1085, 39 L.R.A. 444, the only point decided as against the validity of the bonds related to the form of the ballot. It overruled Skinner v. Santa Rosa, supra, on the question of payment of interest and of payment in gold coin. It is significant that in the case at bar none of these questions are involved.

In City of Inglewood v. Kew, 21 Cal. App. 611, 132 P. 780, respondent clerk refused to sign bonds because he claimed certain rejected ballots should have been counted, and because the ordinance calling the election was indefinite as to what street improvement work was actually to be done, and what amount of money was to be spent by the city. The ordinance itself provided that it was to depend on what objections might thereafter be made by property owners; and on what action might be taken by incoming officers, and that in fact it might even be that no work at all would be undertaken. Under these circumstances, the court held the ordinance to be too indefinite, and therefore void.

[4] It is next contended that the ordinance calling the election was not adopted at a meeting of the city council subsequent to the meeting of the city council at which the resolution of public interest and necessity was passed and adopted. The latter resolution was adopted on July 26, 1937. The record shows that the ordinance calling the election was *read* at the same meeting, but that it was not *adopted* until August 2, 1937. The Bond Act of 1901 (section 2) provides that the ordinance calling the election must be adopted at a meeting subsequent to the meeting at which the resolution of public interest and necessity was adopted. The method pursued here literally complies with the provisions of the statute mentioned. While it is true that the proceedings relating to the adoption of the ordinance calling the election were *initiated* at the same meeting at which the resolution of public interest and necessity was adopted, it would be a very strange construction for us to hold that the legislature did not mean what it said, and that when it used the word "adopted", it referred to the *initiation* of all proceedings relating to adoption. The point is without merit.

Respondent cites Hellman v. Los Angeles, 147 Cal. 653, 82 P. 313, and Jenkins v. Williams, 14 Cal.App. 89–96, 111 P. 116, in support of his contentions. Neither case is in point. In the Hellman case there was no intrinsic evidence from which the true date of the bonds could be ascertained. That, as mentioned in petitioner's opening memorandum, was a suit to invalidate a tax levy, and nothing contained in the tax roll or assessment roll correctly indicated the date of the bonds.

As pointed out above, the proposition as actually submitted to the voters correctly stated the date. The ordinance, as published except in one section, correctly stated the date. Respondent admits the resolution was in fact adopted on the proper date. How, then, can anyone have been deceived or prejudiced?

In Jenkins v. Williams, supra, a suit was brought to compel the auditor of Sacramento county to pay petitioners some $500 more than the bond election allowed for the construction of a bridge. It was held that the county might not lawfully exceed the limitation imposed by the will of the voters. It will thus be seen that nothing contained in the two cited cases is pertinent to the case at bar.

[5] It is next contended that the ordinance calling the election referred to the resolution of public interest and necessity as having been adopted on the *28th* day of July, 1937, whereas in fact said resolution was adopted July *26th*, 1937. We cannot see how any serious prejudice arose over what was obviously a mere clerical error. It did not tend to increase or change the burden upon the taxpayer, nor could it mislead any elector to his prejudice. The contention is trivial and without merit.

Several other objections are made, but we deem them so inconsequential that no discussion of them is required.

We wish to reiterate that the interpretation and construction we have placed upon these proceedings is based to a considerable extent upon the peculiar wording of the statute of 1937, and upon the further fact that an emergency existed which called for prompt and immediate action in order to relieve the people of an intolerable burden. If any of the objections raised were such as would result in misleading the electors, or placing upon them a burden which they did not understand they were assuming at the time of the election, we would not hesitate to uphold them, but as we have pointed out, such is not the case here.

Let the peremptory writ issue.

We concur: PULLEN, P. J.; THOMPSON, J.

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PEOPLE v. SISSON et al.

Cr. 3140.

District Court of Appeal, Second District,
Division 2, California.

Feb. 16, 1939.

Rehearing Denied March 3, 1939.

Hearing Denied by Supreme Court
March 17, 1939.

1. Conspiracy 🔑47

It is not necessary that conspiracy be proved by direct evidence, but elements of crime may be inferred from circumstances shown in evidence.

2. Conspiracy 🔑24

If it is established that conspirators came to a mutual understanding to commit a crime, it is sufficient to constitute a "conspiracy."

[Ed. Note.—For other definitions of "Conspiracy," see Words & Phrases.]

3. Conspiracy 🔑47

Evidence sustained conviction of conspiracy to commit grand theft on ground that defendants through "business opportunity broker" obtained money from unemployed workmen by inducing them in return for promise of employment to invest money in a chartered automobile run which was nonexistent.

4. Conspiracy 🔑41

Each conspirator is responsible for the acts of his coconspirators in furtherance of the objects of the conspiracy.

5. Larceny 🔑62(2)

Evidence sustained conviction of grand theft on ground that defendants through "business opportunity broker" obtained money from unemployed workmen on the representation that there was a bona fide business of carrying passengers to a certain point when in fact no such business existed.

6. Criminal law 🔑741(6)

Rule that circumstantial evidence must not only be consistent with the hypothesis of guilt but inconsistent with any other rational hypothesis is for the guidance of the jury and ordinarily jury must determine, in the light of the rule, question whether defendants are guilty beyond a reasonable doubt.

7. Criminal law 🔑741(6)

Where incriminatory circumstances are equally compatible with innocence as with guilt, question presented becomes one of law.

8. Criminal law 🔑255

Rule that in cases involving circumstantial evidence such evidence must not only be consistent with hypothesis of guilt but inconsistent with any other rational hypothesis is applicable to trial court as finder of fact where case is tried without a jury.

9. Conspiracy 🔑47
Larceny 🔑65

In prosecution for grand theft and conspiracy to commit grand theft, where circumstances whereby defendants obtained money from unemployed workmen by inducing them to invest money in chartered automobile run which did not exist were not shown to be equally compatible with innocence as with defendants' guilt, conviction would not be disturbed.

10. Criminal law 🔑424(1)

In conspiracy prosecution resulting when unemployed workmen were induced to invest money in nonexistent chartered automobile run, testimony concerning witnesses' instructions from "business opportunity broker" in matter of securing return of contracts and that broker admitted the burning of the contracts was admissible as against the broker, as against contention that conspiracy had ended.

11. Criminal law 🔑260(11)

Where case was tried by the court without a jury, it would be presumed that court considered evidence for purpose for which it was legally admissible.

12. Criminal law 🔑1169(7)

In conspiracy prosecution resulting when unemployed workmen were induced to invest money in nonexistent chartered automobile run, testimony concerning witness' instructions from "business opportunity broker" concerning matter of securing return of contracts and the giving of note signed by coconspirator was not prejudicial as to coconspirators.

13. Criminal law 🔑877

In prosecution for grand theft and conspiracy to commit grand theft, that defendants were convicted under different counts of the information charging grand theft would not warrant reversal for inconsistency where coconspirators were not acquitted of any of the charges.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

William Brooks Sisson, John Mossman Meyers, E. S. Tremelling, Warren R. Sheehan and W. M. Fidroeff were charged by information with grand theft and conspiracy to commit grand theft. Charges were dismissed as against the last-named defendant, and from a judgment of conviction on various counts, remaining defendants appeal.

Affirmed. Purported appeals from certain orders dismissed.

Rehearing denied; McCOMB, J., dissenting.

Donald Kolts and Henry C. Huntington, both of Los Angeles, for appellants Sisson and Sheehan.

Paul E. Tapley, of Los Angeles, for appellant Tremelling.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

WOODS, Justice.

An information was filed charging the defendants Sisson, Tremelling, Sheehan, Meyers and Fidroeff with the crimes of grand theft and conspiracy to commit grand theft. In count I of the information it is charged that defendants are guilty of grand theft in the felonious taking of $300 from John Cloud; count II charges grand theft in the felonious taking of $300 from Edwin Nehls; count III charges grand theft in the felonious taking of $300 from Louis McAmis; count IV charges grand theft in the felonious taking of $250 from W. G. Schirmeister; count V charges grand theft in the felonious taking of $300 from Harry H. Loescher; count VI charges grand theft in the felonious taking of $250 from Charles Mercurio; count VII charges grand theft in the felonious taking of $400 from Granville Talbot. In count VIII it is charged that defendants and one Francis Turner are guilty of conspiracy to commit grand theft in that between October 5, 1937, and November 20, 1937, they feloniously conspired to commit grand theft. Fourteen separate overt acts are set forth in the information, of which seven overt acts consist of the various charges of grand theft set forth in the first seven counts of the information. The witness John Cloud, named in count I, was absent from the state at the time of trial and count I was dismissed. Defendants Sisson and Sheehan were found guilty on all the remaining counts. The motion of defendant Tremelling to dismiss counts VI and VII as to himself was granted and he was found guilty on counts II, III, IV, V and VIII. The motion of defendant Meyers to dismiss as to himself counts II, III, IV and V was granted and he was found guilty on counts VI, VII, and VIII. Motions for a new trial were made and denied. Appellants also presented prior to the judgment motions to "vacate the decision" and these motions were denied. Defendants Sheehan, Sisson and Tremelling have appealed from the judgment and from the order denying their motions for a new trial. Defendant Sisson attempts to appeal from the court's order denying his motion to set aside the decision and defendant Tremelling attempts to appeal from the court's order denying his application for probation and from all orders and rules made during the course of the trial.

The case was tried before the court without a jury and it is the main contention of appellants that the evidence is insufficient to support the court's findings that they are guilty. In considering this contention we must look to the evidence presented by the prosecution since no evidence was presented on behalf of the defense.

Defendant Sisson held a license as a business opportunity broker and conducted a business under the fictitious name of Republic Finance Company at 1105 West Seventh street, Los Angeles. His license was in the name of Phillip Smith and he was prosecuted under the name of Smith until late in the court proceedings when his true name was made to appear to be Sisson, at which time the court ordered its records to be amended to show the true name. Defendants Tremelling and Meyers were licensed to represent Sisson as salesmen under his broker's license. During the month of October, 1937, a series of advertisements were placed in Los Angeles newspapers in the business opportunity columns in which it was made to appear that truck drivers and garage men were wanted. The advertisements indicated that a modest investment would be required and that there would be incomes from the various positions ranging from $35 to $55 per week. These advertisements were obtained by the newspapers from both Sisson and Tremelling and were paid for by Sisson.

The complaining witnesses appeared at the office of Republic Finance Company on various dates from October 27, 1937, to November 8, 1937, and asked for jobs as assistant truck drivers. They talked to various ones of the defendants but for the most part the preliminary negotiations were conducted by defendants Tremelling and Meyers, the salesmen. The applicants were told that the jobs they sought had been taken by others or they were asked to advance sums beyond their means. Each was told that he could purchase a one-half interest in a chartered automobile run from Los Angeles to Newport Beach, the purpose of which was to carry passengers back and forth from Los Angeles to water taxis operating between Newport Beach and gambling ships off the coast. The applicants were to receive one dollar for each passenger hauled and on presentation of a ticket to a water taxi another dollar would be paid for each passenger. The interest in the chartered run was to include a one-half interest in an automobile in addition to the profits to be derived. For the so-called one-half interest in the alleged chartered run and for a one-half interest in an automobile each applicant paid money to defendants, the sums varying from $250 to $400. In some instances the applicants secured the money by borrowing after considerable effort.

Defendant Sheehan was introduced to the applicants as the other owner in the chartered run to Newport Beach and in the automobiles. Sheehan had in October, 1937, purchased two used Lincoln automobiles. These automobiles, which with a Packard car were the ones involved in the deals with the applicants, had been purchased on the monthly payment plan and were ultimately repossessed upon failure to make the required monthly payments. In one instance a one-half interest in the same automobile was sold to three different applicants. Upon the consummation of the transactions the applicants were told to report for work the following day. They reported for work daily, some of them for at least two weeks, but there was no work. There was in fact no run from Los Angeles to Newport Beach. The applicants began to compare notes, with the result that efforts were made to recover the sums which they had paid. Defendant Fidroeff, who became a witness for the prosecution after the dismissal of the charges against him, negotiated with the applicants for the ostensible purpose of buying out their interests and returning their money. These negotiations were conducted at the instigation of defendant Sisson. Each applicant received a note signed by Fidroeff for $75 and another note signed by Sheehan for the balance of the amount he had paid. The written contracts were returned by all of the applicants except Mercurio. These contracts were burned by defendant Sisson. The notes were not paid.

[1-4] The foregoing is a summary of the activities of the defendants. We deem it unnecessary to here set forth many other details, some of which are incriminatory. Without doubt the record discloses a nefarious scheme to mulct money from unemployed workmen in which all of the appealing defendants took part. It is not necessary that an illegal combination be proved by direct evidence. The elements of the crime may be inferred from facts and circumstances shown in evidence. The prosecution need not prove that the defendants met and formally agreed to commit a crime or that the conspiracy was expressed in any particular manner. If it be established that the conspirators came to a mutual understanding to commit a crime it is sufficient to constitute conspiracy. People v. Yeager, 194 Cal. 452, 229 P. 40. The evidence is sufficient to justify the finding of the trial court that all of the appellants conspired together to commit grand theft. It is elementary that each conspirator is responsible for the acts of his coconspirators in furtherance of the objects of the conspiracy.

[5] The record also supports the finding of the court that the appellants actually committed the crimes of grand theft set forth in the information. They falsely represented that there was in existence a chartered automobile run between Los Angeles and Newport Beach in the ownership of defendant Sheehan. It is argued by appellants that, according to the testimony of a representative of the railroad commission, such a run as was contemplated between the parties did not require a license or permit. Whether this be true or not is of little consequence, for the statements of appellants justify a finding that they represented that there was in existence a bona fide business of carrying passengers to Newport Beach when in fact no such business existed. The evidence is ample to justify findings that each of the defendants aided and abetted in the commission of all of the crimes of grand theft charged in the information.

[6-9] Appellants refer to the rule controlling in cases of circumstantial evidence, that in such cases the evidence must not only be consistent with the hypothesis of guilt but inconsistent with any other rational hypothesis. This rule is elementary but it is a rule for the guidance of the jury and ordinarily the jury must determine in the light of the rule the question whether the defendants are guilty beyond a reasonable doubt. It is only in cases where the incriminatory circumstances are equally compatible with innocence as with guilt that the question presented becomes one of law. People v. Staples, 149 Cal. 405, 86 P. 886. In our case there was no jury and the rule governing the action of the jury is applicable to the trial court as a finder of fact. It cannot be successfully contended that the circumstances shown in evidence are equally compatible with the innocence of the appellants as with their guilt and we therefore see no occasion for interfering with the findings of the trial court.

[10-12] Complaint is made of the admission in evidence of the testimony of Fidroeff concerning his instructions from defendant Sisson in the matter of securing the return of the contracts and his testimony that defendant Sisson had admitted the burning of the contracts. It is contended that the conspiracy had then ended and that these acts and statements of defendant Sisson were inadmissible. To this respondent answers that the conspiracy was still in existence at the time of the conversation between Fidroeff and Sisson and refers to testimony that Sisson then told one of the applicants not to "run the boys away". It is argued that Sisson was attempting to avert any interference with his duping of additional applicants for employment. Regardless of this contention by respondent it is clear that the evidence was admissible as against defendant Sisson. The case was tried by the court and it will be presumed that the court considered the evidence for the purpose for which it was legally admissible. Moreover, it is apparent that appellants Sheehan and Tremelling were not prejudiced by this ruling and that the judgment of the court would not have been different if the evidence had been limited to defendant Sisson. The same observations may be made with respect to the claim of error on the part of the court in admitting promissory notes signed by defendant Sheehan. They were admissible as to Sheehan and Sisson, and the error, if any, could not have affected adversely the rights of Tremelling.

[13] There is no merit in the contention that the judgments should be reversed for the reason that, as alleged, they are inconsistent. The alleged inconsistency is based upon the fact that defendant Meyers was convicted on two of the counts charging grand theft and that defendant Tremelling was convicted on four of the counts charging grand theft, being counts different from those upon which Meyers was convicted. It is sufficient answer to the contentions of appellants to point out that neither Tremelling nor Meyers was acquitted of any of the charges. Certain counts were dismissed as to them upon their own motions. Moreover, the charges in count VIII, the count charging conspiracy, do not necessarily include any of the elements upon which the court failed to convict either Meyers or Tremelling. Count VIII contains allegations of fourteen distinct overt acts and it was not necessary for the prosecution to prove the commission of any particular one or of all of them.

The judgments and orders denying the motions for new trial are affirmed. The purported appeals from other orders are dismissed.

I concur: CRAIL, P. J.

McCOMB, Justice (dissenting).

I dissent.

Defendants were accused by the district attorney of the county of Los Angeles of the crime of conspiracy to commit grand theft and, in seven separate counts, of having committed grand theft. They were tried jointly before the court without a jury, who found the defendants guilty as follows:

John Mossman Meyer—Counts VI, VII, and VIII.
Warren R. Sheehan, William Brooks Sisson—Counts II, III, IV, V, VI, VII, and VIII.
E. S. Tremelling—Counts II, III, IV, V, and VIII.

The information was dismissed as to defendant W. M. Fidroeff and the court granted defendants' motions to dismiss count I thereof.

Defendants Sheehan, Sisson, and Tremelling alone appeal from the judgments and orders denying their motions for a new trial.

Viewing the evidence most favorable to the prosecution, the facts in the instant case are:

During the month of October, 1937, defendant Sisson (also known as Smith), who was a business opportunity broker operating under the name of Republic Finance Company in Los Angeles, caused to be inserted in the Los Angeles Examiner an advertisement under the business opportunity column seeking assistant truck drivers, garage men, machinists and service station attendants. Each advertisement intimated that there would be incomes from the various positions ranging from $35 to $55 a week and stated that a moderate investment by each applicant would be required. Similar advertisements were inserted by defendants Tremelling and Meyer.

During the same month defendant Sisson contracted for the purchase of two Lincoln automobiles, one bearing engine number KB—1471 with B.E.P.C.S. plate No. 1951, the other, engine number KB—1000 with B.E.P.C.S. plate No. 1952.

In response to the aforementioned advertisements Mr. Nehls appeared at the office of Republic Finance Company, and on October 27, 1937, (count II) purchased from defendant Sheehan for $300 a one-half interest in the Lincoln car bearing engine number KB—1471 and also a one-half interest in a chartered run to Newport Beach.

October 28, 1937, (count III) defendant Sheehan sold to Mr. McAmis for $300 a one-half interest in the automobile bearing engine number KB—1000, and also a one-half interest in a chartered run to Newport Beach.

November 2, 1937, (count V) and November 13, 1937, (count VII) defendant Sheehan entered into contracts with Mr. Loescher and Mr. Talbot respectively similar to the contract he had previously made with Mr. Nehls, excepting that Mr. Loescher paid $300 for his contract and Mr. Talbot paid $400 for his agreement.

November 2, 1937, (count IV) defendant Sheehan sold to Mr. Schirmeister for $250 a one-half interest in a 1929 Packard automobile and also a one-half interest in a chartered run to Newport Beach.

November 8, 1937, (count VI) defendant Sheehan entered into a contract with Mr. Mercurio for the sum of $250 similar to the one he had previously entered into with Mr. McAmis.

In each instance after consummating the transactions above set forth the parties were told to report for work the next day. All reported but none were ever assigned any regular work.

After several weeks the purchasers, excepting Mr. Mercurio, upon demanding their money back, received notes from defendants Fidroeff and Sheehan, in each instance aggregating the amount they had paid for their agreement, and returned their contracts to defendant Fidroeff, who in turn delivered them to defendant Sheehan, who destroyed them. The contract retained by Mr. Mercurio, and which was typical of all of the contracts executed by defendant Sheehan, read as follows:

"Republic Finance Company
"1105 W. 7th Street,
"Los Angeles, California.
"Purchase and Sales Agreement.

"I hereby deposit with Republic Finance Company the sum of $50.00 as part payment of the purchase price of one-half interest in chartered sedan service business with only one sedan. Above includes one-half interest in 1932 Lincoln sedan. Profits are to be divided every 30 days. Located at 408 East 5th Street, in the City of Los Angeles, County of Los Angeles, State of California, owned by W. R. Sheehan and listed by said owner thereof with Republic Finance Company as agent for the sale, and I hereby agree to purchase said property or business upon the following terms and conditions, to-wit:

"The full purchase price of said property or business to be $450.00; the sum of $300.00 additional cash to be paid on or before 11–8–37, and the balance of $200.00 as follows: @ $5.00 every 7 days.

"Said sum of $50.00 deposited as above to be applied to the settlement of all damages sustained by reason of my failure to complete the purchase as outlined above, and Republic Finance Company may retain from said sum the amount of any commission or compensation which would be due it upon the sale of said property at above price under the terms of said owner's contract, as if it had made said sale to me at said price. The purchaser thereof hereby certifies that he has made his own investigation of the above business prior to making this purchase.

"Los Angeles, Calif. date 11–6–37.
"Purchaser Charles Mercurio
"Address 1047 So. Irolo St.

"I hereby accept and ratify the sale mentioned in the foregoing agreement upon the terms and conditions therein mentioned.

"Los Angeles, Calif. date 11–6–37.
"Owner W. R. Sheehan
"Home address."

Each defendant urges reversal of the judgments on the ground that *there is no substantial evidence to sustain the findings of fact upon which the judgments were necessarily predicated.*

This proposition in my opinion is tenable except as to defendant Sheehan (count VII), and is governed by the following established principles of law:

First: (A) To constitute the offense of grand theft by means of false pretenses the following elements must be proved: (1) intent to defraud; (2) actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the owner must have been induced to part with his property because of the false pretenses made use of for that purpose. People v. Wasservogle, 77 Cal. 173, 175, 19 P. 270.

(B) The false pretenses referred to in the third element mentioned above must be of a past event or existing fact, and a representation of a future event, whether in the form of a promise or an opinion, does not constitute a criminal, false pretense. People v. Downing, 14 Cal.App.2d 392, 395, 58 P.2d 657.

Second: One of the necessary elements to be proven to establish the offense of grand theft by trick and device is that there be evidence of a preconceived intent upon the part of the defendant to use the money which is obtained for a purpose different from that for which the person parting with it intended it to be used. People v. White, 124 Cal.App. 548, 553, 12 P.2d 1078; People v. Robinson, 107 Cal. App. 211, 221, 290 P. 470; People v. Solomon, 75 Cal.App. 9, 14, 241 P. 931; People v. White, 66 Cal.App. 703, 706, 226 P. 962.

Third: One of the necessary elements of a conspiracy is that there be evidence from which the jury may reasonably infer an understanding, combination, or agreement between two or more persons to perpetrate an unlawful act. People v. Kizer, 22 Cal.App. 10, 14, 133 P. 516, 521, 134 P. 346.

Fourth: Circumstantial evidence of guilt is not sufficient to sustain a conviction where the evidence relied upon is of such a character as to be as consistent with the hypothesis of innocence as that of guilt. People v. Lamson, 1 Cal.2d 648, 662, 36 P.2d 361.

Applying the foregoing rules to the instant case, we find the record with reference to defendants Sisson and Tremelling, and to defendant Sheehan as to counts II, III, IV, V, and VI, to be completely devoid of any evidence that they or any of them made any false representation of a past or existing fact to the complaining witnesses, or any of them, which induced any of the complaining witnesses to part with their money when entering into the various contracts with defendant Sheehan. Therefore, one of the necessary elements to establish grand theft by means of false pretenses, to-wit, that the complaining witness must have been induced to part with his money or property because of false pretenses made use of for that purpose, is absent, and there was no evidence to sustain a conviction against such defendants for having committed this crime.

As to the same defendants there is no evidence in the record that they intended to use the money which was obtained from the complaining witnesses for any purpose different from that for which the latter delivered it to them. Therefore, one of the necessary elements to establish the crime of grand theft by trick and device being absent, their conviction of this crime cannot be sustained.

Since every deduction from the circumstantial evidence was equally compatible with innocence as guilt, there was not substantial evidence to sustain the findings of fact upon which the conviction of these defendants of grand theft was necessarily predicated, the conviction of defendant Sisson on counts II, III, IV, V, VI, and VII and of defendant Tremelling on counts II, III, IV, and V should be reversed.

With reference to defendant Sheehan we find a different situation. An examination of the record shows that on November 13, 1937 (count VII), he sold to Mr. Talbot a one-half interest in an automobile bearing engine No. KB—1471, in which automobile he had previously sold a one-half interest to Mr. Nehls (count II) and also a one-half interest to Mr. Loescher (count V). It is, therefore, evident that as to defendant Sheehan's transaction with Mr. Talbot there is substantial evidence to sustain the implied finding of the trial court that all of the elements of the crime of grand theft by means of false pretenses were present.

With reference to count VIII of the information, charging the defendants with a conspiracy to commit the crime of grand theft, applying the rule that circumstantial evidence of guilt is not sufficient to sustain a conviction where the evidence relied upon is of such a character as to be as consistent with the hypothesis of innocence as with that of guilt (People v. Lamson, supra) to the facts in the instant case, there is no evidence to sustain a finding of the trial court that there was an understanding, combination, or agreement between any two of the defendants to commit grand theft. Therefore, one of the essential elements of a conspiracy was lacking and the judgment of guilty as to these defendants on this count should be reversed.

For the foregoing reasons in my opinion the judgments and orders relative to defendants Sisson and Tremelling should be reversed and a new trial ordered. The judgments and orders relative to defendant Sheehan as to counts II, III, IV, V, VI, and VIII should be reversed and a new trial ordered as to such counts. The judgment and order denying defendant Sheehan's motion for a new trial as to count VII should be affirmed.

WEST KEY NUMBER SYSTEM

JOHNSON v. FONTANA COUNTY FIRE PROTECTION DIST. et al.*

Civ. 2175.

District Court of Appeal, Fourth District, California.

Feb. 8, 1939.

Rehearing Granted March 7, 1939.

1. Municipal corporations ⇨961

A judgment against county fire protection district for injuries resulting from negligent operation of automobile by district employee acting in scope of his employment is a "cost of maintenance" within statute authorizing board of supervisors of district to levy taxes to defray cost of maintenance of district, if liability for such injury is imposed on district by law. St.1925, p. 672, § 7.

[Ed. Note.—For other definitions of "Cost of Maintenance," see Words & Phrases.]

2. Municipal corporations ⇨880, 883

The supervisors of county fire protection district act in a representative capacity and hold title to property of district for the use and benefit of the district and collect and pay out money of the district for benefit of district and in carrying out its purposes. St.1925, p. 671, § 5.

3. Municipal corporations ⇨724

A county fire protection district performs a "governmental function" in furnishing protection against fire. St.1925, p. 671, § 5.

[Ed. Note.—For other definitions of "Governmental Function," see Words & Phrases.]

4. Automobiles ⇨187

A county fire protection district is a "district established by law" within statute imposing liability on a district established by law for injury resulting from negligent operation of automobile by district employee acting in the scope of his employment. Civ. Code, § 1714½, now Vehicle Code § 400; St.1925, p. 672, § 7.

5. Judgment ⇨584, 720

A "former adjudication" between the same parties may be either final determination of the rights of the parties or may be an adjudication of certain questions of fact which have been put in issue and decided.

[Ed. Note.—For other definitions of "Former Adjudication," see Words & Phrases.]

6. Judgment ⇨725(1)

A judgment operates as an estoppel to prevent the parties thereto or their privies from contending to the contrary as to a matter of fact which was found against them in arriving at the judgment.

7. Judgment ⇨725(1)

A judgment for motorist suing county fire protection district for injury sustained in collision with automobile allegedly driven by district employee was res judicata in mandamus proceeding against county board of supervisors to compel levy of tax to pay judgment, of issue whether driver was employee of district, where supervisors were parties to mandamus proceeding only in their representative capacity as the governing body of the district and the real parties in interest in motorist's action and mandamus proceeding were the same. St.1925, p. 671, § 5.

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*For subsequent opinion see 93 P.2d 168.

8. **Automobiles** ⟹187
Municipal corporations ⟹964

A county fire protection district was liable, as a "district established by law," for injuries sustained by motorist with whom volunteer fireman collided while driving to fire, and a judgment for such injury was a "cost of maintenance" to be defrayed by taxes levied by county board of supervisors. St.1925, pp. 671, 672, §§ 5, 7; Civ.Code, § 1714½, now Vehicle Code, § 400.

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Mandamus proceeding by Rolland J. Johnson against the Fontana County Fire Protection District, a body politic, and others to compel the levy of an assessment or tax upon the taxable property within such district sufficient to pay a judgment obtained against the district by the petitioner. From a judgment denying the application for the writ of mandamus, the petitioner appeals.

Reversed with instructions.

A. J. Getz, of Los Angeles, for appellant.

Jerome B. Kavanaugh and Swing & Swing, all of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying petitioner's application for a writ of mandamus requiring the respondent board of supervisors, as the governing body of the respondent Fontana County Fire Protection District, to levy an assessment or tax upon the taxable property within said fire protection district sufficient to pay a judgment obtained against that district by the petitioner. The proceedings are also directed against the county treasurer and the county auditor whose duties, if any, are dependent upon prior action by the board of supervisors. For convenience, this fire protection district will hereinafter be referred to as the district.

At the hearing the parties stipulated as to the facts from which it appears that on April 16, 1928, the district was organized under the act of 1923 (Stats.1923, p. 431), and on April 20, 1928, the supervisors appointed five commissioners for the district.

It further appears from the stipulated facts that on October 3, 1935, the petitioner, as plaintiff, commenced an action in the superior court of San Bernardino county against "George Calkins, the Fontana County Fire Protection District, a body politic, the Fontana Union Water Company, a corporation, and the county of San Bernardino, California, a body politic and corporate". The complaint alleged, among other things, that the district was and is a body politic and a district organized and existing under the act of May 23, 1923, as amended; that the plaintiff was injured on June 8, 1935, in a collision between an automobile driven by him and another automobile driven by George Calkins; that the collision occurred as the result of the negligent manner in which George Calkins drove his automobile; that at the time of the collision George Calkins was an officer, agent and employee of the district and was then and there driving his automobile within the scope of his agency and employment; and that the plaintiff had filed a written and verified claim with the clerk of the board of supervisors and the secretary of the board of fire commissioners of the district The district filed an answer in said action admitting that it was and is a body politic and a district organized and existing pursuant to the act of May 23, 1923; that the county held title to all property of the district; that the supervisors were the governing body of the district and controlled the district's funds; that a claim had been filed and rejected; and that "George Calkins, at the time and place mentioned in said complaint, was an agent and employee of this defendant, to wit, a fireman, employed by this defendant to aid in extinguishing and controlling fires which occur within said district, and admits that at such time the said George Calkins was engaged in the performance of his duties as such fireman". In separate answers it was alleged that the plaintiff was guilty of contributory negligence, that George Calkins was an employee of the district, whose duty it was to attend fires, and that the collision occurred while he was in the performance of his duty and while he was acting within the scope of his employment as a fireman.

It was further stipulated that before the action came to trial it was dismissed as against the county of San Bernardino; that a judgment of nonsuit was entered in favor of the defendant Fontana Union Water Company; that the defendants George Calkins and the district appeared at the trial; that a judgment for $3500 and costs was entered in favor of the plaintiff and against George Calkins and the district; that no appeal was taken and the judgment has become final; that "said George Calkins was, at the time of said collision, acting as a volunteer fireman for said Fontana County Fire Protection District, by appointment of one Earl Reeves, who was then acting in the capacity of Fire Chief of the Fontana Fire Department; that said Earl Reeves was acting as such Fire Chief under appointment by the aforementioned Fire Commissioners"; and that a written claim had been filed and rejected.

In their answer to the petition for a writ of mandamus the respondents alleged that the judgment against the district obtained by the petitioner is void for the reason that the district is not an entity against which such a judgment can be rendered; that there is no provision in law for the rendition of such a judgment against the district; that there is no provision in law for collecting such a judgment against the district; that the district is not a body politic or a district which can be sued or held liable for the negligence of a volunteer fireman while going to a fire within the district; that there is no provision in law authorizing or empowering the respondents to do or perform any of the acts requested of them; and that another action was pending involving the question of whether or not said George Calkins was covered by a certain insurance policy at the time of the collision.

After a hearing the court found in accordance with the stipulated facts with respect to the formation of the district, the appointment of fire commissioners, and the entry of the judgment in favor of the petitioner and against the district. It was then found that the said George Calkins was never appointed to the position of volunteer fireman by the board of supervisors; that the board of supervisors had never taken any action authorizing the formation of a volunteer fire department within or for the district; that at the time of the accident in question the said George Calkins was purporting to act as a volunteer fireman under appointment of one Earl Reeves, who was then acting in the capacity of fire chief of the Fontana Volunteer Fire Department; and that said Earl Reeves was never appointed to such position by the board of supervisors nor was said Earl Reeves nor said George Calkins ever employed by the board of supervisors, nor was their employment authorized by the board of supervisors. The court further found that the district is not a body politic nor a district against which any suit may be maintained or prosecuted, that the district has no legal entity and no authority to employ agents or servants nor to incur any liability directly or indirectly, that no provision has been made in law or otherwise for the payment of any judgment rendered against such district, and that the board of supervisors has no authority and is not authorized to levy any taxes on any of the property within the district for the payment of the judgment obtained by the petitioner. Judgment was entered denying the petition and this appeal followed.

As originally adopted, section 5 of the act under which this district was formed (Stats.1923, pp. 431, 432) provided that the board of supervisors of any county wherein such a district should be established should be the governing body of such district with power to make rules and regulations for the administration of the district and for furnishing fire protection thereto, to appoint agents and employees for such district sufficient to maintain and operate the property acquired for the purposes of the district, to acquire real or personal property for the purposes of the district, and to perform all other acts necessary or proper to accomplish the purposes of the act. Section 7 provided that the board of supervisors should levy taxes each year upon the real property within the district sufficient to defray the cost of maintenance of the district and to meet other expenditures authorized by the act. In 1925, section 5 was amended (St.1925, p. 671) by adding a provision that the board of supervisors might appoint five commissioners as its agents to manage the affairs of the district and to exercise any or all of the powers mentioned in section 5, said commissioners to hold office at the pleasure of the board. Section 7 was amended (St. 1925, p. 672) by providing that in case such commissioners should be appointed they should recommend to the supervisors the amount of taxes to be levied. In 1931, by amendment (St.1931, p. 1601, § 5), the provision permitting the supervisors to appoint five commissioners as its agents was stricken out.

[1] The respondent contends that nothing in the act, pursuant to which the district was formed, authorized the supervisors to levy a tax for the purpose of paying such a judgment as the one here in question. That act, however, makes the board of supervisors the governing body of such a district with the right to appoint agents and employees to carry out the purposes of the district, to acquire real and personal property needful for such purposes, and to perform all other acts necessary or proper to accomplish the purposes of the act. The board of supervisors are also authorized to levy a tax sufficient to defray the cost of maintenance of the district. One of the costs of maintenance would be a judgment of this nature, arising from the manner in which the operations of the district are carried on, if liability therefor is imposed upon the district by statute. Section 1714½ of the Civil Code, now section 400 of the Vehicle Code, imposed liability on a "district established by law" for negligence in the operation of any motor vehicle owned by the district and for any injury occurring as the result of the negligent operation of any other motor vehicle by any officer, agent or employee of the district when acting within the scope of his office, agency or employment, and further provides that any such injured person may sue any "district established by law". If the district here in question is a district established by law, within the meaning of this statute, it is liable for the negligence of its agents and employees, the amount for which the district is thus liable is a part of the cost of maintenance of the district, and the authority and duty of the supervisors to levy a tax sufficient to cover the same sufficiently appears from the act under which the district was created and the statute imposing liability.

[2-4] The next question presented is whether this district is one established by law within the meaning of the statute. The respondent contends that such a district is not an entity which can be sued because it has no autonomy, performs no functions in its own name, owns no property, has no money, and as a district pays no part of the cost or expenses incurred for fire protection. It is argued that the formation of such a district is simply a means of designating the exterior boundaries of property that requires fire protection and which will be assessed for that purpose, that the board of supervisors has complete control, the owners of property within the district have no voice as to how the district shall be managed or how fire protection shall be provided, and that such a district is analogous to a street improvement district created only to bear the burden of the cost of street improvements but which has no separate entity and which cannot be sued.

The act under which the district was organized provides that such a district can be established and dissolved only upon the vote of the people of the district. While the supervisors are the governing board of the district and hold title to its property they act in a representative capacity and hold this property for the use and benefit of the district. While they handle the money of the district they collect and pay out this money for the benefit of the district and in carrying out its purposes. There is not much similarity between such a district and an assessment district which carries on no continuous function and exists solely for the purpose of paying for a public improvement. In a very real sense the district is not only performing functions but performing a well recognized governmental function in furnishing protection against fire. The very purposes for which the district is organized call for a continuing exercise of this governmental function which involves the use of property, including automobiles to be operated upon the public highways. The district is not only established pursuant to law but the purposes of its establishment necessarily contemplate the use of necessary equipment and the carrying out of these operations requires, under present conditions, the use of automobiles. Negligence in the use of automobiles by various governmental agencies led to the adoption of section 1714½ of the Civil Code, the terms of which are now found in section 400 of the Vehicle Code. There is no essential difference between the operation of an automobile by the agent or employee of a fire protection district and the operation of such a vehicle by an agent or employee of one of the other governmental agencies named in the statute. The statute was aimed at a condition existing, and which might exist, on the highways and the language used, "district established by law", is broad enough to include the district here in question. The legislature must have intended to impose liability for the negligence of its agents in the use of automobiles on such a district as this which is created pursuant to a statute, and which uses agents and automobiles in the continuous performance of a governmental function.

In an amended answer the respondent supervisors alleged that George Calkins was not an agent or employee of the district and the court so found. The appellant contends that the court's finding and conclusion in that regard are erroneous since the fact that Calkins was an agent and employee of the district was judicially determined in the damage action, to which the district was a party, and that such previous determination of that fact is res adjudicata in this proceeding. It is respondent's position that the implied finding of the jury in the former action, that Calkins was an employee of the district, is overcome by the court's finding in this proceeding and that the question of whether or not Calkins was an agent or employee of the district was open for consideration in this proceeding because of the abovementioned stipulation to the effect that Calkins was at the time acting as volunteer fireman under appointment by one Earl Reeves, who was acting as fire chief under appointment by the five commissioners. If the question was an open one it may be conceded that the stipulated facts with respect to the appointment of Calkins support the court's finding. This is especially true since the power of the supervisors to delegate certain of their duties to appointed fire commissioners was probably ended in 1931, when the provision authorizing the appointment of commissioners and the delegation of duties to them was stricken from the statute. The question, however, was not an open one merely because of the stipulation above referred to. The parties simply stipulated as to certain facts relied upon by them respectively, and it was in no way stipulated that any particular fact should be controlling in the face of other facts which were also stipulated. Whether or not the previous judgment, with its implied finding of agency, was controlling here must depend upon general rules of law applicable to that question.

[5, 6] A former adjudication between the same parties may be either a final determination of the rights of the parties or may be an adjudication of certain questions of fact which have been put in issue and decided. People v. Bailey, 30 Cal.App. 581, 158 P. 1036. A judgment operates as an estoppel to prevent the parties thereto or their privies from contending to the contrary as to a matter of fact which was found against them in arriving at the judgment. Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 P. 73; Baker v. Eilers Music Co., 175 Cal. 657, 166 P. 1008; Gage Canal Co. v. East Riverside Water Co., 180 Cal. 204, 180 P. 332.

In the matter now before us it appears that the district was made a defendant in the previous damage action, in which it was alleged that Calkins was an agent and employee of the district. The district admitted this fact in its answer and the judgment against the district, which followed, could only have been based upon that fact. While the supervisors, as the governing board of the district, were not made parties to the former action, the district appeared and defended the action, specifically admitting that Calkins was at the time an agent of the district and acting within the scope of his employment. We think it may not be successfully contended that the real parties in interest were not the same in that action and in the present proceeding. While the supervisors are made parties to this proceeding it is fully apparent that they are parties thereto only in their representative capacity, as the governing board of the district. In Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387, 392, the court said:

"Appellants make the point that, inasmuch as the former suits were in reality County of Los Angeles v. [Dodge], Chairman of the Board of Supervisors and City of Los Angeles v. [Snyder], Mayor [51 Cal.App. 492, 197 P. 403], the rule should not apply. If, however, fraud and collusion be absent, the public interest may be as well represented by the mayor or chairman of the board of supervisors as by any set of taxpayers. For example, the fact that a man has been elected mayor of the city is no reason to suspect that he will not properly represent the public interest, and when such officer defends an action relating to a public contract, no reason can be found why he may not be a suitable, if not the most suitable, representative of the public interest in the matter. This very question was raised in State ex rel. Davis v. Willis, 19 N.D. 209, 124 N.W. 706. There the estoppel by judgment was made to rest upon the case of State ex rel. McCue v. Blaisdell, 18 N.D. 31, 119 N.W. 360, which was a suit by the Attorney General applying for a writ of certiorari against the Secretary of State, and in this connection the court, in disposing of the contention that the taxpayer was not a party to the suit, said: 'Appellant urges, however, that he is not bound by any of the facts adjudged in that proceeding, for the reason that he was not a party thereto, and that the record of that proceeding nowhere discloses any connection of his with that case. It is apparent, however, that plaintiff, acting as he does in a representative capacity, is, constructively at least, a party to any action or proceeding in which the same interest was plaintiff. * * * Standing as he does as representative in a matter of general interest to all of the citizens of Ward county, he is concluded with reference to any state of fact which was or might have been adjudged against that interest in a former action in which the same interest was plaintiff or defendant.' "

In Servente v. Murray, 10 Cal.App.2d 355, 52 P.2d 270, 272, it is said: "The identity of the issue and the determination thereof is of more importance than the identity of the parties named. If they hold the same rights of interest as principals, agents, or representatives and are in fact adverse parties, or their interests are adverse in the two proceedings, the identity of the parties is sufficient. In the present case the identity of the petitioner is identical with the petitioner in the prior proceeding. In the first action there was an adjudication against the members of the pension board of the city of Alameda consisting of the city manager, mayor, and treasurer ex officio. The present action was instituted against the mayor, city manager, treasurer, auditor, and chief of police of the same city. The respondent officers in each case were the agents of the municipality and equally bound by the original judgment. * * * In each proceeding the respondents were merely the representatives of the real adverse party, the municipality. Special circumstances may arise making this rule inapplicable, but generally a political subdivision and the officers, boards, commissions, agents, and representatives thereof form but a single entity. Price v. Sixth District Agricultural Ass'n, supra, 201 Cal. 502, at page 513, 258 P. 387; Davidson v. Baldwin, 2 Cal.App. 733, 84 P. 238; Bernhard v. Wall, 184 Cal. 612, 194 P. 1040; People [ex rel. Bryant] v. Holladay, 93 Cal. 241, 29 P. 54, 27 Am.St.Rep. 186."

[7, 8] We think these principles apply here and that the previous judgment was controlling on the question of whether or not Calkins was an agent of the district, and that such a question was not open to consideration in the mandamus proceeding. The views already expressed, if correct, lead inevitably to the conclusion that the judgment obtained by the petitioner is binding upon the district and that it is the duty of the supervisors, as the governing board of the district, in fixing a tax levy upon the property within the district, to make provision for the payment of that obligation.

The judgment is reversed with instructions to the trial court to issue a writ in accordance with the prayer of the petition and the views herein expressed.

We concur: MARKS, J.; GRIFFIN, J.

12 Cal.2d 709

HARTH v. TEN EYCK et al.

L. A. 16863.

Supreme Court of California.

Feb. 17, 1939.

1. Appeal and error 🔑82(1)

An order granting plaintiff's motion for reconsideration of denial of motions dismissing action against one defendant with prejudice was a "special order made after final judgment," within statute permitting appeal therefrom. Code Civ.Proc. § 473; § 963, subd. 2.

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

2. Appeal and error 🔑659(1)

Where movant failed to request inclusion of certain material in transcript when transcript was presented for certification, or to object to certification on ground that notice to clerk requesting transcript waived reporter's transcript of evidence, motion for diminution of record was denied. Code Civ. Proc. § 953a.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by H. A. Harth, Sr., against Warren Ten Eyck and others. From an order granting plaintiff's motion for reconsideration of denial of motions to dismiss as to defendant L. E. Olinger, defendant L. E. Olinger appeals. On plaintiff's motion for diminution of record.

Motion denied.

L. Lee Bernstein, of Los Angeles, for appellant.

Cummins, McMillan & Cummins, of Los Angeles, for respondent.

R. Dechter and B. L. Hoyt, both of Los Angeles, for respondents Petroleum Supply Co. etc., Sam Goldman and Frank Goldman.

Hanna & Morton, of Los Angeles, for respondents Canal Oil Co., Warren Ten Eyck, and Marian Ten Eyck.

WASTE, Chief Justice.

This cause comes here on motion of plaintiff-respondent for diminution of record. He seeks to have the reporter's transcript of testimony added to the record heretofore certified by the trial judge.

During the trial of the cause, plaintiff in open court dismissed the action as to defendant Olinger (appellant here). The court thereupon ordered said defendant dismissed with prejudice, which order of dismissal was entered in the minutes of the court. Plaintiff continued to prosecute his action against the remaining defendants, and the cause was submitted on briefs to be filed. Plaintiff thereupon moved the court, under section 473 of the Code of Civil Procedure to set aside such dismissal and to reopen the cause for further evidence, which motions were denied. Subsequently, plaintiff moved for a reconsideration of the denial of these two motions. This last motion was granted by the trial court on April 18, 1938. Defendant Olinger has appealed from the order granting this motion.

[1] During the course of the argument before this court, the question was raised as to whether or not the order of the trial court from which Olinger attempted to appeal was, in fact, an appealable order. Section 963, subd. 2, Code of Civil Procedure, provides, among other things, that an appeal from the superior court may be taken from "any special order made after final judgment". It is appellant's contention that the order under consideration comes within the classification of a special order made after final judgment. With that contention we are in accord. James v. Center, 53 Cal. 31, 32; Robinson v. Southland Produce Co., 98 Cal.App. 365, 366, 276 P. 1036; Colby v. Pierce, 15 Cal.App.2d 723, 726, 59 P.2d 1046.

[2] As to the motion for diminution of record, respondent failed to avail himself of the opportunity to urge inclusion of the material now requested when the transcript was presented to the trial judge for certification, or to have objected to its certification as presented on the ground that the notice to the clerk requesting that a transcript be made up and prepared, Code Civ.Proc. sec. 953a, waived a reporter's transcript of the evidence with the exception of certain designated portions. An order admitting a "Supplemental Transcript" was made by the district court of appeal to which the cause was inadvertently appealed, and at a time when that court was without jurisdiction.

The motion for diminution of record is denied.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; HOUSER, J.

12 Cal.2d 715

MONJAR v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 16853.

Supreme Court of California.
Feb. 27, 1939.

1. Prohibition 🔑28

Where record on application for prohibition to restrain superior court from proceeding against petitioner for failure to obey decree ordering petitioner to return his minor child to the state failed to sustain allegation that petitioner had been adjudged guilty of contempt, Supreme Court would not determine jurisdiction of superior court over child.

2. Prohibition 🔑5(3)

Prohibition was not a proper remedy to prevent superior court from proceeding against petitioner for failure to obey decree ordering petitioner to return his minor child to the state where petitioner apparently had not been found guilty of contempt by superior court and merely questioned jurisdiction of superior court over child.

3. Prohibition 🔑3(1)

Prohibition will not be granted to prevent superior court from proceeding in a contempt matter merely upon ground that court erred in the proceeding out of which alleged contempt grew; the proper remedy being to present the defense upon hearing of contempt proceedings, and, if found guilty of contempt, to apply to a higher court for a writ of certiorari or habeas corpus.

◆

In Bank.

Application by George O. Monjar for a writ of prohibition to restrain the Superior Court of the state of California in and for Los Angeles County and Leslie E. Still, judge thereof, from taking further steps in connection with an order made in a divorce action instituted against petitioner in so far as the order affects the care, custody and control of petitioner's minor son, wherein an alternative writ was issued.

Peremptory writ of prohibition denied and alternative writ discharged.

T. Paul Moody and Thomas Hawkins, both of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Chief Deputy Co. Counsel, both of Los Angeles, for respondents.

WASTE, Chief Justice.

Application for a writ of prohibition to restrain the respondent court from taking any further steps in connection with an order made in a divorce action instituted by Fay Monjar against the petitioner herein, George O. Monjar, in so far as said order affects the care, custody and control of their minor son.

The facts are not involved. On or about December 14, 1937, petitioner, who with his wife and their minor child had been living in Los Angeles, left for the state of Iowa, following some domestic trouble, with the intention, he alleges, of making his residence in that state. Later, he returned to Los Angeles, and again left for Iowa, taking the minor child with him. While in that state, he obtained letters of guardianship over the person and estate of the minor. Petitioner was an employee of the United States postal service, and made application for transfer from California to Iowa. He states he was informed by the postal service that it would take time to effect such transfer, and that in the meantime he should continue his work as a mail carrier in Los Angeles, whereupon he once more returned to California to carry out the suggestion of the postal department, leaving the child in Iowa.

Subsequently, and on or about April 18, 1938, in Los Angeles, petitioner was served with a complaint for divorce, summons, order to show cause regarding alimony, attorney's fees, court costs, and care, custody and maintenance of the minor child. Petitioner asserts that this was his first knowledge of the filing of the divorce action by his wife on December 31, 1937. After a hearing on the order to show cause, the respondent court, on May 11, 1938, made its order directing, among other things, that petitioner herein "return the child to California by June 1, 1938", and setting the matter of the custody for hearing on the latter date. On May 27, the petitioner applied to the District Court of Appeal for a writ of prohibition staying further proceedings affecting the minor, which petition was denied without opinion.

Petitioner then filed a petition for hearing in this court. According to the allegations of his petition here, the respondent court, on June 1, 1938, following the denial by the District Court of Appeal of the petition for writ of prohibition, made its order finding petitioner in contempt of court, and threatened to send him to jail until he performs the order commanding him to return the child to California. Relying on that allegation, among others, this court granted the petition and issued an alternative writ. The allegation that petitioner was adjudged guilty of contempt of court is not borne out by the record, and petitioner himself states that "no element of contempt is now being contested", his points and authorities being directed solely to the question of the respondent's jurisdiction over the minor child. It would appear, from the somewhat incomplete record before us, and as contended by respondents, that "no hearing has ever been held to determine whether or not petitioner here has been guilty of contempt of court in failing to obey the order" requiring him to return his child to California.

[1-3] Under these circumstances, we do not find it necessary at this time to pass upon the question of the court's jurisdiction. Petitioner has mistaken his remedy. The courts of this state have repeatedly held that prohibition will not be granted in an appellate court to prevent the superior court from proceeding in a contempt matter merely upon the ground that the court has erred in the proceeding out of which the alleged contempt grew. The remedy of the petitioner in such a case is to first present his defense upon the hearing of the contempt proceeding, and then, if found guilty of contempt, to apply to a higher court for a writ of certiorari or habeas corpus. Wessels v. Superior Court, 200 Cal. 403, 253 P. 135; Commercial Bank v. Superior Court, 192 Cal. 395, 397, 220 P. 422; Drew v. Superior Court, 43 Cal.App. 651, 655, 185 P. 680.

The peremptory writ of prohibition is denied, and the alternative writ is discharged.

We concur: SHENK, J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.; HOUSER, J.

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12 Cal.2d 781

DE ARYAN v. AKERS.

L. A. 16631.

Supreme Court of California.

Feb. 28, 1939.

1. Licenses ⚷28

The Retail Sales Tax Act imposes an excise tax on the retailer and not on the consumer and the amount collected by retailer as reimbursement is added merely as part of purchase price. St.1933, p. 2599, as amended.

2. Licenses ⚷29

Under statute imposing 3 per cent tax on retail sales, a consumer who was charged 15 cents plus 1 cent on account of sales tax for 15-cent article could not object to 1-cent charge on ground that retailer would have to pay but 4½ mills tax on the sale. St.1933, p. 2599, as amended.

3. Licenses ⚷7(1)

Provisions of Retail Sales Tax Act that tax should be collected by retailer from consumer in so far as possible, and authorizing State Board of Equalization to require amounts collected by retailer from consumer, in reimbursement of tax, to be displayed separately from list price, are valid. St. 1933, p. 2602, § 8½; St.1935, p. 1258, § 9.

4. Licenses ⚷32(2)

Under Retail Sales Tax Act providing that tax imposed shall be collected by retailer from consumer "in so far as the same can be done," quoted phrase indicates reservation only in those cases where so to pursue authority of reimbursement to retailer it would infringe consumer's existing contractual or other constitutional rights. St.1933, p. 2602, § 8½.

EDMONDS and HOUSER, JJ., dissenting.

* * *

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by C. Leon de Aryan against Roy O. Akers to recover one-cent sales tax which plaintiff had paid to defendant in purchase of a fifteen-cent item. Judgment for defendant and plaintiff appeals.

Affirmed.

Prior opinion, 81 P.2d 1028.

C. Leon de Aryan, in pro. per.

Roy O. Akers, in pro. per.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., amici curiae.

SHENK, Justice.

This is an appeal from a judgment in favor of the defendant in an action to recover one cent, which had been paid by the plaintiff to the defendant pursuant to the Retail Sales Act, Stats.1933, p. 2599, as amended, and allegedly so paid under protest.

The defendant sold printing supplies, including cardboard, at retail, and was therefore a "retailer" as that term is defined by the act. By the transaction the plaintiff purchased cardboard from the defendant for which the defendant charged him and for which he paid fifteen cents plus one cent on account of the sales tax requirement. At the time of the sale the plaintiff objected to the payment of the one cent added to and separately stated from the amount demanded by the defendant as the purchase price. The plaintiff contended that the "exaction" was illegal and void. A trial was had on the issues framed by the complaint and answer. The trial court rendered judgment for the defendant, from which the plaintiff appealed to the District Court of Appeal, which reversed the judgment. 81 P.2d 1028. In reversing the judgment the District Court of Appeal relied in part on the recent case of National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal.2d 283, 79 P.2d 380. A hearing was granted in this court because of what was deemed to have been a mistaken application of certain language appearing in our decision in that case. We shall restrict our consideration herein to the question of the alleged illegality of the tax. Our conclusion on that issue renders it unnecessary to discuss the questions whether the superior court had jurisdiction and whether the plaintiff was one who could "protest" the payment of such alleged tax.

[1] The cases definitely establish that the Retail Sales Tax Act of California imposes an excise tax on the retailer and not on the consumer. They are referred to in National Ice & Cold Storage Co. v. Pacific Fruit Express Co., supra, and other decisions. Standard Oil Co. of California v. Johnson, 10 Cal.2d 758, 76 P.2d 1184; Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731, 117 A.L.R. 838. In view of those decisions the question is no longer an open one. The general provisions of the act are dealt with at length in those cases and need not here be repeated. Sections 8 and 8½ of the act are as follows:

"Sec. 8. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

"Sec. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included herein."

By section 9, as amended by St.1935, p. 1258, the state board of equalization is given power by regulation to provide "that the amount collected by the retailer from the consumer, in reimbursement of taxes imposed by this act, shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sale".

Pursuant to the power thus vested, the board adopted a scale of amounts to be charged the customer by the retailer on fractions of a dollar, beginning with fifteen cent purchases to which one cent should be added, and has promulgated regulations requiring that the amounts so to be added as reimbursement of the tax should be displayed and be separately stated from the retail list price.

The gist of the plaintiff's contention is that the addition by the defendant of one cent on a fifteen cent sale was excessive and contrary to the provisions of the act which impose a three per cent tax. He attempts to support his contention by the argument that the defendant was merely deputized by the act to collect the tax which is in fact a tax on the consumer. Amici curiae present the question whether the tax, being on the retailer, may be "passed on" to the consumer pursuant to the provisions noted. They also argue the validity of the provisions of section 8, above quoted, as a lawful exercise of the police power. But inasmuch as the facts on the present record do not directly raise that question, we refrain from passing on it.

We need not dwell upon the question whether, were the tax on the consumer, the retailer could be designated to collect the tax and be made liable for its payment. That question is concluded for our purposes by the decisions in this state to the effect that the tax is imposed on the retailer, and that the amount collected by him as reimbursement is added merely as part of the purchase price. Western Lithograph Company v. State Board of Equalization, supra. The pertinent provisions of the act indicate that the legislature recognized the obvious economic necessity of the retailer's recoupment of the tax from sales, and that some such method as that adopted by it for reimbursement was also necessary if the small and independent tradesman was to remain in business. It also distinctly indicated, however, that the provision for the method of reimbursement should not disturb the relationship of sovereign and taxpayer created between the state and the retailer.

[2] The enforcement of the provisions of the act, under the facts here presented, discloses no infringement upon the plaintiff's rights. When it is recognized that the amount separately stated is itself part of the purchase price, it cannot become of immediate legal concern to the plaintiff as the consumer that the defendant as the retailer out of the purchase price perhaps pays to the state but four and one-half mills instead of the full one cent which was added to the list price.

Our conclusion is in harmony with the holding in the case of National Ice & Cold Storage Co. v. Pacific Fruit Express Co., supra. There the question was whether section 4 of the act contravened the constitutional rights of the consumer, whose contract for the purchase of goods from the retailer was entered into before the effective date of the act. Section 4 of the act provided that the tax could be collected by the retailer from the consumer in such case. Collection was permitted by the addition to the contract price of the percentage imposed as a tax. It was held that this was inconsistent with the structure of the act which contemplated imposition of the tax on the retailer, and it was concluded that the section was therefore in violation of the constitutional inhibition against legislative impairment of contract rights. That decision went no further than to hold that, on the facts there appearing, a retailer may not expect reimbursement of the tax as to sales under contracts made prior to the effective date of the act. Such holding was expressly "not intended to indicate the illegality of authority which may be lodged in a retailer to 'pass on' the tax to a purchaser with the latter's consent thereto, either expressly or impliedly given. That sort of arrangement between interested parties in such a sale is not here involved."

[3, 4] The language in that case did not preclude consideration of the questions here presented, and particularly the question whether the legislature may provide for a method of "passing on" the tax by the retailer. When properly understood, in connection with the other parts of the act, the provisions of sections 8½ and 9 here involved must be considered valid and enforceable. The words which we italicize in the first sentence of section 8½, viz., "The tax hereby imposed shall be collected by the retailer from the consumer *in so far as the same can be done*", must be deemed to indicate a reservation only in those cases where so to pursue the authority of reimbursement to the retailer would infringe the consumer's existing contractual or other consitutional rights. Otherwise his freedom to contract is not embarrassed nor impeded by the method of reimbursement as part of the purchase price. It must be conceded that the purchase price ultimately is necessarily the source from which payment of the tax must be made. The consumer still has the right to purchase or not at the asked price which includes the tax. Any quibbling between the parties, in an attempt to differentiate between the purchase price and the tax by reason of the separate statement of the amount intended as tax reimbursement, will not alter the fact that within the purview of the legislative enactment the aggregate of the list price and the amount of tax reimbursement constitutes the actual purchase price of the commodity. The pertinent provisions of the act, if not directly brought into question, were at least impliedly recognized as binding and effective in the other cases hereinbefore cited. In other jurisdictions

it has been directly held that the burden of the tax may be "passed on" to the consumer by similar provisions. Doby v. State Tax Commission, 234 Ala. 150, 174 So. 233; Long v. Roberts & Son, 234 Ala. 570, 176 So. 213; City of Covington v. State Tax Commission, 257 Ky. 84, 77 S.W.2d 386. In Doby v. State Tax Commission, supra, it was said of section 25, Alabama Acts 1936-37, Ex.Sess., p. 125:

"This section, quite clearly, does not conflict with nor modify other portions of the act defining who is the taxpayer. The taxpayer, the seller, is charged with the mandatory duty to add the amount of the tax to his sales price, and to collect it from the purchaser along with the sales price. He has all the authority to collect this added sum which he has to collect, his sales price. The law intervenes and adds the amount of the sales tax which the seller must pay to the state to the price he must collect from the purchaser. It is collected to reimburse the seller for what he must pay the state. The ultimate burden of the tax is thus passed on to the customer. Such provision makes mandatory the trade practices, which usually obtain, directly or indirectly, as to many forms of taxation. Few businesses perhaps could endure if the numerous tax burdens now imposed were not figured as part of the overhead or fixed charges in fixing prices.

"The mandatory provision in this section is for the benefit of the seller, but more particularly for the protection of all retailers charged with the payment of this tax. The lawmakers deemed it unfair competition for the strong to absorb the tax and build up his trade at the expense of the weaker dealer who could not absorb it. So, the legal duty of the retailer, the taxpayer, is to pay the tax and also to collect a like amount from the purchaser. It is not a question of whether he should pay the tax, or, in the alternative, collect the tax for the state." [234 Ala. 150, 174 So. 237.]

What has been said sufficiently disposes of all of the determinative questions raised on the appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

EDMONDS, Justice (dissenting).

As I analyze the question presented in this case, the conclusions of my associates upon it are not, as their opinion states, "in harmony with the holding in the case of National Ice & Cold Storage Co. v. Pacific Fruit Express Co., supra". Nor can I agree that the former decision "went no further than to hold that, on the facts there appearing, a retailer may not expect reimbursement of the tax as to sales under contracts made prior to the effective date of the act".

In that case the plaintiff claimed that to require it to pay a tax measured by the amount of ice which it sold under a contract in force before the statute was enacted, impaired the obligation of that contract. This court held "that the existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of the state to levy or to impose a tax which may adversely affect the financial interests of either or any of the parties which may have been acquired under or by reason of the mutual covenants of such parties to the contract". [11 Cal.2d 283, 79 P.2d 386.] But the court decided against the plaintiff on another ground, namely, that the "direction or mandate" of section 8½ of the Retail Sales Tax Act, supra, requiring a retailer to collect the tax from the consumer, "is violative of the 'due process' clause of both the State and the Federal Constitutions, Const.Cal. art. 1, § 13; Const.U.S. amend. 14, with reference to the fundamental right of ownership of property". Accordingly it affirmed a judgment requiring the plaintiff, as the seller, to pay the tax imposed.

The reason for this holding was stated by the court as follows: "As a legal deduction, it has been judicially declared that a tax constitutes a debt owed by the person upon whom such tax has been legally imposed; and aside from equitable considerations (which here are not involved), to baldly legislate that without, and in the absence of either due or any process of law, a legal debt that is owed by one person must be paid by another, is quite at variance with ordinary notions of that which may be termed the administration of justice. It therefore may be deemed concluded, that as far as may concern the particular or any other provision of the statute to which attention hereinbefore has been directed, which purports either directly or indirectly to authorize the retailer of 'tangible personal property' to collect from or to charge to the purchaser thereof the tax imposed upon its retailer 'for the privilege of selling' such property, is unconstitutional and consequently invalid." Page 384.

Although the courts of other jurisdictions may have construed the statutes before them in a different way, that opinion is as plain as words can make it. As I read it, the conclusions there stated are neither explained nor distinguished in the one written by my associates in the present case. Also, the former decision is exactly in accord with the determination reached in Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731, 735, 117 A.L.R. 838, where this court said: "The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales."

Nor may the present case be decided upon the ground that the purchaser either expressly or impliedly consented to the imposition of a tax, a situation which this court in the National Ice Company case said was not included within the issues there decided. The record here shows not only that the purchaser did not consent to the imposition of the tax but that he paid it under protest.

In my opinion, upon the principles applied in the former decisions of this court, the judgment in the present case should be reversed as ordered by the District Court of Appeal.

I concur: HOUSER, J.

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12 Cal.2d 718

SELTZER v. MUSICIANS' UNION LOCAL NO. 6 et al.

S. F. 16214.

Supreme Court of California.

Feb. 27, 1939.

Appeal and error ⚷477

Where trial court vacated temporary restraining order and order vacating restraining order became effective immediately and there was no proceeding pending upon which writ of supersedeas could operate, Supreme Court would not issue writ of supersedeas which would have effect of granting injunction which trial court had refused.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Suit for an injunction by Oscar Seltzer against Musicians' Union Local No. 6 and others. From an order vacating temporary restraining order theretofore issued, plaintiff appeals and applies for writ of supersedeas to preserve the status quo of the action pending the appeal.

Writ denied.

Milton Marks and Morris Lowenthal, both of San Francisco, for appellant.

Clarence E. Todd and Henry C. Todd, both of San Francisco, for respondents.

PER CURIAM.

This is an application for a writ of supersedeas. The petitioner is conducting a roller derby in San Francisco. A controversy arose between him and the respondent Musicians' Union in the course of which, on February 4, 1939, he filed in the superior court a complaint praying for an injunction to restrain the defendants in said action, respondents herein, from interfering with the conduct of the plaintiff's business. Upon the filing of the complaint the presiding judge of the superior court issued an order requiring the defendants to show cause on February 9, 1939, if any they had, why they should not be enjoined from doing the acts complained of, and, as a part of the same order, issued a temporary restraining order pending the hearing. The order to show cause came on for hearing and was held on February 9, 10 and 14, 1939, in the law and motion department of said court, at the conclusion of which the defendants moved the court to vacate the temporary restraining order theretofore issued. This motion was granted on February 16, whereupon the plaintiff filed a notice of appeal from said order and commenced this proceeding for a writ of supersedeas "to preserve the status quo" of the action pending the appeal. Upon the filing of said application an order was issued by this court requiring the respondents to show cause on February 23, why the writ of supersedeas should not issue as prayed.

Upon the consideration of the return and the authorities presented therewith it is concluded that the order of the superior court vacating the temporary restraining order became effective immediately upon its entry and was self-executing; that no proceeding or other process of the superior court is pending or outstanding upon which the writ of supersedeas may appropriately operate within the rule laid down in In re Imperial Water Co. No. 3 v. Hall, 199 Cal. 556, 250 P. 394; Hulse v. Davis, 200 Cal. 316, 253 P. 136, and other similar cases. See 10 Cal.Jur. 10 yr. Supp., p. 461. To grant the writ would, in effect, grant an injunction which the trial court had refused. McCann v. Union Bank & Trust Co., 4 Cal.2d 24, 47 P.2d 283; Wollenshlager v. Riegel, 186 Cal. 622, 200 P. 726; Southern Pacific Co. v. Smith, 171 Cal. 8, 151 P. 426.

The order to show cause is discharged and the petition for the writ is denied.

12 Cal.2d 711

PACIFIC GAS & ELECTRIC CO. v. NAKANO et al.

Sac. 5200.

Supreme Court of California.

Feb. 17, 1939.

Rehearing Denied March 17, 1939.

1. Garnishment 🔑44

Pending an appeal from a judgment rendered in a tort action, the debt represented by the judgment is not subject to garnishment.

2. Execution 🔑49
Garnishment 🔑44

An execution or garnishment levied by third party upon judgment for personal injuries, pending appeal from the judgment, was invalid.

3. Assignments 🔑24(1)

A purely tort claim is not assignable.

4. Judgment 🔑835

A judgment based upon a cause of action for tort is assignable.

5. Judgment 🔑835

As respects assignability of judgment based on a tort, a judgment does not become "final" so long as action in which it was rendered is pending; an action being "pending" until it is finally determined on appeal or until time for appeal has passed. Code Civ.Proc. § 1049.

[Ed. Note.—For other definitions of "Final" and "Pending," see Words & Phrases.]

6. Judgment 🔑835

An assignment of judgment in action for personal injuries, pending appeal from the judgment, was invalid, since the judgment, pending appeal, was not "final" in sense that it determined rights of parties to the action.

7. Garnishment 🔑44

A judgment for personal injuries became "final" upon affirmance by reviewing court, and was subject to execution on garnishment levied on the judgment after its affirmance.

8. Interpleader 🔑35

Allowance of attorney's fee in favor of plaintiff in interpleader action was improper.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Interpleader action by the Pacific Gas & Electric Company against Jirokichi Nakano and others to determine the party entitled to a balance due on a judgment rendered against the plaintiff in favor of one H. Hiroshima for personal injuries. From an adverse judgment, defendant Retailers' Credit Association of Sacramento appeals.

Reversed.

Rehearing denied; SEAWELL and HOUSER, JJ., dissenting.

John A. McGilvray, of Sacramento (Kenneth G. McGilvray, of Sacramento, of counsel), for appellant.

R. H. Schwab, of Sacramento, for respondent Pacific Gas & Electric Co.

Walter T. Tsukamoto, of Sacramento, for respondent Jirokichi Nakano.

CURTIS, Justice.

Action in interpleader. Plaintiff had in its possession the sum of $1,080, being the balance due on a judgment rendered against it and in favor of one Hiroshima for personal injuries. The two defendants laid claim to this money, whereupon plaintiff paid the same into court, and brought this action for the purpose of having it determined which of the two defendants was entitled to the money. The plaintiff herein, being the defendant in the personal injury action, appealed from the judgment in said action, which was subsequently affirmed. The defendant, the Retailers' Credit Association, claimed to be entitled to said money by virtue of two executions or garnishments levied upon said fund, one pending said appeal, and the other after the judgment in the personal injury action had become final through affirmance. The defendant Nakano claimed to be entitled to said money through and by virtue of an assignment of one-half of said judgment. (The other half had been assigned to the attorneys in the personal injury action in payment of their services, and no question is raised as to the validity of that assignment.) The assignment to Nakano was executed and delivered and notice given to the plaintiff after the levy of the first execution or garnishment, but before the levy of the second execution or garnishment. The trial court rendered judgment in favor of the defendant Nakano, and the Retailers' Credit Association appeals. We shall refer to the plaintiff herein as the plaintiff, to the Retailers' Credit Association as the appellant, and to Nakano as the respondent.

The respondent contends that a judgment rendered in a purely tort action is assignable after its entry and pending the time it is on appeal, and therefore claims that his assignment takes precedence over the subsequent levy of appellant's garnishment. Respondent does not discuss the effect of appellant's prior garnishment of the money in plaintiff's possession. If the debt represented by said judgment was assignable pending the appeal, it was also subject to execution, and upon the service of the first execution or garnishment upon the plaintiff, the rights of the judgment creditor, the appellant in this case, would be prior to the subsequent assignment to respondent of said debt. On the other hand, if this debt was not subject to execution pending appeal therefrom, it was not assignable, and the respondent took nothing by his assignment. Therefore, whether we hold that the judgment was assignable or not assignable, the result in so far as the rights of the parties defendant in this action are concerned is the same. In either case, the appellant's claim to said fund would take priority over the claim of respondent.

[1] However the weight of authority supports the rule that pending an appeal from a judgment rendered in a tort action, the debt represented by said judgment is not subject to garnishment. Arp v. Blake, 63 Cal.App. 362, 218 P. 773; Waples-Platter Grocer Co. v. Texas & P. Ry. Co., 95 Tex. 486, 68 S.W. 265, 59 L. R.A. 353; Miller v. Newell, 20 S.C. 123, 47 Am.Rep. 833; 4 Am.Juris., p. 685, sec. 206.

[2] The case of Arp v. Blake, supra, is on all fours with the instant action. The facts in that case show that Blake recovered a judgment against Arp in a tort action. Arp appealed from the judgment, and pending the appeal a third party instituted an action against Blake in which an attachment was issued and served on Arp purporting to attach and garnishee all debts, credits, etc., belonging to Blake in the possession of Arp. Under this attachment, the plaintiff in the attachment suit claimed to have garnisheed the claim for damages in the case of Blake v. Arp, supra. The judgment in the action of Blake against Arp was subsequently affirmed. It was held that the garnishment having been served pending an appeal from the judgment was of no validity, that the effect of that appeal was to deprive the judgment of its finality, and to keep alive the case as one of tort as it existed before the judgment was rendered. (See, also, 4 Am. Juris., p. 686, sec. 206.) Under these authorities the first execution or garnishment levied by the appellant upon the judgment against Hiroshima must be declared invalid and of no legal effect.

[3, 4] The further question is then presented as to the validity of the assignment by Hiroshima of the one-half of said judgment to respondent, which assignment was also made pending the appeal from said judgment. It is well settled in this jurisdiction that a purely tort claim is not assignable. Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 463, 274 P. 959; Cassetta v. Del Frate, 116 Cal.App. 255, 2 P.2d 533. It is further held however, that while a cause of action for tort is not assignable, such a claim when merged in a final judgment is a debt and may become the subject of an assignment. Adams v. White Bus Line, 184 Cal. 710, 712, 195 P. 389;

15 Cal.Jur. 249; 2 Black on Judgments, [2d ed.], sec. 942; Lawrence v. Martin, 22 Cal. 173, 174. However, the judgments which were the subject of discussion in the authorities just cited had prior to assignment become final either by affirmance or by the lapse of time in which an appeal could have been taken. No reference in any of these authorities is made to the status of a tort claim merged in a judgment pending on appeal from said judgment.

[5, 6] The decisions in this state indicate that a judgment does not become final so long as the action in which it was rendered is pending (Feeney v. Hinckley, 134 Cal. 467, 66 P. 580, 86 Am.St.Rep. 290; 15 Cal.Jur., pp. 121, 122), and an action is deemed pending until it is finally determined on appeal or until the time for appeal has passed. Sec. 1049, Code Civ. Proc. The judgment, therefore, in favor of Hiroshima, at the time he made a purported assignment thereof to the respondent herein was not a final judgment in the sense that it determined the respective rights of the parties to the action. It was final in that it had reached the state when an appeal could be taken from it, but pending such appeal the determination of the issues in the case was held in abeyance until the appeal was finally passed upon in the appellate court. The effect of the appeal "operated to keep alive the case as one of tort as it existed before the judgment was rendered". Arp v. Blake, supra, page 373, 218 P. page 778. Therefore, pending the appeal, the plaintiff in said action had only a claim for damages for injuries suffered by the acts of the defendant, or a chose in action arising on tort. Such a claim, as we have seen, is not subject to assignment.

In the case of Miller v. Newell, 20 S. C. 123, 47 Am.Rep. 833, 840, we find the following statement: "Under this case the appeal was pending, and such being the case the rights of the parties had not been determined. The matter was still a chose in action arising on tort of a strictly personal character and therefore not assignable."

Applying the principles of law announced in the authorities hereinbefore cited to the assignment of said judgment to the respondent, it must be concluded that said assignment, having been made pending an appeal from said judgment, was of no legal effect and passes to appellant no right to said judgment.

[7] The judgment in favor of Hiroshima having become final by affirmance was subject to the execution of garnishment levied thereon after its affirmance. 4 Am.Juris., p. 688, sec. 212; Burke v. Hance, 76 Tex. 76, 13 S.W. 163, 18 Am. St.Rep. 28. The case just cited holds that a judgment is subject to garnishment when all proceedings in the suit in which it was rendered, whether original or appellate, are at an end.

[8] The judgment further made an allowance of $100 as attorney's fee in favor of plaintiff for the institution of this interpleader action. It is well settled in this state that an allowance of an attorney's fee in favor of a plaintiff in an interpleader action is improper and is without authority of law. Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 107, 239 P. 847; Peterson v. Chorley, 103 Cal.App. 783, 787, 284 P. 956.

The judgment is reversed.

We concur: WASTE, C. J.; EDMONDS, J.; HOUSER, J.; SHENK, J.

31 Cal.App.2d 157

PEOPLE v. O'CONNOR et al.

Civ. 6032.

District Court of Appeal, Third District, California.

Feb. 20, 1939.

1. Evidence 🔑555

Expert witnesses' testimony that their opinions as to amount of damage to realty because of severance of strip, condemned for widening of highway, were based on facts that widening would decrease distance from owners' house to right of way line, that, highway being slightly raised, it would be more difficult of access, and that traffic noises and hazards would be increased, was not inadmissible as merely conjectural and speculative.

2. Eminent domain 🔑262(5)

Exclusion of testimony on cross-examination of defendants' valuation witness in eminent domain action as to whether it would have made any difference to him if he had known that land was assessed for taxes at $50 per acre when he valued it at $400 per acre was not prejudicial to state.

3. Eminent domain ⚷149

Evidence *held* sufficient to support jury's award of $1,535 as compensation and severance damages for state's taking of strip of land along front of defendants' property for widening of highway.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action in eminent domain by the People of the State of California, acting by and through the Department of Public Works, against Thomas E. O'Connor, S. D. Oden, his wife, and another, to acquire a strip of land running along the front of defendants Odens' property. From a judgment on a jury's verdict, assessing the value of the land taken and allowing severance damages, plaintiff appeals.

Affirmed.

Clarence W. Morris and Lincoln V. Johnson, both of San Francisco, for the People.

Duard F. Geis and Milton M. Hogle, both of Willows, and W. E. Johnson, of San Francisco, for respondents.

ROSS, Justice pro tem., delivered the opinion of the court.

This is an action in eminent domain by which the plaintiff acquired a strip of land ten feet in width and running along the front of defendants Oden's property for a distance of 495 feet. The purpose of the taking was the widening of the Pacific highway (U. S. 99 W) in Glenn county. The parcel taken was a little more than one-tenth of an acre. Defendants in their answer placed a value of $500 on this parcel, and asked an additional $4,000 as severance damages. The verdict of the jury assessed the value of the parcel taken at $35, and allowed $1,500 severance damages, or a total of $1,535, from which the judgment appealed from was rendered.

The entire tract affected comprises about fifteen acres just south of Orland, partly used for fruit trees and partly for clover and alfalfa. A home, built of hollow tile, and immovable, with other improvements (barn, hog-house, chicken-house, garage, granary and milk-house), are on the property. The various witnesses admitted the value of the place as a suburban homesite, as well as for a farm.

Appellant does not attack the part of the judgment awarding the $35 for the parcel taken, but only the award of $1,500 severance damages.

The witnesses for respondents placed these severance damages at from $1,100 to $4,000, while appellant's witnesses gave amounts for the same at from $200 to $510.

[1] The only two points on appeal raised by appellant are that the trial court denied motions to strike all the testimony of two of respondents' valuation witnesses, Barceloux and Smith, the motion being made on the ground that the testimony was based upon speculative, remote and conjectural elements of damage, and that the court sustained an objection to a question asked by appellant on cross-examination of one of respondents' valuation witnesses relative to his knowledge of the assessed valuation of the property.

No claim is made that witnesses Barceloux and Smith were not qualified to give opinions. Both of them, after giving their opinions as to the severance damage, stated that said opinions were based on the fact that the widening of the highway right of way would decrease the distance from the house to the right of way line from 37 to 27 feet; that the lawn and landscaping in front of the house would be adversely affected; that the highway, being slightly raised, would be more difficult of access, and ingress and egress to and from the premises would be more difficult; and that the increased closeness of the highway would increase traffic noises and hazards. Appellant moved, as to each of these witnesses, that the entire testimony as to damages be stricken, "on the ground it is based upon mere conjecture and is speculative".

These elements of damages mentioned by the witnesses are not claimed by respondents as special damages, but are merely the reasons given by the experts for their opinions that the market value of the portion of the tract not taken would be diminished by reason of the taking of the ⅒-acre strip in front. They are not conjectural but actual admitted facts. The house actually is ten feet closer to the highway right of way; the highway is actually 2½ feet higher than it was before, and the approach to it is actually more steep, and the traffic actually moves over the highway. All of the matters mentioned were proper reasons to be advanced by the experts as bases for their opinions as to value, and the jury could determine what weight to give the opinions in proportion to the weight the reasons had with them.

The cases cited by appellant are not in point. For instance, in Coast Counties Gas & Electric Company v. Miller & Lux, 118 Cal.App. 140, 5 P.2d 34, the conjectural elements of damage were such matters as the possible trespassing of the employees of the condemning party on adjacent lands, the possible escape of gas from the pipes, the possible future interference with irrigation pipes, etc., i. e., no actualities as in the instant case.

It should be noted that the jury's verdict was well below the opinions of these experts in the instant case and even lower than the values assessed by other witnesses for the respondent, whose testimony was not made the subject of any motion to strike.

[2] On cross-examination of Kerr, one of the valuation witnesses for respondent, counsel for appellant asked: "When you valued that land at $400 an acre, Mr. Kerr, for almond acreage, would it have made any difference to you if you had known the same land was assessed per acre on the basis of $50.00 per acre?" An objection that the question was incompetent, irrelevant and immaterial was sustained by the trial court.

Conceding that Central Pacific Railway Company v. Feldman, 152 Cal. 303, at page 310, 92 P. 849, at page 852, has laid down the rule that, "while the assessed value of property is not admissible as original evidence of its market value, a witness who has testified as an expert may properly, on cross-examination, be asked what is his knowledge regarding such assessment for the purpose of testing the value of his opinion", the sole question along that line asked in the instant case to which an objection was sustained, was not in the exact form approved in the Feldman case. The time of the assessed value of $50 per acre is not mentioned, but it may be inferred that the present was meant. Regardless of that, the ruling of the court was not in any way prejudicial. The question was asked during cross-examination of the witness concerning the value of the parcel of land taken by the highway, and appellant does not complain on this appeal of the verdict or judgment as to the award for that parcel.

The Feldman case, above cited, holds that the knowledge of a valuation witness as to assessed value may properly be asked on cross-examination. It has never been held that the refusal of such evidence by the trial court would be prejudicial error. It is a known fact that assessments made for taxation purposes are variable, and are very little criterion of the actual market value. The substantial rights of appellant were in no way affected in the instant case by the sustaining of the objection here discussed.

[3] The evidence in this case amply supports the award made by the jury and included in the judgment.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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31 Cal.App.2d 149

ALLBRITTON v. INTERSTATE TRANSIT LINES.

Civ. 11687.

District Court of Appeal, Second District, Division 1, California.

Feb. 20, 1939.

Hearing Denied by Supreme Court April 20, 1939.

1. Carriers 🔑321(21)

In passenger's action against bus company for injuries allegedly resulting from defect in bus, instruction directing verdict for plaintiff unless company established unavoidable casualty or other defenses was erroneous, notwithstanding that company's answer alleged due care and latent defect in spring as proximate cause of accident.

2. Negligence 🔑108(1), 121(2), 134(1)

In negligence action, a cause of action is stated only when negligence by defendant is alleged and negligence must be proved by preponderance of evidence, irrespective of inference of negligence from occurrence of the accident.

3. Negligence ⚷121(2)

Proof that thing which caused injury was under defendant's management, and that accident was such as does not ordinarily happen if those who have the management use proper care, is reasonable evidence of negligence in absence of explanation by defendant, but does not shift the burden of proof.

4. Negligence ⚷121(1), 134(1)

The burden of proving negligence by a preponderance of the evidence never shifts, but continuously remains with plaintiff.

5. Negligence ⚷121(2), 134(1)

The term "burden of showing" or "burden of proof," used in connection with defendant's duty of rebutting inference of negligence from occurrence of accident, signifies the burden of meeting plaintiff's prima facie case, not necessarily by a preponderance of evidence.

[Ed. Note.—For other definitions of "Burden of Proof," see Words & Phrases.]

6. Trial ⚷296(8)

Where instructions clearly and erroneously required defendant to show freedom from negligence by a preponderance of evidence, plaintiff could not escape reversal on ground that reading of all the instructions disclosed that jury was fairly and correctly instructed.

7. Trial ⚷234(7)

The phrase "burden of proving" is properly used in instructions that upon plaintiff's proving a prima facie case, defendant has burden of producing evidence of equal but not superior weight, to meet plaintiff's case as aided under res ipsa loquitur doctrine.

8. Trial ⚷296(8)

Error in instructions that defendant must prove freedom from negligence by preponderance of evidence was not cured by instruction directing verdict for defendant "if you believe from the evidence" that defendant performed its duty and that accident was unavoidable.

9. Negligence ⚷121(2), 134(1)

Where defendant has made such a showing of the exercise of due care that the jury cannot conclude that negligence has been satisfactorily shown, verdict must be against plaintiff despite inference of negligence from occurrence of the accident.

10. Appeal and error ⚷1064(1)

Where there was a substantial conflict in evidence, reviewing court could not determine, on ground that under the evidence jury was bound to find as it did, that error in instructions was not prejudicial.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Oscar O. B. Allbritton against the Interstate Transit Lines for injuries received in bus accident. From a judgment on a verdict for plaintiff, defendant appeals.

Reversed and remanded.

E. E. Bennett, Edward C. Renwick, and Malcolm Davis, all of Los Angeles, for appellant.

Henry G. Bodkin, of Los Angeles (Guy Stuart Silliman, of Los Angeles, of counsel), for respondent.

WHITE, Justice.

This appeal is taken by defendant, Interstate Transit Lines, a corporation, from an adverse judgment.

The action was one for damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of defendant. Defendant owned and operated a passenger-carrying bus on the road between Boulder City, Nevada, and Las Vegas, Nevada. Plaintiff alleged in his complaint that on March 13, 1935, while he was a passenger for hire on said bus, the same was driven in such a negligent manner that it overturned while plaintiff was riding therein; and further alleged that defendant was negligent in permitting the bus to be operated on the highway "with an unsafe and faulty steering gear and with unsafe and faulty brakes".

By its answer defendant denied any negligence in the maintenance or operation of the bus, denied that the steering gear was unsafe or faulty, or that the brakes on the bus were either unsafe or faulty. Defendant's answer further averred that while the bus was proceeding along the highway and while it was being operated in a careful manner, one of the springs on the bus suddenly broke by reason of an internal defect in the material comprising said spring which was not discoverable by careful inspection, and that by reason thereof the bus was caused to swerve suddenly from its course and overturn. Defendant further alleged that it had at all times maintained the bus in proper repair and had made all inspections and overhauls reasonably necessary to maintain the bus in a safe and proper condition, but that notwithstanding all such precautions, the defect in said spring could not be and was not discovered.

The cause was tried before a jury, which returned a verdict in favor of the plaintiff for $20,000 general and $5,000 special damages. Judgment having been entered thereon and its motion for a new trial being denied, defendant prosecutes this appeal from such judgment.

Upon the trial plaintiff testified that the bus was traveling toward Las Vegas at a speed of approximately forty-five to fifty miles per hour, when all at once "it gave quite a rock to the right and commenced to shimmy. The driver first sat back into his seat and then stood up on the brake, but the bus continued to go off the highway. Then a piece of glass popped—a piece of it flew back inside and I pulled my overall jumper over my head. We got a shake or two more and then the bus went back the other way and began to turn over." With respect to the cause of the accident, plaintiff also introduced evidence through two former employees of defendant corporation to the effect that the brakes on the bus always had been faulty and were faulty at the time the bus was taken out on the day of the accident.

To meet the prima facie case of negligence made by the showing of the accident, defendant introduced evidence to the effect that the bus involved in the accident was regularly inspected and repaired, including daily inspection of its under parts, and that one or two days before the accident the defendant's mechanic had made a front-end inspection of the bus, consisting of thoroughly cleaning the front wheels, spindles, front wheel bearings and front steering mechanism; also the tie rod and the springs. It was further testified that after such cleaning process a solution of chalk and alcohol was applied to these parts in order to show up cracks, flaws or defective parts, if any, in the materials. In doing this, it was testified, the mechanic looked at the left front spring, but did not discern any defect in the metal of which the spring was composed. On the day following the accident, this mechanic made another inspection of the wrecked bus, particularly with reference to the left front spring. He testified that he found "the left front spring broken and the left front brake cable torn loose from the wheel housing * * * I will say the break showed approximately fifty per cent old break and fifty per cent new break. * * * I had inspected the underparts of the bus each day for probably a year." The driver of the bus testified that as the bus went through a slight depression in the pavement he felt the left side drop; that he tried to apply the brakes, but found that the foot pedal already was down to the floor when he put his foot on it; that the bus slowed down some when he pressed on the foot brake and slowed down some more when he applied the emergency brake; that the bus then turned to the right and the steering gear had no effect in bringing it back until suddenly it swung abruptly to the left and then commenced to turn over. The driver further testified that on the ill-fated trip prior to the accident he had used the brakes and that they worked properly on those occasions.

Under these circumstances, the trial court, after instructing the jury that upon proof of an injury to a passenger on the car of a common carrier, caused by the operation of a car, a prima facie case of negligence is made out against the carrier, whereupon the carrier must assume the burden of proving that the injury was occasioned by unavoidable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the passenger himself, then instructed the jury as follows:

"Having established such facts by such preponderance of the evidence, the burden of proof shifts, and defendant carrier must prove by a preponderance of the evidence that the injury was occasioned by an unavoidable casualty, or some other cause, which human care and foresight could not prevent, before such carrier can escape liability."

In another instruction the court also advised the jury in part as follows:

"* * * The questions whether said spring contained an internal or latent defect which could not be discovered by the exercise of reasonable skill, and whether defendant caused reasonable inspections or overhauls to be made so as to keep said bus in reasonable repair and make it safe for use, are both questions of fact for you alone to determine. Unless you believe, from a preponderance of the evidence, that the broken spring was an unavoidable casualty, which proximately caused the accident, or that said accident was one which, by the exercise of human care and foresight, defendant could not prevent, or that plaintiff, himself, contributed to his injuries by his own negligence, your verdict should be for plaintiff. On the other hand, if defendant has established any one of these three last named defenses by a preponderance of the evidence, your verdict must be for the defendant."

[1-4] The giving of these instructions was error. No citation of authority is necessary for the statement that in any action for damages resulting from negligence, a cause of action against the defendant is stated only when negligence on the part of the defendant is alleged, and at the trial such negligence must be proved by the plaintiff by a preponderance of the evidence. True, as stated in Shearman & Redfield on Negligence (6th ed., vol. I, p. 133, sec. 59), "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." But when such an accident is shown, a prima facie case of negligence on the part of the defendant is made, and the latter is required to show the exercise of such requisite care as will offset the inference of negligence arising from the occurrence of the accident. Such inference, however, is merely evidence in the case—no different in effect than evidence of witnesses showing negligence. The burden of proving negligence by a preponderance of the evidence never shifts from one side to the other in the trial of a case, but continuously remains with the party having the affirmative of the issue—the plaintiff in an action for damages for negligence. The defendant is never required to show a want of negligence by a preponderance of the evidence. Valente v. Sierra Railway Co., 151 Cal. 534, 91 P. 481; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Seitzman v. Srere Corp., 116 Cal.App. 674, 678, 3 P.2d 58; Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 486, 46 P.2d 774.

[5] "The term 'burden of showing' or 'burden of proof,' used in that connection, signifies simply the burden of meeting the prima facie case made by the plaintiff. This is the only theory upon which such instructions can be held to be free from error, unless we are to hold that the well-settled rule as to the burden of proof being on the party who has the affirmative of the issue has no application in the one case of an action for damages for negligence, where the damage results from an accident to a thing under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care." Valente v. Sierra Railway Co., supra, page 539, 91 P. page 482. Therefore all that is required of the defendant is to produce evidence sufficient to offset the effect of plaintiff's showing, but the defendant is not required to offset it by a preponderance of the evidence. In Sweeney v. Erving, 228 U. S. 233, 33 S.Ct. 416, 418, 57 L.Ed. 815, Ann. Cas.1914D, 905, it was said: "Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

While it is true, as contended by respondent, that in the instant case appellant in its answer alleged that it had used the requisite care in the maintenance and inspection of the bus, and also that the proximate cause of the accident was the latent defect in the left front spring, nevertheless this did not change the rule that the burden of proving negligence by a preponderance of the evidence remains unchangeably and constantly with the plaintiff. In his complaint respondent placed reliance upon the doctrine of res ipsa loquitur, and what was said in the answer in addition to the denial of negligence on the part of defendant was merely supplementary to such denial and superfluous. It did not in any way change the effect of such denial. It did not constitute the statement of an affirmative defense.

[6] Respondent's contention that a reading of all the instructions given by the court discloses that the jury was fairly and correctly instructed as to the law is unavailing, because by those instructions complained of the jury was clearly and unequivocally instructed that the defendant must show by a preponderance of the evidence that it was not negligent. As was said in Seitzman v. Srere Corp., supra, "The language referred to, therefore, might well have been the very thing that determined the verdict returned. The fact that the court, earlier in the instructions, told the jury in effect that unless plaintiff proved by a preponderance of the evidence that defendant was guilty of negligence he could not recover, could not in our opinion cure the error, as the jurors might

well think that such earlier instruction applied to evidence produced before them and that it had no application to a case where the facts themselves spoke and in connection with which they were in effect told that the defendant must overcome such prima facie case by a preponderance of the evidence. An instruction to the effect that the jurors might infer negligence from the situation surrounding the accident would attract their attention rather more than the ordinary instruction, anyway, and placing the burden on the defendant to overcome such inference by a preponderance of the evidence must have had a very impressive effect. At least in our opinion it constituted prejudicial error." [116 Cal.App. 674, 3 P. 2d 60.]

[7] In none of the cases cited by respondent to sustain his claim that the instructions complained of were without prejudice to appellant, did the court advise the jury that the "burden of proving" absence of negligence on the part of the defendant required the latter to exculpate itself by a preponderance of the evidence. The phrase "burden of proving", as used in the instructions in the cases cited by respondent, was properly used in advising the jury that upon proof of a prima facie case by plaintiff the burden was cast upon the defendant to produce evidence sufficient to meet, by evidence of equal, but not superior weight, the case made by the plaintiff's evidence, as aided by the inference arising under the doctrine of res ipsa loquitur. A reading of the entire charge to the jury in the case at bar immediately suggests that the trial court intended to and did advise the jury that it was up to the defendant to produce a preponderance of evidence in order to escape a judgment against it. That such was the view of the trial court is evidenced by its refusal to give the following instruction proffered by defendant:

"In this case the plaintiff claims to have sustained injuries by reason of the negligence of the defendants. The burden is upon the plaintiff to prove such negligence by a preponderance of the evidence, and to prove further that such negligence upon the part of the defendants contributed directly and proximately to the injuries sustained. On both of these issues the burden is upon the plaintiff. Unless the plaintiff proves both the negligence of the defendants and that such negligence directly or proximately contributed to the injuries sustained, there can be no recovery herein, and your verdict must be against the plaintiff and in favor of the defendants."

[8, 9] It is true, as respondent urges, that the court did instruct the jury, "* * * If you believe from the evidence that the defendant Interstate Transit Lines performed this duty with regard to the bus involved in the accident, and that the accident was either an unavoidable casualty or one which could not have been prevented by the exercise of reasonable human care and foresight, then you are instructed that it was guilty of no negligence and your verdict must be in favor of said defendant, Interstate Transit Lines"; but such an admonition did not cure the vice contained in the instructions which advised the jury that it devolved upon defendant to make such proof by a preponderance of the evidence. As was said in Valente v. Sierra Railway Co., supra, at page 539, 91 P. at page 483, "When a defendant has made such a showing as to the exercise of the care required of him by the law as to leave the evidence upon the issue of negligence in such condition that the jury cannot conclude that the negligence has been satisfactorily shown, he has met the requirements of the law, and the verdict must be against the plaintiff." The rule just stated is fully recognized and established by the decisions in this state.

[10] Respondent's claim that the appellant was not prejudiced by the court's failure to instruct the jury that the burden of proof as to the main issue of negligence remained with the plaintiff throughout the trial, for the reason that under the evidence the jury was bound to find against defendant, cannot be upheld, because there was in the record a substantial conflict in the evidence upon the issue of whether the accident was caused by, or resulted from, such inevitable casualty or unavoidable accident, or cause beyond human care or foresight to prevent. We cannot say as a matter of law that the instructions here under attack were not prejudicial to the defendant. It follows that the judgment must be reversed on account thereof.

The other points raised in support of a reversal do not require notice for the purpose of another trial.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

ROSS et ux. v. McDOUGAL et ux.

Civ. 2188.

District Court of Appeal, Fourth District, California.

Feb. 16, 1939.

Rehearing Denied March 18, 1939.

Hearing Denied by Supreme Court April 17, 1939.

1. Judgment 🔑181

Where trial court could have entered no different judgment on the pleadings than judgment finally entered after trial of the issues, denial of motion for summary judgment was not reversible error. Code Civ. Proc. § 437c.

2. Courts 🔑121(2)

An action to recover an installment due on purchase price of realty, and the accrued interest, amounting to $739.82, wherein complaint admitted sum of $700 was received by vendors but stated that the sum was applied on last payments due, was an "action at law" to recover the $739.82, as respects superior court's jurisdiction after dismissal of cross-complaint seeking to rescind the contract because of failure of consideration.

[Ed. Note.—For other definitions of "Action; Action at Law," see Words & Phrases.]

3. Courts 🔑121(2)

Superior court's jurisdiction of subject matter is not determinable by amount of recovery.

4. Courts 🔑121(2)

In action for $739.82 constituting amount of installments due under contract of sale of realty, and accrued interest, superior court's jurisdiction attached at time of institution of action and superior court did not lose jurisdiction because amount of recovery was below limit required for jurisdiction of superior court.

5. Vendor and purchaser 🔑303

Where purchase money is payable in installments under contract for sale of realty, and conveyance is to be executed on day of last payment or on payment of whole price on any previous day, the covenants to pay installments falling due before time for execution of deed are "independent" and suit may be brought thereon without conveying or offering to convey.

[Ed. Note.—For other definitions of "Independent," see Words & Phrases.]

6. Vendor and purchaser 🔑303

Where final payment becomes due under contract for sale of realty in which time is essential, purchaser's obligation to pay the price and vendor's obligation to give a deed are "dependent and concurrent," and, if vendor allows the whole amount to become due without declaring a forfeiture, he must tender a deed as a condition to demanding payment.

7. Vendor and purchaser 🔑58

Covenants to pay installments falling due under contract for sale of realty on or after day appointed for conveyance are "dependent covenants."

[Ed. Note.—For other definitions of "Dependent Covenant," see Words & Phrases.]

8. Vendor and purchaser 🔑303

Where an overdue installment on contract for sale of realty is left unpaid until after expiration of time for performance of the entire contract, payment of such installment and execution and tender of deed are regarded as "mutual" and "dependent" conditions, if the contract is silent on the subject.

[Ed. Note.—For other definitions of "Dependent; Dependency" and "Mutual," see Words & Phrases.]

9. Pleading 🔑250

In action for installments due under contract for sale of realty, and for accrued interest, denial of motion to permit amendment to complaint, seeking judgment for entire amount due under contract, without making proper tender of deed clear of encumbrances in accordance with purchase contract, was not abuse of discretion. Code Civ.Proc. § 464.

10. Pleading 🔑229

Great liberality should be shown in allowing amendments to pleadings. Code Civ. Proc. § 464.

11. Appeal and error 🔑959(1, 2)
Pleading 🔑236(6)

The granting of permission to file amendment to complaint or supplemental complaint to increase amount sought to be recovered is within trial court's sound discretion, which in absence of abuse will not be disturbed. Code Civ.Proc. § 464.

12. Pleading 🔑250

In action for installment due under contract for sale of realty, and for accrued interest, refusal to permit amendment of complaint, to conform to proof, in seeking

recovery of additional payments that subsequently came due, was not an abuse of discretion, where there was no compliance with contract in reference to paying off mortgage and no sufficient tender of a deed was made.

Appeal from Superior Court, Riverside County; William D. Dehy, Judge.

Action by J. Edgar Ross and wife against W. T. McDougal and wife for an amount allegedly due and unpaid on a conditional sales contract for purchase of realty, wherein the defendants filed a cross-complaint. From an adverse judgment, the plaintiffs appeal.

Affirmed.

J. Edgar Ross and Anna M. Ross, in pro. per.

Albert H. Ford, of Riverside, for respondents.

GRIFFIN, Justice.

Appellants brought this action to recover $600 principal and $139.82 interest alleged to be due and unpaid on a conditional sales contract for the purchase of real property. Besides answering, the respondents filed a cross-complaint seeking to rescind the contract because of failure of consideration. On July 21, 1930, appellants and respondents executed an executory contract for the sale and purchase of property in Riverside county for the sum of $3,500, payable $100 in cash, $500 on or before August 1, 1930, $600 on or before each August 1st of 1931, 1932, 1933 and 1934, and $500 on or before August 1, 1935, the deferred payments to draw interest at the rate of 8 per cent per annum, payable quarterly. The property was incumbered with a mortgage for $1,000, which appellants agreed to pay and have released. The contract further provided that respondents should keep the dwelling on the property insured in the sum of $1,200. During the month of May, 1931, the dwelling burned without fault of either party. Respondents had been given possession but were away at the time of the fire. Insurance in the sum of $700 was paid to the mortgagee upon the written consent of the parties. Appellants asked respondents' consent to credit the insurance on the last instalments of the contract. Although respondents did not consent to this being done, appellants proceeded to make the credit in that manner.

This action was brought on February 26, 1932, for the recovery of the instalment of principal falling due on August 1, 1931, and for the accrued interest. This case was previously before this court for determination. 12 Cal.App.2d 172, 55 P.2d 574, 575. The additional factual background is adequately set forth in that opinion. After a reversal of the judgment on the cross-complaint, the case was presented to the trial court for a new trial. In reversing the judgment this court held that the $700 received from the insurance should be applied as follows: "first, on any interest due and unpaid; second, on the $600 payment of principal falling due August 1, 1931; and third, on obligations next in maturity which would be installments of interest next accruing", citing section 1479 of the Civil Code. After the case was remanded, appellants moved in the trial court that the answer be stricken and that they be given judgment in accordance with the prayer of the complaint. This motion was denied. Appellants then moved for leave to file a supplemental complaint, setting up the matters which had occurred since the filing of the original complaint, and deposited with the court a written tender of a deed. This motion was also denied. Respondents then moved to transfer the case to the justice's court of Beaumont township, on the ground that the superior court of Riverside county had no jurisdiction. This motion was likewise denied. Respondents then moved for leave to file an amended answer. They were allowed to file certain amendments to the answer, including the defense that the superior court of Riverside county had no jurisdiction to try the cause. Respondents, sometime before the trial, moved for a dismissal of their cross-complaint. The motion was granted. This action went to trial on the original complaint without amendments and the original answer with its amendments, before the court, on February 26, 1937. At the close of the trial the court rendered its decision. Appellants moved for a new trial. The motion was heard and denied by the court, after making an order changing and modifying its findings.

The court found, after crediting the sum of $700 as ordered, that there was due from respondents under the terms of the contract of purchase, the sum of $37.17, together with interest thereon at the rate of 7 per cent per annum from the first day of February, 1932, being $14.52, making a total of $51.69. Appellants appeal from this judgment.

Appellants now complain that the trial court erred (1) in denying plaintiffs' motion for an order striking the answer and granting summary judgment as prayed for in the complaint; (2) in denying plaintiffs' motion for an order permitting them to file a supplemental complaint; (3) in denying plaintiffs' motion for an order permitting them to file an amendment to conform to the proof; (4) in denying plaintiffs' motion for a new trial; and (5) in giving judgment only for the amount due at the time of the filing of the complaint instead of giving judgment for the amount shown to be due at the time of rendition of the judgment. Other specifications of error were made as to certain findings which are immaterial to the issues presented.

[1] The motion for summary judgment was made under section 437c of the Code of Civil Procedure. Under the pleadings, the motion was properly denied. Appellants cannot be heard to complain, for the trial court could have entered no different judgment on the pleadings than was finally entered after trial of the issues.

Respondents contend that the trial court was without jurisdiction to try the cause after dismissal of the cross-complaint; that it then, in effect, was an action at law to recover less than $50 and that therefore the jurisdiction was in the justice's court of Beaumont township, citing Smith v. Chin Chew, 81 Cal.App. 704, 254 P. 599, and Hammell v. Superior Court, 217 Cal. 5, 17 P.2d 101. Appellants claim that equity jurisdiction having once attached, it continues until all of the rights of the litigants have been adjusted, and that the equity court will dispose of the entire controversy, citing 10 Cal.Jur. p. 496, and 10 Cal.Jur. p. 559.

[2] Considering first the allegations and prayer of the complaint filed February 26, 1932, we are impelled to hold that the cause of action stated is but an action at law to recover the sum of $739.82. Paramore v. Colby, 45 Cal.App. 559, 188 P. 72. The complaint, however, did admit that the sum of $700 was received by plaintiffs, but states that this sum was applied on the last payments due.

In passing on the issue when the case was previously before this court, it was stated: "Plaintiffs asked defendants' consent to credit the insurance on the last installments of the contract. Although defendants did not consent to this being done, plaintiffs proceeded to make the credit in that manner." In the absence of evidence of the intention or desire of the debtor that performance should be applied to the extinction of any particular obligation, this court held that the payment should be applied under section 1479 of the Civil Code. This ultimate determination was gleaned from the record of the evidence. The question of the intent or desire of the debtor as to the application of the $700 was not discernible from the pleadings.

[3, 4] Jurisdiction of the subject-matter is not to be determined in accordance with the amount of the recovery. The superior court retained jurisdiction throughout. The jurisdiction attached at the time of the institution of the action, even though the amount of the recovery at the time of the judgment was below the limit required for the jurisdiction of the superior court. Rosenkranz v. Bentley, 220 Cal. 529, 31 P.2d 782; Turley v. Roberts, 99 Cal.App. 71, 277 P. 878; Kling v. Kimball Pump Co., Inc., 138 Cal.App. 470, 32 P.2d 659. Assuming but not holding, that the claim of respondents, who have not appealed from the judgment, is vulnerable to this jurisdictional attack, a complete answer to the objection is contained in the decision of Coggins v. Superior Court, 127 Cal.App. 412, 16 P.2d 148.

It was found by the court from the allegations in the amendment to the answer that upon the rendition of the previous decision of the trial court the defendants quit and surrendered possession of the real estate to the plaintiffs and disclaimed any rights under the contract, and that therefore the plaintiffs ought not to be allowed to further maintain any action for the recovery of any portion of the purchase price after surrender of the real property by the defendants.

The written tender of a deed filed with the court February 24, 1937, contained the following condition: "You will also take notice, that Mrs. Anna Gallagher, mortgagee of said property, has recently died, and her estate, of which Anna M. Ross is one of the heirs, is now being administered. On account of the administration there may be a fews days delay in the matter of securing from the personal representative of the said Anna Gallagher a release of the mortgage referred to in the said contract of sale, but said mortgage will be released of record before the final payment required by the terms of the agreement heretofore referred to."

Appellants were obligated under the terms of the contract before the last payment was made, to discharge of record the mortgage on the property. The proffered supplemental complaint does not allege a tender of a deed or a discharge of the mortgage. In fact, no tender of a deed was ever made to respondents. The written tender was simply filed with the other papers in the case.

It was held in the case of North Stockton Town Lot Co. v. Fischer, 138 Cal. 100, 70 P. 1082, 71 P. 438, that a vendor of land under a written contract of sale, who has demanded payment of the residue of the contract price, after it has become due, and who has tendered a deed in connection with such demand, may maintain an action of debt to recover the unpaid portion of the contract price, at any time within the statute of limitations of four years. To the same effect is the case of Amaranth Land Co. v. Corey, 182 Cal. 66, 186 P. 765.

[5-8] When the purchase money is payable in instalments and a conveyance is to be executed on the day of the last payment or on the payment of the whole price on any previous day, the covenants to pay the instalments falling due before the time for the execution of the deed are independent and suit may be brought thereon without conveying or offering to convey. But when the final payment becomes due under a contract in which time is essential, the obligation of the purchaser to pay the price and the obligation of the vendor to give a deed are dependent and concurrent. Accordingly, if the vendor allows the whole to become due without declaring a forfeiture, he must tender a deed as a condition to demanding payment. Without such tender, he may not declare a forfeiture or maintain a suit, either for the whole price or for an intermediate instalment. Covenants to pay instalments falling due on or after the day appointed for the conveyance are also dependent covenants, and where an overdue instalment is left unpaid until after the expiration of the time for performance of the entire contract and the contract is silent on the subject, the payment of such instalment and the execution and tender of a deed are regarded as mutual and dependent conditions. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126; Kerr v. Reed, 187 Cal. 409, 202 P. 142; Hoppin v. Munsey, 185 Cal. 678, 198 P. 398; Lemle v. Barry, 181 Cal. 1, 183 P. 150; Sausalito, etc., Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 P. 57; Hayt v. Bentel, 164 Cal. 680, 130 P. 432; Hill v. Grigsby, 35 Cal. 656; Menzel v. Primm, 6 Cal.App. 204, 91 P. 754; Weisenberg v. Hirschhorn, 97 Cal. App. 532, 275 P. 997.

[9] The denial of appellants' motion to file an amendment to the complaint or a supplemental complaint seeking judgment in the sum of $3,325.40, the entire amount due under the contract, both principal and interest, without a proper tender of a deed free and clear of all incumbrances in accordance with the contract of purchase, was not an abuse of discretion.

[10, 11] Although great liberality should be shown in allowing amendments to pleadings, permission to file an amendment to a complaint or a supplemental complaint under section 464 of the Code of Civil Procedure to increase the amount sought to be recovered is addressed to the sound discretion of the trial court, and its decision in the matter, as in other cases, will not be disturbed in the absence of an abuse of such discretion. Merced Bank v. Price, 9 Cal. App. 177, 98 P. 383; Philpott v. Superior Court, 1 Cal.2d 512, at page 526, 36 P.2d 635, 95 A.L.R. 990. The record does not affirmatively show that its discretion was abused. Clavey v. Lord, 87 Cal. 413, 25 P. 493.

[12] To disallow the amendment of the complaint to conform to the proof in seeking a recovery of all of the additional payments that came due after the original decision and after surrender of possession of the real estate, where there was no compliance with the contract in reference to paying off the mortgage and no sufficient tender of a deed was made, was not an abuse of discretion. Hancock v. Board of Education, 140 Cal. 554, 74 P. 44. It is only in exceptional cases that the action of the trial court upon a matter of this kind will be disturbed upon appeal. We do not think this is such an exceptional case. Williams v. Flinn & Treacy, 61 Cal.App. 352, 214 P. 1024; Phenegar v. Paolini, 27 Cal.App. 381, 149 P. 1008; French v. Orange County Investment Corporation, 125 Cal.App. 587, 13 P.2d 1046.

We find no other specifications of error meriting further consideration.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

31 Cal.App.2d 181

PEOPLE v. VOLSTAD.

Cr. 3184.

District Court of Appeal, Second District, Division 2, California.

Feb. 23, 1939.

Criminal law 🔑1130(4)

Where appeal was regularly upon court calendar and no appearance or briefs were filed by appellant, appeal was dismissed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Proceeding by the People of the State of California against Lillian M. Volstad. On motion to dismiss defendant's appeal.

Appeal dismissed.

Claude A. Watson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

PER CURIAM.

This case is regularly upon our calendar, due notice having been given, and comes before us upon the motion of the attorney-general to dismiss the case under section 1253 of the Penal Code upon the ground that there has been no appearance by the defendant and no briefs filed by him. We find the motion well taken.

The appeal is dismissed.

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31 Cal.App.2d 168

In re GRAZZINI'S ESTATE.

ANTONGIOVANNI et al. v. GRAZZINI et al.

Civ. 10994.

District Court of Appeal, First District, Division 2, California.

Feb. 21, 1939.

Rehearing Denied March 23, 1939.

Hearing Denied by Supreme Court April 20, 1939.

1. Adoption 🔑7

The use of word "their," in statute providing that consent to adoption is unnecessary from father or mother of child deserted by its parents without provision for "their" identification, is a clerical error and consent of father to adoption of children whose mother was dead was unnecessary if father abandoned children without provision for their identification. Civ.Code, § 224, subd. 5.

[Ed. Note.—For other definitions of "Their," see Words & Phrases.]

2. Adoption 🔑7

Under statute providing that consent to adoption is unnecessary from father or mother of child abandoned by its parents without provision for "their identification," requirement that parents make provision for "identification" required parents to make provision for their identification as parents of the child and the child's identification as parents' child. Civ.Code, § 224, subd. 5.

[Ed. Note.—For other definitions of "Identification," see Words & Phrases.]

3. Courts 🔑125

The superior court is a court of general jurisdiction.

4. Adoption 🔑14

A superior court judgment or order of adoption is entitled to all presumptions which attach to a judgment of a court of general jurisdiction.

5. Adoption 🔑9

Proceedings in adoption will be liberally construed. Code Civ.Proc. § 4.

6. Adoption 🔑14

Where only objection to adoption proceeding is question of consent of the natural parent, he alone may attack the proceedings on that ground and decree is valid as to all others.

7. Adoption 🔑14

Decree of adoption could not be attacked in collateral proceedings by parties claiming under adopting parent, 11 years after the decree was entered.

8. Executors and administrators 🔑17(2)

Adopted children of testator, being entitled to succeed to entire estate, were entitled to testamentary letters in preference to sister of testator. Probate Code, §§ 90, 257, 409, 422.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the estate of Armando Grazzini, deceased, wherein the will of the decedent was offered for probate by decedent's sister, who asked for testamentary letters, and wherein Gina Antongiovanni filed an opposition to the petition, contest of the will, and petition asking that letters be granted to her as administratrix with the will annexed. From portions of order ordering letters issued to sister of decedent and denying letters to Gina Antongiovanni, the latter appearing for herself and as guardian of her minor sister, Giuseppina Grazzini appeals. The appeal was opposed by Carolina Grazzini and another.

Reversed.

John J. Mazza, of San Francisco, and Kenneth J. Carey, of Oakland, for appellants.

Edmund Scott, of Redwood City, for respondents.

NOURSE, Presiding Justice.

Armando Grazzini died testate April 22, 1937, leaving a mother, a sister, and two daughters by adoption. His last will left all his property to the mother and sister, and failed to mention the adopted daughters. The sister filed the will for probate and asked for letters. The older daughter filed an opposition to the petition, a contest of the will, and a petition asking that letters be granted her as administratrix with the will annexed. A demurrer to her contest was sustained. The two petitions for letters were heard at the same time and letters were ordered issued to the sister of deceased and denied to appellant. The daughter appearing for herself, and as guardian of her minor sister, has appealed from these portions of the order.

The appellant now concedes, on the authority of Estate of Sankey, 199 Cal. 391, 405, 249 P. 517, that as a pretermitted heir, she has no right to contest the will upon that ground, but that as to her and her sister there is in contemplation of law no will because of such pretermission. There is left for decision two questions of law—may the order of adoption be collaterally attacked in these proceedings, and is appellant entitled to letters as an heir at law.

When the order of adoption was offered by appellant the trial court refused to admit it upon the ground that it was void upon its face. This was error. The ruling was based upon the highly technical conception that the order of adoption showed lack of jurisdiction because of the recital that the consent of the natural father was not necessary because of his "abandonment of said minor children without provision for *their* identification". Section 224 of the Civil Code, as it read when the order of adoption was made in March, 1926, provided that the consent of the parents of a legitimate child was not necessary (subd. 5). "From a father or mother of any child deserted by its parents without provision for *their* identification." Respondents argue that the section makes it unnecessary to have the consent of the parents only where both have deserted the child without provision for the identification of the *parents* and that, since in the case at hand, the mother was dead, the recital in the order means that the father had not made provision for the identification of the *children* and thus the order shows lack of jurisdiction.

[1] This position cannot be sustained for these reasons—the use of the word "their" was clearly a clerical error which was corrected at the 1927 session of the legislature (page 1196, § 1). This portion of the section was then made to read "where *the* father or mother of any child has deserted the child without provision for *its* identification". Thus the section was made to read that if one of the parents deserted a child without provision for identification, the consent of that parent only was dispensed with, whereas, the old section was open to the interpretation that a child must be deserted by "its parents" without provision for the identification of both. If such was the interpretation placed upon the old section by the court below, it was entirely too narrow and technical. The court in the adoption proceedings found that the mother of the children was dead and to now hold that her consent was nevertheless necessary unless she was also found to have failed to make provision for her identification after death would be absurd.

[2] But for another reason the ruling may not be sustained. The requirement that the parents make provision for "identification" means this and nothing more—that they make provision so that they may be identified as the parents of the minor and that the minor may be identified as their child. This is in accord with the rule of "reasonable" interpretation which so many cases have held to be our guide. Hence, the difference between "their" and "its" is like tweedledum and tweedledee.

[3-5] It should be noted that the adoption statutes do not require that the jurisdictional facts be stated in the order of adoption. These proceedings are initiated by petition filed in the superior court, which is a court of general jurisdiction. The judgment or order of adoption is entitled to all the presumptions which attach to any other judgment of such courts. Burris v. Kennedy, 108 Cal. 331, 338, 41 P. 458; In re Williams' Estate, 102 Cal. 70, 77, 36 P. 407, 41 Am.St.Rep. 163; Estate of McKeag, 141 Cal. 403, 408, 74 P. 1039, 99 Am. St.Rep. 80; In re Campbell, 9 Cal.App.2d 622, 623, 51 P.2d 138; 1 Am.Jur., p. 636. The reason for this holding is frequently based upon the grounds stated in Re Campbell, supra, that findings had been waived which, if made, would have covered every objection raised. Here findings might have been made covering these points, which findings would have been available on a direct attack. Then, again, in the absence of findings proof might be made in a direct attack upon the order that all these jurisdictional facts were presented to the court and proved in the original proceeding. In re Williams' Estate, supra. All these considerations have moved the courts of this jurisdiction to disregard the antiquated rule that proceedings in adoption are to be strictly construed because they were not known to the ancient common law. In harmony with section 4 of the Code of Civil Procedure we have chosen the more reasonable rule of liberal construction so well stated in 1 American Jurisprudence 636, and have fortified that rule by invoking the doctrine of estoppel against the adopting parent and those who would claim under him. This is well stated in Estate of McKeag, supra, at page 411, 74 P. at page 1041: "Nearly nine years after the decree was entered, and more than one year after the death of her adopted father, his administrator and collateral heirs come into court and ask that this decree of adoption be vacated. They are not here in the interest or on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption, and therefore have no standing in court, or they are privies in blood or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim. Surely Samuel Sankey, if living, could not be heard in this court questioning its decree made at his solicitation. He invoked the jurisdiction of the court; he asked that the decree of adoption should be made; he got what he desired; and he should not now be allowed to question the means he set in motion. If any wrong was done, Samuel Sankey did it; and neither he, nor those who claim under him, can be permitted to take advantage of his wrong, to the prejudice of an innocent party."

[6, 7] Here it should be noted that eleven years elapsed from the time of the adoption until the attack was made—not by the adopting parent, but by those claiming under him. If this had been a direct attack upon the order of adoption the defense of estoppel would have been available to the minors and they could also have made proof in support of the order. Clearly linked with this doctrine is the salutary rule adopted in many jurisdictions that where the only objection to adoption proceedings is the question of consent of the natural parent, he alone may attack the proceedings on that ground and the decree is valid as to all others. 1 Am.Jur. p. 642. These are sufficient reasons for denying to respondents the right to make this collateral attack upon the order.

[8] The second ground urged by appellant requires little discussion, since the rights of the parties are governed by express statutes. An adopted child succeeds the same as a natural child. Probate Code, § 257. When a child is not provided for by will, or by settlement, such child succeeds to the same share as if the testator had died intestate. Probate Code, § 90. The adopted children, being entitled to succeed to the entire estate, are entitled to testamentary letters in preference to the sister of deceased, who does not succeed to any portion of the estate. Probate Code, §§ 422, 409. For these reasons the appellant Gina Antongiovanni is entitled to letters with the will annexed. In reaching this conclusion we are in accord with the ruling of the trial court that the unsigned note is no part of the will, as is clearly disclosed on the face of the paper.

The portions of the order appealed from heretofore noted are reversed. The appellants should have their costs.

We concur: STURTEVANT, J.; SPENCE, J.

31 Cal.App.2d 77

FORMOSA v. YELLOW CAB CO. et al.

Civ. 10494.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1939.

Rehearing Denied March 18, 1939.

1. Appeal and error 🔑930(1)

That letters erroneously admitted laid foundation for argument to jury that would tend to impeach testimony of street car motorman respecting speed of taxicab prior to collision with truck was not determinative of its prejudicial effect, since triers of fact are presumptively influenced only by pertinent evidence.

2. Appeal and error 🔑1048(7)

In action for injuries sustained by taxicab passenger in collision between cab and truck, erroneous admission of letters written by truck owner's insurance carrier to street car company referring to statement by street car conductor respecting speed of cab was not prejudicial, where attempted impeachment of motorman's testimony failed.

3. Trial 🔑213

The language of the Vehicle Code being plain, giving of explanatory or specific instructions as to legal effect of words used is not mandatory on trial court. St.1923, p. 517; St.1935, p. 93.

4. Trial 🔑213, 241

Instructions based on Code provisions should follow wording of particular section involved, and when confusing or couched in legal terms, should be explained, but when language is unambiguous and clearly stated without legal embellishments, no explanatory instructions are required.

5. Trial 🔑213

Whether a particular Code section should be explained by specific instructions as to effect of wording used rests with trial court.

6. Carriers 🔑321(23)

In action for injuries sustained by taxicab passenger, where instructions clearly set forth basis of cab company's liability and there was no testimony tending to show that company was an insurer, refusal to instruct that company was not insurer of safety of passenger was not error.

7. Carriers 🔑316(4)

"Res ipsa loquitur" was applicable to injuries sustained by taxicab passenger who had no warning of accident but was relying on driver of cab and was rendered unconscious by collision and had no recollection of happenings immediately preceding or following accident.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

8. Carriers 🔑325

Taxicab passenger had right to assume that he would be safely conveyed to his destination in cab which was under exclusive control of driver.

9. Carriers 🔑316(4)

In action for injuries sustained by taxicab passenger who had been rendered unconscious by accident and had no recollection of events immediately preceding or following collision, cab company, to be relieved of liability, was required to show that accident was result of negligence of some agency other than driver.

10. Carriers 🔑321(21)

In action for injuries sustained by taxicab passenger who was rendered unconscious by accident and had no recollection of events immediately preceding or following accident, instruction on doctrine of res ipsa loquitur was proper.

11. Carriers 🔑320(21)

In action for injuries sustained by taxicab passenger who at time of collision was relying on driver and was rendered unconscious by accident and had no recollection of events immediately preceding or following accident, whether driver was negligent was for jury.

12. Appeal and error 🔑1064(1)

In action for injuries sustained by taxicab passenger in collision at street intersection between cab and approaching truck as truck was making left turn, refusal to instruct on statute relating to when signal for turn is required was harmless as to cab driver, although negligence of truck driver might have been shown, since cab driver would not have been relieved of his negligence. St.1935, p. 185, § 544.

13. Trial 🔑296(13)

In action for injuries sustained by taxicab passenger in collision at street intersection between cab and truck, error if any in trial judge's unsuccessful attempt to explain intersection by diagram was obviated by court's definition of intersection after directing jury to disregard former statements.

14. Carriers 🔑320(21)

In action for injuries sustained by taxicab passenger in collision between cab and approaching truck as truck was making left turn, whether view at intersection was obstructed was for jury. St.1935, p. 99, § 86.

15. Carriers 🔑321(12)

In action for injuries sustained by taxicab passenger in collision with approaching truck at intersection, where question whether view was obstructed was for jury, and finding would determine speed at which vehicles approaching intersection should travel, court properly instructed as to speed limits to be observed in approaching both obstructed and unobstructed intersections. St. 1935, p. 99, § 86.

16. Trial 🔑296(13)

In action for injuries sustained by taxicab passenger in collision with approaching truck at intersection, where court had instructed jury to disregard statements by court with reference to factual conditions surrounding intersection, necessity of giving any other definition of intersection than statutory definition given was obviated. St. 1935, p. 99, § 86.

17. Automobiles 🔑243(3)

In action for injuries sustained by taxicab passenger in collision between cab and approaching truck as truck was making left turn, evidence of truck driver and owner to show that other intersections on same street were marked with turning markers was properly excluded, as sole question for jury was whether intersection at which accident occurred was marked and whether markers were observed by trucker.

18. Automobiles 🔑243(3)

In action for injuries sustained by taxicab passenger in collision between cab and approaching truck as truck was making left turn, ordinance allegedly requiring placing of turning markers at intersections was properly rejected since, irrespective of ordinance, truck driver was required to observe markers and if no markers were stationed at paticular intersection to comply with state law applicable thereto.

19. Appeal and error 🔑1004(1)

Whether amount of damages awarded by jury is excessive is largely in discretion of trial court and its determination thereof may not be set aside unless it appears that award is so disproportionate to injuries received as to indicate passion, prejudice or corruption.

20. Appeal and error 🔑989

In determining whether amount of damages awarded by jury is excessive, reviewing court may consider amounts awarded in similar cases involving equally serious injuries, and also changing conditions in purchasing power of money.

21. Appeal and error 🔑1004(4)

The mere fact that amount awarded as damages by a jury may be larger than would have been made by reviewing court if assessment of damages had been within its province is not ground for disturbing the verdict.

22. Damages 🔑132(1)

$25,000 for injuries consisting of multiple compound comminuted fractures of bones of upper and lower right leg and of knee joint, a crushed chest, skull injuries, and numerous lacerations about the head, necessitating several painful operations and resulting in permanent disability and occasioning special damages, including doctor's and hospitalization fees of $4,377.79, was not excessive.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Frank Formosa against the Yellow Cab Company and others, for personal injuries. Judgment for plaintiff, and defendants appeal.

Affirmed.

Walter H. Linforth and William M. Cannon, both of San Francisco, for appellant Yellow Cab Co.

Christopher M. Bradley and Cooley, Crowley & Supple, all of San Francisco, for appellants Thomas W. Gilboy, Gilboy Co. and Henry Lane.

Elmer P. Delany, of San Francisco, for respondent.

PER CURIAM.

The respondent, Frank Formosa, recovered a judgment against the defendants, Yellow Cab Company, and its employee, Thomas C. O'Brien, and Thomas W. Gilboy, transacting business under the firm name of Gilboy Co., and his employee, Henry Lane, for the sum of $25,000.

At about 12:45 a. m., on the morning of May 8, 1936, the respondent, Frank Formosa, engaged a taxicab owned and operated by the Yellow Cab Company and being driven by Thomas C. O'Brien, to convey him from the Mission district in the city of San Francisco to Larkin and Turk streets in said city. The taxicab was proceeding northerly on Larkin street and on the easterly side of the north-bound street car rails; but just prior to reaching the intersection of Larkin and McAllister streets the defendant O'Brien turned slightly to the left so that the wheels of the taxicab were astride of the easterly rail of the north-bound track. Larkin street extends in a general northerly and southerly direction, and McAllister street extends in a general easterly and westerly direction; the distance between the east rail of the north-bound car track and the east curb of Larkin street south of McAllister street is 23 feet 4 inches, but to the north of McAllister street is 14 feet 6 inches. The truck of the defendant Gilboy, driven by the defendant Henry Lane, was traveling southerly on Larkin street and at the intersection with McAllister street made a left-hand turn and collided with the taxicab in which the respondent was riding. The record discloses without any conflict that there were no turning markers at this particular intersection at the time of the accident. As a result of the accident the respondent received injuries consisting of lacerations of the scalp, a fracture of the sternum, a compound comminuted fracture of the right femur, compound fracture of the right tibia, a laceration of the chin and a possible skull facture. He was rendered unconscious as a result of the collision, and at the time of the trial could recall no happenings either immediately prior to the actual impact nor subsequently thereto until after he had been in the hospital. The taxicab was proceeding at a rate of speed between 15 and 20 miles an hour, and did not at any time slacken or reduce its speed; the truck of the Gilboy Co. was traveling at approximately the same rate of speed as was the taxicab; the night was clear; both machines had their lights on and the street lights at that intersection added to the visibility; the defendant O'Brien testified that he did not see the truck driven by Lane until the instant before the collision. Lane testified that he did not see the taxicab until he was but a few feet away from it, and that it was then too late to avoid the collision. An east-bound street car was approaching on McAllister street and stopped at the loading zone on the westerly side of Larkin street. There is testimony to show that the taxicab driver was watching the street car to see if it was going to stop before proceeding across McAllister street, and the truck driver was endeavoring to beat the street car into the intersection and to proceed easterly on McAllister street ahead of the street car. There was a loading zone 54 feet in length and 6 feet in width on the easterly side of the north-bound rail of Larkin street.

It is the contention of the respondent that the concurrent negligence of the defendants caused the collision resulting in his injuries.

From a verdict in favor of the respondent and against all of the named defendants the said defendants have respectively appealed. Each of the appellants, by the appeal, attempts to justify and excuse its own actions and accuses each other. The appeals were separately taken by the Yellow Cab Company and by the Gilboy Co. The appellant Thomas C. O'Brien perfected a separate appeal, but it is predicated upon the points and authorities submitted by the appellant Yellow Cab Company, and raises but one point not therein discussed. It will be necessary for us to consider the points raised by the several appellants separately. We will first consider the appeal by the Yellow Cab Company.

The trial court admitted in evidence as Gilboy's and Lane's exhibits No. 8 and No. 9, two letters written by the representative of the insurance carrier of Gilboy and Lane to a claims adjuster of the Market Street Railway Company. These letters are in the words and figures following:

"San Francisco, California. May 23, 1936. Mr. J. H. Handlon, c/o Market St. Railway Co., 58 Sutter Street, San Francisco, California. Dear Mr. Handlon: It will be remembered that several weeks ago I called in at your office to see if you would be kind enough to let me have the name of the motorman who was a witness to the accident that occurred at the corner of McAllister and Larkin streets, in which a Yellow Cab and a truck of one of our assured, the Gilboy Company, was involved and in which an occupant of the Yellow Cab was badly injured. You stated at that time that you were going to look this up and also that the Yellow Cab Co. had made an inquiry along these lines. I am wondering if you have had any success in locating the motorman, as I am very anxious to talk with him. Thanking you for past favors, I remain, Yours very truly, S. Dodge S. Dodge, Dist. Claims Mgr."

"San Francisco, California. August 28, 1936. Mr. J. H. Handlon, c/o Market Street Railway Company, 58 Sutter Street San Francisco, California. Re: SF 1993—Formosa v. Gilboy Dear Mr. Handlon: It will be remembered that you were kind enough to forward to my office a copy of the motorman's statement of an accident which he witnessed, and which occurred at the corner of McAllister and Polk Streets, on the night of May 8, and in which a taxicab and a truck collided. I have now been informed by our attorneys that this case has been set for sometime the middle of September, and I am wondering if you would be kind enough to now give me the name and address of the motorman and allow me to use him when this matter comes to trial, and in return for that I will be more than pleased to take care of this man's expenses while he is away from work. The case in question is as you know, the passenger in the cab suing the Yellow Cab Company and our assured, the Gilboy Company, and I believe that the motorman's testimony would be very valuable to us. Thanking you for past favors, I remain, Very truly yours, S. Dodge, Dist. Claims Mgr."

The statement mentioned in these letters was not introduced in evidence. It was, however, offered as an exhibit for identification and received for that purpose but for no other purpose.

[1, 2] These letters have no evidentiary value. They refer only to a statement alleged to have been made by the motorman on the McAllister street car with reference to the speed at which the taxicab was traveling immediately prior to and at the time of the accident. The motorman was present in court and testified as to the speed at which the taxicab was traveling. His testimony was beneficial to this appellant, and the effort of the appellant Gilboy Co. to impeach his testimony could most certainly not be predicated upon anything contained in these letters. While the letters have no evidentiary value and should not have been received in evidence, we fail to see where any right of the appellant Yellow Cab Company was prejudiced by reason of their introduction. Appellant contends that the introduction of these letters laid the foundation for an argument to the jury that would tend to impeach the testimony of the motorman. This construction has never been a controlling factor with the triers of fact who are presumed to be influenced only by the pertinent evidence or testimony introduced during the trial. The introduction of said letters under the circumstances existing in this particular case could not be misleading nor have influenced the jury to the detriment of the appellant. The coappellant, Gilboy Co., endeavored to impeach the testimony of the motorman. This they had a legal right to do. The basis of the impeachment lay in the presentation of a contrary statement made at another time. In order to determine if such contrary statement was made, a foundation for the introduction of the statement (Gilboy Co.'s exhibit No. 5 for identification) had to be laid, and this foundation was their exhibits No. 8 and No. 9. The trial court could not anticipate the value of exhibit No. 5 for identification. No motion to strike the letters from the record was made. The attempted impeachment failed, and the letters standing alone were of no evidentiary value, and this appellant's rights were not prejudiced thereby.

[3-5] The second point raised by this appellant is that the court erred in refusing to give specific instructions requested by appellant, based on its theory of the case, where that theory clearly had support in the evidence.

The specific instructions complained of were requested in amplification of the provisions of the Vehicle Code (St.1935, p. 93). Appellant had submitted to the trial court, in the form of instructions, certain enumerated sections of the Vehicle Code, and these instructions were given by the trial court. The Motor Vehicle Act (St. 1923, p. 517) and its successor the Vehicle Code were passed by the legislature primarily for the purpose of guiding the motoring public. The language is plain and concise, and not couched in legal verbiage that is baffling to a juror. Under such circumstances, the giving of explanatory, or as they are here termed, specific instructions as to the legal effect of the wording used, is not mandatory upon the trial court. Instructions based on code provisions should follow the wording of the particular section involved, and when confusing or couched in legal terms should be explained, but when the language of the section is unambiguous and clearly stated without legal embellishments, no explanatory instructions are necessary. It is incumbent upon the trial court to determine whether or not a code section should be explained.

[6] This appellant requested the court to instruct the jury that the Yellow Cab Company was not an insurer of the safety of the respondent herein. A careful examination of the instructions, which are quite voluminous and cover all phases of the case, reveals that the trial court clearly and specifically set forth the basis of liability of this appellant. The trial court, having properly instructed the jury upon the duties and liabilities of this appellant, fully complied with all legal requirements of this state. There is no testimony showing or attempting to show that this appellant was an insurer, and such an instruction therefore could not be considered as pertinent to the issues and proof involved herein.

[7-11] The respondent herein was a passenger for hire in a taxicab owned and operated by this appellant. He had no warning or foreknowledge of this particular accident. He was seated in the taxicab in the place allotted for passengers and was paying no attention whatsoever to matters regarding traffic, relying entirely upon the driver of the taxicab. He was rendered unconscious by the accident and at the time of trial had no recollection whatsoever of any of the happenings immediately preceding or following the accident. Under these facts the doctrine of res ipsa loquitur applies. "Where that which causes an injury is under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management and control use proper care, it affords reasonable evidence, in the absence of explanation, that the accident is the result of the want of care." (9 R.C.L., p. 1259; 20 R.C.L., p. 185.) In the instant case the respondent was riding in the taxicab, having agreed to pay his fare or hire for the use of the taxicab to the destination that he had given to its driver. He had the absolute right to assume that he would be safely conveyed to his destination; the taxicab was under the control and management of the defendant O'Brien, and O'Brien was the sole and only person in charge of the taxicab at that particular time; the happening of the accident was not in the ordinary course of things so long as the operator thereof used proper care. It was impossible for the respondent to know or determine whether proper care was used; and it therefore became necessary for the appellant herein to show that the accident was the result of the negligence of some agency other than O'Brien. Three courses were open to the jury in reaching their verdict: (1) the jury could find that the sole cause of the accident was the negligence of defendants Gilboy Co. and Lane; (2) the jury could have determined, as in fact they did determine, that the accident was caused by the concurring negligence of all appellants; or (3) that the negligence of O'Brien was the sole, proximate cause of the injuries sustained by the respondent. Under the last theory a proper instruction on the doctrine of res ipsa loquitur was proper. The burden rested with the jury and the court was justified in submitting the question of negligence to them.

[12] The appellant O'Brien, in addition to the points raised by his employer, Yellow Cab Company, contends that the trial court erred in refusing an intruction based upon section 544 of the Vehicle Code (St.1935, p. 185). The proposed and refused instruction would have added nothing to the conclusion arrived at by the jury. It may have tended to show negligence upon the part of appellant Lane, but would not have relieved this appellant from the negligence found against him. The refusal, under the circumstances, was harmless.

Both of these appellants and the coappellants have raised the question of excessive damages, and we will discuss this phase of the case at the conclusion hereof. We will now discuss the appeal of Thomas W. Gilboy, Gilboy Co., and Henry Lane, pertaining to the contentions made by said appellants herein.

[13-16] Upon the conclusion of the case and while giving the instructions to the jury, the trial judge attempted to explain to the jury, upon the diagram presented in evidence, a factual demonstration of the intersection at Larkin and McAllister streets. After several attempts to demonstrate the boundaries of the intersection the trial judge came to the conclusion that anything he might state with reference to such intersection would be confusing to the jurors and thereupon instructed them to disregard entirely his attempted delineation of the intersection. A legal definition of an intersection was later given by the court, after he had directed the jury to disregard entirely his former statements. In our opinion the giving of a proper instruction and the direction to disregard former

statements by the trial judge obviated any error that might have been committed. Under the facts of this particular case it was incumbent upon the jury to determine whether the intersection at Larkin and McAllister streets was an obstructed or "blind" intersecton. A proper definition of an intersection according to the Vehicle Code (St.1935, p. 99, § 86) had been given to the jury by the trial court. The particular intersection involved was one that was indeed very difficult to define, and more or less confusing. It became a question of fact for the jury to determine whether or not this particular intersection was an obstructed intersection, and the finding of the jury upon this question would determine the speed at which vehicles approaching both from the north and from the south should travel. It was therefore proper for the trial court to instruct the jury as to the relative speed limits in approaching an intersection that was obstructed and also approaching the same intersection where the view was not obstructed. The court had definitely instructed the jury to disregard any and all statements made by the court with reference to the factual conditions surrounding the intersection, and this instruction obviated the necessity of making any other definition than the one given by the court as set forth in the Vehicle Code.

[17, 18] These appellants contend that there were no markers of any kind at the intersection of Larkin and McAllister streets. They further contend that the city ordinance of the city of San Francisco required the placing of turning markers at all intersections, and that north of McAllister street on Larkin street each of the intersections was marked with turning markers. They offered to show that on the intersections north of McAllister street such markers did in fact exist, but this line of testimony was excluded by the court. We believe that its exclusion was proper, and that the sole question to be determined by the jury was whether or not there were markers at the intersection of Larkin and McAllister streets and if so whether these markers were observed by the defendant Lane in driving his truck in a southerly direction and making a left turn on to McAllister street. The ordinance of the city of San Francisco was offered and rejected by the court. It is of no moment as to what the ordinance might be or might have been; it was incumbent upon the driver of the truck to observe the markers, and if no markers were stationed at that particular intersection, then to comply with the state law applicable thereto.

As a matter of justification for the turn made by the defendant Lane, these appellants contend that there was an object placed in the street at almost the same position that a turning marker would be placed, which was mistaken by the driver of the truck for a turning marker. The truck driver had according to his own testimony, traversed that particular intersection many times—as many as fifty times, and knew, or should have known, that the object allegedly mistaken by him as a turning marker was in fact a cover placed by the San Francisco Police Department over a hole used for the placing of posts as guide lines on special occasions. The defendant Lane's testimony, however, does not bear out the contention of appellant herein, as it shows that Lane in operating his truck merely assumed, or presumed, that there was a marker along the northerly line of McAllister street and in the center of Larkin street. There is no definite testimony that the defendant Lane mistook the posthole cover for a marker. The city of San Francisco may have been negligent in not placing turning markers at the intersection of McAllister and Larkin streets, but such an omission upon the part of the city is no justification or excuse to the appellant for failure to observe the state law. The exclusion of the city ordinance was proper, and to have admitted the ordinance in evidence would have been erroneous. It has no application to the facts and circumstances of the instant case.

[19-21] The final contention made by all appellants is that the amount of damages awarded is grossly excessive. It is well settled, however, that the question of whether the amount of damages awarded by a jury is excessive is committed largely to the discretion of the trial court, and that its determination of the question may not be set aside on appeal unless it appears that the award is so disproportionate to the injuries received as to indicate that the award was the result of passion, prejudice or corruption on the part of the jury. Mohn v. Tingley, 191 Cal. 470, 217 P. 733; Hale v. San Bernardino Valley T. Co., 156 Cal. 713, 106 P. 83; Hamilton v. Hammond Lumber Co., 13 Cal.App.2d 461, 56 P. 1257; Holden v. Patten-Blinn Lumber

Co., 7 Cal.App.2d 220, 45 P.2d 1037. It is also well settled that in determining the question the reviewing court may take into consideration the amounts awarded in similar cases involving equally serious injuries (McNeil v. East Bay Street Rys., Ltd., 220 Cal. 591, 600, 32 P.2d 598; Maede v. Oakland High School Dist., 212 Cal. 419, 298 P. 987), and also the changing conditions in the purchasing power of money (O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381; Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350; Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603; Criss v. Angelus Hospital Ass'n, 13 Cal. App.2d 412, 56 P.2d 1274); and that the mere fact that the amount of the award may be larger than would have been made by the reviewing court, if the assessment of damages had been within its province, is not ground for disturbing the verdict. Collins v. Jones, 131 Cal.App. 747, 22 P. 2d 39; Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601; Bennett v. Hardy, 108 Cal.App. 473, 291 P. 903.

[22] Here the evidence shows that respondent's injuries were of a most serious character, extremely painful, required a great deal of surgical treatment, and left him in a permanently crippled condition. They consisted mainly of multiple, compound, comminuted fractures of the bones of the upper and lower right leg, and of the knee joint, a crushed chest, skull injuries and numerous lacerations on the chin, forehead and scalp. The thigh bone was badly broken and splintered in several places, and the lower third thereof protruded through the flesh. Higher up on the leg a piece of bone three inches long was found in a horizontal position, and at the lower end the condyles forming the knee joint were split into three parts. There was likewise a compound comminuted fracture of the larger shin bone; and the periosteum was badly torn. The chest injury consisted chiefly of a fracture of the largest, strongest part of the breast bone and a possible fracture of a rib; and as a result of the skull injuries respondent suffered from cerebral concussion.

Immediately following the accident respondent was taken in an unconscious condition to the Central Emergency Hospital, and the surgeon in charge pushed back the protruding thigh bone as far as he could, applied a sterile dressing, splinted the leg, cleansed the numerous flesh wounds, stopped much of the flow of blood, and sutured the wounds. Respondent was then removed to the San Francisco General Hospital, where an attempt was made by means of an open operation to reduce the compound fractures and put in place the broken parts of the bone. The operation consisted in part of laying the bones of the knee bare, removing the fragmentary parts of the knee joint, washing them in sterile solution, cutting away much of the injured tissues and replacing the broken parts. The leg was then placed in a "Thomas splint" with a "Pearson attachment" and a "Matthews' pin and stirrup" which was connected with a pulley at the end of the bed and weights attached for countertraction; and in order to place the Matthews pin it was necessary to drill a hole through the bone of the leg two inches below the knee. A few days later respondent was encased in a complete body cast extending from the middle chest to the heels, and removed to Mary's Help Hospital. There he was attended by two specialists, who operated on four different occasions. Three of the operations consisted of manipulations of the leg. The other was an open operation, which was postponed until the last because of possible infection. Meantime respondent was stricken with bronchial pneumonia, which was much aggravated by the fractured breast bone, and the body cast. The first manipulation operation was extremely painful, because respondent's bronchial affliction would not permit the giving of any anaesthetic; consequently it was necessary to restrain him by physical force. The operation consumed nearly two hours, and consisted in part of tightening up the traction wire through the shin bone so as to make it taut and rigid. The apparatus was then fixed by lateral compression, using hands and clamps to mould the fractures down in place. Respondent was then placed in a plaster body cast extending from the chest down, the leg being locked within the cast. The second manipulation operation was performed under anaesthetic about ten days later. The sutures and wire were removed from the upper end of the shin bone to prevent infection, and further attempt was made to mould the fragmentary bones together, and respondent was again locked in a cast in the same fashion, from the chest to the heels. The third manipulation operation took place about three weeks later, at which time callus was present in the knee joint; and an attempt was made to bend the fractures of the bone in proper position. It was discovered, however, that several of the fractures were caught in the muscles, and it became necessary to perform an open operation, which took place about six weeks after the third manipulation. Many of the fragments which were found sticking close to the skin were removed; but further operation for the realignment of the bones was then abandoned because of the profuse bleeding of the bone itself, which could not be stopped by clamps. Thereupon a "capsule sliding operation" was performed, which consisted of running up the capsule of the knee joint and sliding it past the roughened area without getting into the joint. Following this last operation a splint was applied and counterweight balance traction provided by means of a pulley to work the knee; and about a month later the leg was placed in a cast and respondent was allowed to go about on crutches.

As to the permanent character of the injuries, the medical testimony shows that due to the total destruction of the crucial ligaments of the knee joint, the disarrangement of the bones thereof, the distribution of the articulate surfaces and change in the weightbearing line, respondent will always have a "very unstable knee", and for the rest of his life will be compelled to wear a leg brace and go about with the aid of crutches or a cane; and that if he does not do so greater disability will result. It also shows that osteomyelitis might develop at any time within several years. The medical testimony further shows that at the time of trial, which took place five months after the accident, the knee was abnormal and there was great danger of the deformity increasing in time; that on account of the unstable condition of the knee respondent will never again be able to follow his occupation as chef, nor do any other kind of work which will require standing or walking; that the right leg is three inches shorter, and that there will be a permanent loss of flexation of about 45 per cent. Respondent was able to attend the trial, but at that time he was still under medical treatment at the hospital, and totally incapacitated from performing any work; and according to the medical testimony such total incapacity would continue for more than a year, and thereafter that he would suffer partial disability to the extent hereinabove stated.

At the time of the accident respondent was 40 years of age, married, and the father of three minor children. He was steadily employed as a chef, and his weekly earnings were $42 a week; and his life expectancy was 28 years. His special damages up to the time of trial amounted to $4,377.79, of which $3,285.79 was incurred for doctors' fees and the cost of hospitalization. The balance represented loss of wages. It appears, therefore, that the jury awarded him approximately $20,623 for pain and suffering, permanent injuries, loss of future earnings, and cost of future medical services and hospitalization; and in view of the facts above narrated there would seem to be no legal ground upon which it may be reasonably held that the amount awarded is so grossly disproportionate as to indicate the existence of passion or prejudice on the part of the jury.

The judgment is therefore affirmed.

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31 Cal.App.2d 233

PEDIGO v. CRESSMAN.

Civ. 2244.

District Court of Appeal, Fourth District,
California.

Feb. 24, 1939.

Appeal and error ⟹78(3)

An appeal does not lie from an order sustaining a demurrer to an amended complaint, and an attempted appeal from such an order will be dismissed. Code Civ.Proc. § 963.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Proceeding by J. P. Pedigo against A. N. Cressman. From an order of the superior court sustaining defendant's general demurrer to plaintiff's amended complaint, plaintiff appeals.

Appeal dismissed.

Rae B. Carter, of Fresno, for appellant.

H. E. Barbour and W. B. Backlund, both of Fresno, for respondent.

GRIFFIN, Justice.

This is an attempted appeal from an order of the superior court of Fresno county, sustaining the general demurrer of the respondent to appellant's amended complaint.

An appeal does not lie from an order sustaining a demurrer to an amended complaint and an attempted appeal from such an order will be dismissed. Code Civ. Proc., sec. 963; Bryant v. Kelly, 203 Cal. 721, 265 P. 817; Harmon v. De Turk, 176 Cal. 758, 761, 169 P. 680.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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31 Cal.App.2d 182

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. v. CHAPMAN et al.

Civ. 1691.

District Court of Appeal, Fourth District, California.

Feb. 23, 1939.

Rehearing Denied March 24, 1939.

Hearing Denied by Supreme Court April 24, 1939.

1. Mortgages 🔑218

Ordinarily, a personal action may not be brought upon a debt secured by a mortgage or deed of trust without first exhausting the security. Code Civ.Proc. § 726.

2. Guaranty 🔑77(3)

Where a third party guarantees a debt secured by mortgage or trust deed, action may be maintained against guarantor without exhausting security, since guaranty constitutes an obligation independent of secured debt. Code Civ.Proc. § 726.

3. Corporations 🔑237, 252

Stockholders of a corporate mortgagor may be sued for amount of mortgage debt irrespective of any foreclosure or sale. Code Civ.Proc. § 726.

4. Corporations 🔑252

That corporation assuming mortgage is liable for entire debt is not, in itself, conclusive that such corporation's stockholders could be sued for debt irrespective of foreclosure or sale. Code Civ.Proc. § 726.

5. Mortgages 🔑556

The liability of mortgagor and his assuming grantee for mortgage debt must be enforced by foreclosure, and deficiency judgment may be entered only after exhausting security. Code Civ.Proc. § 726.

6. Corporations 🔑480½

A corporate mortgagor is directly liable on original debt incurred without regard to mortgage given as security and its right to have security exhausted arises not from contract through which debt was incurred but by operation of procedural statute limiting remedy of mortgagee. Code Civ.Proc. § 726.

7. Mortgages 🔑280(4)

The provisions of statute relating to procedure in foreclosing mortgages must be read into any agreement of assumption of mortgage and become a part of it. Code Civ. Proc. § 726.

8. Corporations 🔑480½

A corporation which assumes a mortgage agrees to become liable for mortgage debt as it then stands, including any rights conferred by existing mortgage, with mortgaged property constituting primary fund for payment of debt, and there is an implied agreement that assuming corporation will pay any deficiency remaining after exhaustion of security. Code Civ.Proc. § 726.

9. Corporations 🔑225

The independent statutory liability of stockholders of corporation assuming mortgage is for the exact obligation incurred by corporation and not for anything different or greater. Code Civ.Proc. § 726.

10. Mortgages 🔑97

Mortgage provision that upon repeal of any statute "now in force" prohibiting exercise of any other remedy concurrently with proceeding to enforce mortgage lien, such statute should not be deemed to have become part of mortgage, indicated intent that upon future change in law, mortgagee should not be bound by law existing when mortgage was executed but should receive benefit of any change. Code Civ.Proc. § 726.

11. Mortgages 🔑218

The right to have a security exhausted was not waived by mortgage provision that judgment could be recovered for mortgage debt before, after or during pendency of proceeding for enforcement of mortgage liens, especially in view of other provisions. Code Civ.Proc. § 726.

12. Mortgages ⟹218

Where mortgaged property has been destroyed or sold and is no longer in existence so far as mortgagee is concerned, personal action may be maintained without going through foreclosure proceeding. Code Civ. Proc. § 726.

13. Mortgages ⟹218

As respects action on debt secured by mortgage, where mortgaged property is still in existence but is claimed to be valueless because of other liens and claims, foreclosure and sale is proper mode for determining whether security has in fact become valueless. Code Civ.Proc. § 726.

14. Mortgages ⟹218

Where facts from which mortgagee drew conclusion that mortgaged property was valueless were specifically alleged, mortgagee could not maintain personal action without having brought foreclosure proceedings, especially where such allegations were inconsistent with general conclusion. Code Civ. Proc. § 726.

15. Pleading ⟹8(2)

In mortgagee's action against stockholders of corporation which assumed mortgage, to recover personal judgment for mortgage debt, mortgagee's allegation that mortgaged property had become valueless could not be considered as an allegation of fact rather than a conclusion, where facts upon which it was based were clearly alleged and indicated otherwise. Code Civ.Proc. § 726.

16. Corporations ⟹268(1)

In mortgagee's action against stockholders of corporation which assumed mortgage, to recover personal judgment on mortgage debt without having brought foreclosure proceeding, on ground that mortgaged property was valueless, allegations of complaint did not conclusively show property to be valueless. Code Civ.Proc. § 726.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by the Security-First National Bank of Los Angeles, as trustee, and others against Charles C. Chapman and others based on stockholders' liability. From a judgment of dismissal following the sustaining of a general demurrer to a fourth amended complaint, plaintiffs appeal.

Affirmed.

Forgy, Reinhaus & Forgy, of Santa Ana, Gibson, Dunn & Crutcher, of Los Angeles, and A. M. Bradley, of Santa Ana (Ira C. Powers and Frederic H. Sturdy, both of Los Angeles, of counsel), for appellants.

Drumm, Tucker, Martell & Drumm, of Santa Ana, E. O. Leake and J. J. Leake, both of Los Angeles, and Sam L. Collins, of Fullerton, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment of dismissal following the sustaining of a general demurrer to a fourth amended complaint in an action based upon a stockholder's liability.

From the allegations of the amended complaint it appears that the Alexandria Hotel Realty Corporation, which will be referred to as the hotel corporation, owned and held seven separate leasehold interests covering contiguous city property in the city of Los Angeles, on which adjoining and connecting buildings had been erected and were maintained under the name of the Alexandria Hotel. On May 1, 1927, the hotel corporation executed and delivered to the predecessor of the plaintiff bank, as trustee, a trust indenture which is alleged to be "a mortgage, deed of trust, assignment and instrument of pledge", securing bonds to the amount of $1,350,000. For convenience the parties in their briefs have referred to this trust indenture as a mortgage and, for the sake of brevity, we will do the same in this opinion. The property thus conveyed to the trustee or mortgagee as security for these bonds, and making up the trust estate, included these seven leasehold interests, and also a certain sublease from the hotel corporation to two individuals, covering the hotel building, together with a chattel mortgage on the furniture, furnishings and equipment of the hotel given to secure this sublease.

The mortgage contained a provision that nothing therein should prevent the hotel corporation from selling the entire trust estate to any person or corporation, provided that such sale should not impair the lien and security of the mortgage or any rights of the trustee or of the bondholders, and provided further that the person or corporation acquiring the trust estate should by a writing deposited with the trustee expressly assume the payment of the bonds then outstanding and secured thereby. On June 10, 1930, the hotel corporation sold and assigned the trust estate to the Santa Ysabel Land Company, which will hereinafter be referred to as the land company, and of which the defendants herein were then the stockholders. This assignment recited that it was made subject to "the lien" of the mortgage (describing it) securing the bond issue, "which said bonded indebtedness the said Santa Ysabel Land Company hereby expressly assumes and agrees to pay". The land company executed and delivered to the trustee an acceptance reciting that it "hereby accepts the foregoing assignment subject to all of the terms, covenants, and conditions of that certain trust indenture", and after describing the trust indenture given to secure this bond issue the acceptance goes on to state that the land company "hereby expressly assumes and agrees to pay the bonds secured by said Trust Indenture now outstanding in the aggregate principal sum of $1,292,500.-00", together with interest, "and further undertakes and agrees to perform each and all of the covenants and conditions in said Trust Indenture which were to be performed by" the hotel corporation. A resolution adopted by the board of directors of the land company, containing similar recitals, was also furnished to the trustee. It is alleged that pursuant to such agreement the land company entered into possession of the leasehold estate and exercised all rights of ownership over the same for over seventeen months and that on or about November 21, 1931, the land company "duly and regularly sold, assigned, transferred, conveyed and set over" the trust estate to the Spring Street Properties, Inc., a corporation.

It is then alleged that defaults in various respects existed on May 1, 1933; that these defaults were not remedied; that the trustee, in compliance with the terms of the trust indenture, elected on May 16, 1933, to declare the whole indebtedness represented by the outstanding bonds to be due and payable; and that no part of the principal or interest of the outstanding bonds or the indebtedness or liability incurred by the land company by its assumption agreement and no part of the indebtedness of the defendant stockholders had been paid. The plaintiff bank sued as trustee for and on behalf of the holders of all outstanding bonds, and the individual plaintiffs sued as a bondholders' committee holding such bonds of the par value of $813,500. It is not alleged that there had been any foreclosure or sale of any of the trust estate, given as security for the bonds.

The first question presented is whether the stockholders of such an assuming corporation are entitled to have the security represented by the mortgaged property exhausted before a personal action is brought against them on their stockholders' liability. It seems that this question has not been directly decided in this state. The appellants contend that it has been uniformly held that the provisions of section 726 of the Code of Civil Procedure, or the corresponding right in the case of a trust deed (see Bank of Italy etc. Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940), are available only to a mortgagor corporation and are no defense to an action on the independent liability of its stockholders; that the land company, the assuming corporation here, stepped into the shoes of the mortgagor corporation and, like that corporation, was personally liable for the full amount of the bonds; that the stockholders of the land company are equally liable for the full amount of that debt; and that, like the stockholders of a mortgagor corporation, these stockholders are not entitled to the benefit of section 726 or to have the security first exhausted.

[1-3] While, ordinarily, a personal action may not be brought upon a debt secured by a mortgage or deed of trust without first exhausting the security, there are certain well-established exceptions to this rule. Where a third party guarantees such a debt an action may be maintained against the guarantor without exhausting the security since the guaranty constitutes an obligation independent of the secured debt. Birkhofer v. Krumm, 4 Cal.App.2d 43, 40 P.2d 553; Loeb v. Christie, 6 Cal.2d 416, 57 P.2d 1303. It has also been held that the stockholders of a corporation mortgagor may be sued for the amount of the mortgage debt irrespective of any foreclosure or sale. Knowles v. Sandercock, 107 Cal. 629, 40 P. 1047; Niles State Bank v. Jennings, 22 Cal.App. 66, 133 P. 329; Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A.L.R. 1380; Title Ins. & Tr. Co. v. Torrance, 10 Cal.App.2d 416, 51 P.2d 1123. The reasons given for so holding are that a stockholder has a separate and distinct liability under the constitutional and statutory provisions imposing such liability, as they formerly existed; that in accepting ownership of his stock a stockholder offers, in effect, to make pay-

ment proportionately to any future creditor of the corporation during his ownership; that his statutory liability is primary and independent of the liability of the corporation upon the debt; that this liability of the stockholder, within its extent, is in the nature of a continuing guarantee of and for debts contracted by the corporation; and that since the mortgage only affects the remedy against the mortgagor corporation the stockholder may be sued upon his independent liability without foreclosing the mortgage. Aronson & Co. v. Pearson, supra. In each of these exceptions to the general rule a personal action, without exhausting the security, is permitted because the obligation sued upon is separate and distinct from that of the secured debt.

[4] It may be conceded that the nature of the liability of the stockholders of this assuming corporation depends upon the position and situation of the corporation itself. If, as the appellants contend, the assuming corporation stands in all respects in the shoes of the mortgagor corporation, being liable for the entire debt in exactly the same way that the mortgagor corporation was liable for it, and with the existence of security merely invoking a procedural rule affecting the remedy against the corporation, it might well follow that its stockholders are in the same position as would be the stockholders of the mortgagor corporation and that they are liable as guarantors under their statutory liability, irrespective of the mortgage. If, however, the position of the assuming corporation differs from that of the mortgagor corporation, a corresponding difference in the situation of its stockholders may well result. The fact that the assuming corporation is, in a sense, liable for the entire debt is not, in itself, conclusive since that liability may be contingent and since it arises under a separate contract (the assumption agreement) and may be governed thereby.

In some of the earlier cases (e. g., Biddel v. Brizzolara, 64 Cal. 354, 30 P. 609) it was held that the liability of a mortgagor is only to pay any deficiency after foreclosure and sale. In Loeb v. Christie, supra, in passing upon the obligation of a guarantor, it was held that the obligation of the maker of a note and mortgage is for the face of the note and not for the deficiency after foreclosure. In Birkhofer v. Krumm, supra, we said:

"The more logical rule is formed by a consolidation of the first and second theories we have been considering. By so doing we arrive at the following: That the land furnishes the principal or primary fund for the payment of the mortgage debt; that as between the grantor and grantee, the grantee becomes the principal and the grantor the surety for the deficiency remaining after applying the money derived from the sale of the land on the debt; that from the point of view of the mortgagee both the grantor and the grantee stand in the relation of sureties for the payment of the deficiency to the mortgagee. A surety may require his creditor to exhaust the principal fund to lighten the surety's burden before proceeding against the surety personally. Section 2845, Civ.Code; Murphy v. Hellman etc. Bank, 43 Cal.App. 579, 185 P. 485. This reasoning brings us to a point where the rules we have announced governing the relations of the mortgagor, his grantee and the mortgagee are in strict harmony with the provisions of section 726 of the Code of Civil Procedure and the multitude of decisions which hold that the mortgagee must exhaust the security before he can recover against his debtor and that this recovery must be limited to the deficiency remaining after applying the funds derived from the sale of the property on the debt." [4 Cal.App.2d 43, 40 P.2d 557.]

[5] While the liability of both the mortgagor and the assuming grantee is for the debt secured by the mortgage it must be enforced by foreclosure, and a deficiency judgment may be entered only after exhausting the security. Roberts v. Fitzallen, 120 Cal. 482, 52 P. 818. To the extent above noted the mortgagor corporation and the assuming corporation stand in the same position.

[6] The mortgagor corporation is directly liable on the original debt it incurs without regard to the mortgage it gives as security. Its right to have the security exhausted arises not from the contract through which the debt was incurred, but by the operation of a procedural statute limiting the remedy of the mortgagee.

[7, 8] In the case of an assuming corporation it does not create the debt but assumes it as it is. Its main contract is to assume the mortgage and although it agrees to pay the debt the latter agreement is incidental to the former and is but a part of the entire agreement. The provisions of section 726 must be read into any assumption agreement and become a part

of it. Lewis v. Hunt, 133 Cal.App. 520, 24 P.2d 557. The right to have the security exhausted is included in the contract under which the obligation of the assuming corporation is created and limits the obligation which is assumed. Such a corporation agrees to become liable for the debt as it then stands, including any rights conferred by the existing mortgage and with the mortgaged property constituting the primary fund for the payment of the debt. While the assuming corporation agrees to protect the mortgagor corporation in the matter of paying the debt, it has a contractual right to the benefit of the security, there is an implied agreement that it will pay any deficiency remaining after the exhaustion of that security and, in a real sense, its agreement is "merely one to pay the amount of such deficiency judgment as might be entered after the foreclosure of the mortgage and the sale of the mortgaged premises". Robson v. O'Toole, 45 Cal.App. 63, 187 P. 110, 114.

[9] In the case of a mortgagor corporation which incurs a debt, to secure which a mortgage has been given, the stockholders have been held liable on an independent obligation to pay that debt although under a procedural rule the creditor's remedy against the corporation was more limited. In the case of an assuming corporation the stockholders are in a somewhat different position since that corporation, in incurring the obligation has limited the same by its contract of assumption and has made the right to have the security exhausted a part of its contract and a condition of its liability on the debt. It follows that the independent statutory liability of its stockholders is for the exact obligation incurred by the corporation and not for something different and greater.

While the assuming corporation steps into the shoes of the mortgagor corporation it steps in not only as to a possible liability for the whole debt, but also as having the right to have the security exhausted; this right being an essential part of its contract which, like an agreement to assume any other contract, is merely to assume the obligation as it then exists and to carry out the contract of the mortgagor, of which the mortgage is an essential part. Its real position is that of an indemnitor rather than that of a guarantor. Lewis v. Hunt, supra; Biddel v. Brizzolara, supra; Small v. C. R. Rogers Productions, 11 Cal.App.2d 191, 53 P.2d 774; Shuey v. Mulcrevy, 34 Cal.App. 218, 166 P. 1019. The appellants concede that no personal judgment could have been rendered against the land company without a foreclosure and sale, and the reason for this is not alone the fact that under section 726 the remedy of the mortgagee was limited but also because its liability was thus fixed by the contract under which its obligation was created.

Viewing the matter from another angle, while as between them the assuming corporation becomes the principal and the mortgagor corporation the surety, as to the mortgagee the assuming corporation stands in the position of a surety for the payment of any deficiency. Birkhofer v. Krumm, supra. In assuming the mortgage and agreeing to pay the debt the assuming corporation is not only contracting in view of the existing mortgage, with a right to all of its benefits as well as being subject to its obligations, but it is, by its contract, assuming the position of a surety with the right of a surety to have the security first exhausted. While, in a sense and contingently, the assuming corporation is liable for the full debt, in creating its obligation it assumed something less than the burden originally assumed by the mortgagor corporation and, in effect, merely contracted to become a surety. Its stockholders, as continuing guarantors of its obligations under their stockholders' liability, are guarantors of its obligation as a surety only, and are consequently entitled to have the security first exhausted.

It is next contended that under the terms of the mortgage instrument, made applicable to both the mortgagor corporation and its grantee, each of these corporations expressly waived the right to have the security exhausted and granted to the trustee the right to commence an action and obtain a judgment for the full amount of the bonds before foreclosure. It is first argued that the provisions of section 726 of the Code of Civil Procedure are remedial and procedural, intended solely for the benefit of the mortgage debtor, and may be waived by the debtor. In support of this contention the appellants cite Murphy v. Hellman Coml. Bank, 43 Cal.App. 579, 185 P. 485; Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann.Cas.1916D, 171; Western Fuel Co. v. S. G. Lewald Co., 190 Cal. 25, 210 P. 419, and Bank of Italy etc. Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940. While some of these cases contain statements suggesting that such a right of waiver might exist such statements are in each instance dicta, and none of these cases goes farther than to hold that where the parties had an independent right, under a separate agreement not connected with the mortgage, the provisions of section 726 did not prevent them from exercising their right under the other agreement. Assuming that under some circumstances a mortgagor might waive the benefit accruing to him under section 726, his right to waive the applicability of the section, in advance, by providing in the original mortgage that the mortgagee should be free from the limitations of this section, made applicable to all mortgages in this state, may well be questioned. However, we are not called upon to decide this question here.

It is argued that the right to have the security exhausted was here expressly waived because of section 15 of article IX of the mortgage instrument. That section provides that in the event of a default in one or more respects the mortgagee agrees, upon demand of the trustee, to pay the amount which shall then be due and payable on all such bonds; that in case it shall fail to pay the same forthwith the trustee shall be entitled to recover a judgment for the whole amount so due and unpaid; that "The Trustee shall be entitled to recover judgment as aforesaid before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture upon the trust estate"; that the right of the trustee to recover such judgment shall not be affected by any entry or sale thereunder; and that "The powers granted to the Trustee by this section, however, are expressly subject to the limitations prescribed by section 21 of this Article". Section 21 of that article, so far as material here, reads as follows: "Notwithstanding the foregoing provisions of this Article, the powers hereby granted to the Trustee are strictly subject to the limitations that if, by the commencement of any action at law to recover judgment for any amount due and unpaid hereunder or upon the bonds secured hereby, * * * (the lien of this indenture) * * * would, * * * be surrendered, waived, or lost, the Trustee shall have no power to commence such action at law. * * * But in case any statute now in force * * * prohibiting the exercise of any other remedy prior to or concurrently with proceedings to enforce the lien of a mortgage upon the premises mortgaged * * * shall hereafter be repealed or cease to be in force, such statute shall not be deemed to have become or to be a part of the contract contained in this indenture."

[10, 11] The right to sue without foreclosure is thus made expressly subject to the provisions of section 21. In effect, it is there provided this may not be exercised if the commencement of an action at law to recover judgment would result in the security being waived or lost. The main purpose of this provision appears to be that nothing shall be done to jeopardize this security. If the mortgagor could, in advance, waive the right to have the security exhausted it might well be held that the mortgagee, in accepting and acting upon the waiver, was electing between the security and the right to secure a personal judgment and the security might be lost. Jones v. Maria, 48 Cal.App. 171, 191 P. 943. The section goes on to provide that in case any existing statute prohibiting any other remedy than the foreclosure of the lien should later be repealed such statute should not be deemed a part of the contract. Reading these sections of the mortgage instrument in relation to their context it seems to have been the intention to provide that in the event of a future change in the law the mortgagee should not be bound by the law existing at the time the instrument was executed, but should be entitled to the benefit of any such change. This is a reasonable interpretation of the language used and the trial court was entitled to so interpret the instrument. Aside from other considerations, it does not appear from the face of the complaint that the right to have the security exhausted was expressly waived. The parties contracted in view of the existing law and the terms of their agreement disclose an intent to secure the benefit of any change in that law rather than an attempt to evade it by providing in advance that the contract should not be subject thereto.

The last point requiring consideration is appellants' contention that this action could be maintained without foreclosure since the security had become and has remained valueless. In this regard the amended complaint alleged "that subsequent to the execution of such trust indenture the value of all of the said property mortgaged * * for security for said bonded indebtedness declined, and prior to the commencement of this action, had depreciated to such an extent that the same was entirely without value". It is then alleged that the rental due under the leases and the taxes were more than $25,000 a year in excess of the annual rental value of the property: that during the year preceding the commencement of this action the operating income of said hotel did not exceed the operating expense thereof; that by reason of the fact that defaults existed in the payment of rent under the leases and in the payment of taxes the leasehold interests assigned by the trust indenture did not possess any market or other value; that each of the seven leases assigned by the trust indenture was cancelled, three under notices of default served prior to the commencement of this action, and four by notices filed a few months later; that all seven leases were formally cancelled and forfeited in unlawful detainer actions by judgments entered some months after this action was brought; that in March, 1933, the hotel building on the leased premises was severely damaged by an earthquake and had not been repaired at the time this action was commenced; and that by reason of the fact that the leaseholds had become valueless "as aforesaid" no security for the debt remained.

[12-14] The appellants contend that the general allegation that the security had become valueless was in itself sufficient to require the overruling of the demurrer, since it is well settled that when the security of a mortgage becomes valueless no foreclosure is necessary prior to bringing a personal action, and that it further appears from the other allegations that the security had in fact become valueless.

In support of the first of these contentions these cases are cited: Toby v. Oregon Pac. R. Co., 98 Cal. 490, 33 P. 550; Merced Bank v. Casaccia, 103 Cal. 641, 37 P. 648; Savings Bank v. Central Market, 122 Cal. 28, 54 P. 273; Otto v. Long, 127 Cal. 471, 59 P. 895; Crescent Lbr. Co. v. Larson, 166 Cal. 168, 135 P. 502; Western Fuel Co. v. S. G. Lewald Co., 190 Cal. 25, 210 P. 419; J. I. Case T. M. Co. v. Copren Bros., 32 Cal.App. 194, 162 P. 647; Dyer Law & Coll. Co. v. Abbott, 52 Cal.App. 545, 199 P. 340. Without reviewing these cases in detail it may be observed that they were cases where no mortgage lien had ever existed, where the mortgaged property had been sold in some court proceeding, where the pleadings raised no issue regarding security for the debt, or where the property had actually been sold under a power of sale. In Otto v. Long, supra, in discussing the case of Barbieri v. Ramelli, 84 Cal. 174, 24 P. 113, the court said: "In effect, this is saying that a foreclosure and sale is the special mode provided for determining whether there is anything for a particular mortgagee in the property subject to the lien. * * * To inquire whether there is such property as that which the mortgage purports to cover, or whether for any reason it failed to create a lien, is not to violate the rule announced in Barbieri v. Ramelli [supra], nor the policy of the statute. If it can be made to appear that there is no such property as that which the mortgage purports to describe, it would demonstrate that there was no lien, and the debt would not be one secured by mortgage." [127 Cal. 471, 59 P. 896.] Where mortgaged property has been destroyed or sold and is no longer in existence, so far as the mortgagee is concerned, there is little doubt that a personal action may be maintained without going through the empty form of foreclosing the mortgage. But where the property is still in existence and it is claimed to be valueless because of other liens and claims, the case last referred to seems to hold that a foreclosure and sale is the proper mode for determining whether the security has, in fact, become valueless. To permit a mortgagee to bring and maintain a personal action by merely alleging his conclusion that the mortgaged property, on which he still holds a lien interest which has never been disturbed, is valueless, or more accurately that it will eventually become so, would be not only to disregard the statute but to allow the mortgagee to substitute his judgment of the value for the mode of determining that fact established by law. Assuming that this should be permitted in any case it should not be allowed where, as here, the facts from which the mortgagee draws his general conclusion are specifically set forth. This is especially true if the facts alleged are inconsistent with the general allegation. Little v. Union Oil Co., 73 Cal.App. 612, 238 P. 1066.

[15] While the allegation that the property had become valueless might, in a proper case, be considered as an allegation of fact rather than a conclusion, we think it cannot be so taken here where the facts upon which it is based are so clearly alleged. The real question presented is whether the factual allegations are suffi-

cient to show that the security was valueless at the time the action was brought.

[16] Looking to the amended complaint, it appears that because of defaults in the payment of rent and taxes, notice of cancellation of the various leases had been given. In the case of four of the leases this notice was given more than three months after this action was begun. In three instances this notice was given about two weeks before the action was begun, but in accordance with the terms of those leases the lessee had thirty days in which to remedy the default, which time did not expire until after the action was brought. Judgments cancelling the leases were entered, the earliest six months and the latest eight months after the action was brought. It appears that at the time the action was brought some time remained in which to remedy the defaults under these leases, and in the light of human experience it cannot be said that it affirmatively and conclusively appears that the security represented by the assignment of the leases was entirely valueless. Even a short time is sometimes sufficient to turn an unprofitable business enterprise into a profitable one. While it is alleged that the building had been damaged, the leases had then been assigned to the Spring Street Properties, Inc., and it is not alleged that this corporation was unable to repair the building or that repairs were not then being made.

It is alleged that the trust indenture provided that the mortgagor would pay to the trustee as a sinking fund, between May 1, 1932, and April 30, 1933, the sum of $60,000. And further, that the mortgagor would at all times keep on deposit with the trustee in a special rent fund, in cash, in securities of the United States, the state of California or any city in this state, or any bonds certified as a legal investment for savings banks, an amount equal to six months' rent next due under the seven leases, which amount was between $25,000 and $30,000. It is not alleged that these agreements were not kept and presumably the trustee had such amounts or such securities in his possession.

One of the things transferred to the trustee under the trust indenture and comprising a part of the trust estate, was a chattel mortgage on all the furnishings of the hotel. It is alleged in the complaint that Spring Street Properties, Inc., claiming to have cancelled the sublease had noticed for sale and sold the hotel furnishings covered by the chattel mortgage, selling the same for $40,000; that the appellant bank, as trustee, had filed an action for the purpose of establishing that it was the owner of the mortgagee's interest in this chattel mortgage, and that said action was still pending. It not only appears from the allegations of the complaint that the trustee still held this chattel mortgage covering the furnishings of this hotel, as a part of the trust estate and as a part of the security given for the bonds, but the fact that the trustee is still the legal owner of that chattel mortgage has since been judicially established. Security-First National Bank v. Spring Street Properties, Inc., 20 Cal.App.2d 618, 67 P.2d 720. While the appellants argue that this chattel mortgage is to be considered a pledge and not a part of the mortgage security, the fact still remains, in spite of any fine distinctions, that this chattel mortgage represents a very considerable asset which is still in the hands of the trustee and which was turned over as a part of the security for the debt here sued upon.

In our opinion, the court correctly held that the facts alleged were not sufficient to show that the security given was entirely valueless.

For the reasons given, the judgment is affirmed.

I concur: GRIFFIN, J.

MARKS, J., deeming himself disqualified, does not participate in this opinion.

31 Cal.App.2d 205

DU VAL MOORE & CO. v. WARD.

Civ. 10674.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1939.

1. Evidence ⚿455, 461(1)

In buyer's action on contract for sale of Babbitt skimmings, where letter of buyer referred to purchase of "Babbitt Skimmings described by you," followed by two varying analyses of metals, evidence as to conversations and relation of parties prior to letter was admissible to show circumstances under which language was used and to determine intention of parties. Civ.Code, § 1649; Code Civ.Proc. § 1860.

2. Sales ⚿441(2)

In buyer's action on contract for sale of Babbitt skimmings, evidence that buyer's manager inserted varying analyses in letter and that seller refused to sell on basis of analysis, warranted finding that it was not agreed that skimmings would contain any specified percentage of metals and that analyses were incorporated in sales contract solely to identify subject matter of contract.

3. Sales ⚿260, 273(1)

That Babbitt skimmings failed to conform to analyses inserted by buyer in contract of purchase did not render seller liable to buyer for damages for breach of warranty of conformity to description where seller was not a manufacturer and did not represent skimmings would conform to either analysis and purchaser did not rely on seller's skill or judgment. Civ.Code, § 1735.

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Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Du Val Moore & Company against Ivan Ward on a contract for the purchase and sale of Babbitt skimmings. From a judgment for defendant, plaintiff appeals.

Affirmed.

Jerome Politzer and John E. Truman, both of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondent.

WARD, Justice.

Du Val Moore & Co., a corporation, entered into a written agreement with Ivan Ward for the purchase of a quantity of scrap metal referred to as "Babbitt Skimmings". The contract was in the form of a communication from the corporation to Ward, who endorsed thereon "Confirmed & accepted". The agreement provides in part as follows: "Confirming conversation of October 20th, we herewith offer you firm, for acceptance by Saturday noon, October 22nd, $19.25 per ton of 2,000 lbs. for the approximate one hundred to one hundred and twenty-five tons of Southern Pacific Babbitt Skimmings described by you, and of which you have given us an analysis reading as follows:" Thereafter follow analysis No. 1 and analysis No. 2 referring to tin, antimony, copper and lead, and the yield of each analysis. The percentage of each respective metal and the yield in analysis No. 1 differed from the percentage and yield given in analysis No. 2. Analysis No. 1 indicated a less commercial value than No. 2 though the total yield was higher. The scrap metal was delivered by the seller to the place designated in the agreement. The corporation paid for the number of tons delivered and immediately resold to parties in an eastern state. Upon arrival at the destination it was found that the skimmings contained a less percentage of metal content which resulted in reducing the market value. Du Val Moore & Co. brought this action against defendant Ward on the contract and alleged damages in the sum of $2,033.27. Judgment was entered for the defendant, and plaintiff appealed.

The question presented on appeal is, did the written agreement create a warranty? The trial court held that it did not and, for the purpose of ascertaining the intention of the parties, permitted testimony of prior conversations to show the circumstances under which certain words and figures were used. In a supplement to appellant's opening brief, certain findings essential to support the judgment are attacked as without foundation in evidence, but this ground of appeal may be disposed of on the main point presented; namely, under the letter-contract, did the trial court commit error in the reception of evidence of conversations occurring prior to the date of the letter.

[1] Section 1649 of the Civil Code provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must

be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it". A mere reading of the contract-letter suggests immediately the questionable purpose of the insertion of two varying analyses. What was the description of the approximate one hundred twenty-five tons of Southern Pacific Babbitt Skimmings "described by you"? Was it the analysis of less commercial value, or the greater? Was it the analysis of greater or less total yield? Was it the percentage of each respective metal, and if so, was it the first or the second reading that was contracted for? Was it both or neither? Was this an express or implied warranty, or was it just a designation or description of the tonnage of metal of which the analyses were made, without representation as to the correctness of either analysis in metallurgical content? It is a well known fact that the metallurgical content controls the quality and usability of a quantity of metals, and therefore it must be definite or designated, as calculated or approximated, in order to come within the purview of the statutory definition of an express warranty. If these questions can not be answered from the contract itself, then the contract is ambiguous and its interpretation may possibly be determined from the previous conversation referred to in the letter; and if not, then from all of the circumstances under which it was made, including the relation of the parties. Code Civ.Proc. § 1860; Wachs v. Wachs, 11 Cal.2d 322, 79 P.2d 1085; California Canning Peach Growers v. Williams, 11 Cal.2d 221, 227, 78 P.2d 1154.

[2] This contract is ambiguous. The purpose of the insertion of two analyses is answered by the testimony of the manager of appellant corporation who prepared the contract and testified: "A. Yes, but the point is I had to identify the material and that is the reason I put in those two analyses. Q. In other words, that was merely for identification? A. If I didn't have something to go on, what would I have bought? They could have shipped anything." The evidence further disclosed that the separate analyses were made by prospective purchasers other than appellant; that respondent, engaged in the scrap iron business, made no independent analyses, and in fact this was his first deal in non-ferrous metals; that the manager of appellant corporation had the benefit of three years of training at Columbia University in mining and metallurgy and had been continuously engaged in the purchase of oils and metals for a number of years. The figures contained in the two analyses were first obtained by appellant's manager from a representative of another prospective purchaser. Subsequently respondent showed copies of the analyses to appellant but, according to the testimony of appellant, respondent "didn't want to have anything to do with the question of analysis. He wanted to sell them on a flat price regardless of the outcome". "Mr. Ward suggested that I go up to Sacramento and satisfy myself, yes." Upon the above facts and other similar evidence, including the contract, the court was justified in finding "That it is not true that it was agreed between Du Val Moore & Co., a corporation, plaintiff, and Ivan Ward, defendant, that said quantity of Babbitt Skimmings to be purchased under the terms of said agreement would contain the percentage of metals set forth and listed in said agreement, or would contain any specified percentage of metals; and in this connection, the Court further finds that the analyses set forth in said agreement containing listed metals and percentages were incorporated in said agreement for the sole purpose of identifying the subject matter of the sales contract."

In California Jewelry Company v. Provident Loan Association, 6 Cal.App.2d 506, 45 P.2d 271, relied upon by appellant, the writing set forth a definite agreement. In the present case extrinsic evidence was required to aid in the interpretation of the intent of the parties because the buyer could not have relied on the inconsistent analyses as a basis for the purchase.

The description of the property sold, we find in the letter-contract, is (1) "approximate one hundred to one hundred and twenty-five tons", (2) "Southern Pacific Babbitt Skimmings", and from the evidence we discover that the skimmings were the same skimmings from which two certain samples had been taken, and subsequently two analyses had been made which were inserted in the agreement only for the purpose of identifying the particular material. So far as we may ascertain from the transcript of testimony, the goods contracted for were the goods sold, and no misstatement as to the kind or variety appears in the written instrument or the oral testimony.

[3] This case was tried upon the theory that the contract in question was an

express warranty. On appeal, in addition to the attempt to sustain that theory, the claim is presented that there was an implied warranty that the goods in question would conform to the description. Civ. Code, sec. 1734. In Smith v. Zimbalist, 2 Cal.App.2d 324, 333, 38 P.2d 170, 174, the court said: "Without burdening this opinion with the citation of additional authorities, it may suffice to state that, although the very early decisions may hold to a different rule, all the more modern authorities, including many of those in California to which attention has been directed (besides the provision now contained in section 1734, Civ.Code), are agreed that the description in a bill of parcels or sale note of the thing sold amounts to a warranty on the part of the seller that the subject-matter of the sale conforms to such description. See, generally, 22 Cal.Jur. 994; 55 Cor. Jur. 738 et seq.; 24 R.C.L. 171; and authorities respectively there cited." Appellant argues that if the corporation agreed to buy "Babbitt Skimmings" containing 83.65 per cent lead and 1.90 per cent copper, it did not want skimmings containing 51.43 and 12.07 per cent of lead and copper respectively. The difficulty in approving appellant's theory is that the sale did not come within the usage of trade provisions; the seller was not a grower or manufacturer, and the buyer did not rely on the seller's skill or judgment. Civ.Code, § 1735. On the contrary, the term "Babbitt Skimmings" is utterly meaningless in determining even an approximate nature of the substance. It is a conglomerate mass of materials, skimmed from the top of a vat containing molten metals, which is then dumped into a pile containing anything from dirt to broken bits of wood. The respondent never affirmed as a fact that the skimmings would conform to either analysis. They had not been prepared under his direction, and respondent had no knowledge of the correctness of either analysis, which appellant well knew; and finally, the analyses were inserted into the contract by appellant, and appellant relied not upon any inducement by respondent but upon the analyses prepared by third parties. In Smith v. Zimbalist, supra, each party believed and assumed that the articles sold were genuine, and the general conduct of the parties led to a decision that no enforceable sale had taken place. In the instant case, the refusal of the manager of the appellant corporation to inspect the skimmings or to make his own analyses, followed by his conduct in seeking a warranty by insertion of the analyses into the contract when he knew that respondent was not prepared to affirm the correctness of either analysis, takes appellant corporation without the category of one entitled to damages upon an implied warranty.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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31 Cal.App.2d 219

PEOPLE v. McREYNOLDS et al.

Civ. 5952.

District Court of Appeal, Third District, California.

Feb. 24, 1939.

1. Eminent domain 🔑222(6)

In condemnation proceeding pursuant to straightening highway through a farm, court did not err in refusing, under evidence which was remote and speculative, that land was benefited by being made available for use as cabin sites, to instruct that jury should deduct, from severance damages, value of special benefits derived by landowners on account of change in location of highway.

2. Eminent domain 🔑146

In condemnation proceeding, state would be entitled to have award of severance damages assessed against it diminished in amount of any proved special benefits accruing to land which was not condemned. Const. art. 1, § 14, as amended in 1928.

3. Eminent domain 🔑74

Under Constitution, an ordinary corporation may not appropriate right of way without first compensating owner therefor, irrespective of benefits to be derived from improvement. Const. art. 1, § 14, as amended in 1928.

4. Eminent domain 🔑146

When a right of way is condemned by municipality, county, or state, such appropriators are entitled to have severance damages awarded against them reduced in amount of benefits which accrue to property not taken if benefits are special as distinguished from general benefits enjoyed by public at large, "special benefits" being those which result from mere construction of improvement and peculiar to land in question and reasonably certain to result from construction of the work. Code Civ.Proc. § 1248; Const. art. 1, § 14, as amended in 1928.

[Ed. Note.—For other definitions of "Special Benefits," see Words & Phrases.]

5. Eminent domain 🔑202(4)

In estimating damages suffered or benefits derived from appropriation of land for public use, evidence of land's reasonable adaptability for a particular purpose, even though land is not then actually used therefor, is competent if such adaptability is so reasonably probable as to have an effect upon present market value of land.

6. Eminent domain 🔑219

In condemnation proceeding, where landowner swore in first answer that condemned land was worth $500 an acre and swore to amended answer in which value was set at $1,000 an acre, court properly refused to strike his explanation of increased demand as due to intervening increase in value.

7. Witnesses 🔑267

The latitude permitted in cross-examination of a witness is largely within trial judge's sound discretion.

8. Witnesses 🔑276

In condemnation proceeding, court did not abuse discretion by unduly restricting examination of landowner who was called under statute by state and questioned as to price he paid for land, his valuation thereof, and price at which he sold four acres thereof. Code Civ.Proc. § 2055.

9. Evidence 🔑474(18)

A farmer, who lived some distance from condemned land, had never visited condemned premises until being called as witness, and who did not know of sales of land similar to that condemned in the vicinity of condemned land, was not qualified to testify to value of the land.

10. Eminent domain 🔑262(1)
Evidence 🔑498½

The determination of qualifications of a witness to testify concerning value of land condemned for public use is addressed solely to trial judge and is largely subject to his sound discretion.

11. Appeal and error 🔑971(2)

In absence of clear abuse of trial judge's discretion, his determination of a witness' qualification to testify to value of land sought to be condemned will not be disturbed.

12. Evidence 🔑601(4)

The value of land appropriated by eminent domain is essentially a question of opinion to be established by expert testimony.

13. Evidence 🔑474(18), 543(3)

To be qualified to testify as to value of land condemned, a real estate agent or farmer must be familiar with market price of similar land in same neighborhood, and be acquainted with property involved in suit; general knowledge of real estate values being insufficient.

14. Evidence 🔑474(18)

A farmer who owns similar land in another portion of county remote from property in question will not be presumed to be qualified to give expert opinion as to value of land appropriated by eminent domain.

15. Eminent domain 🔑150

$2,500 for 8.46 acres of farm land appropriated for state highway purposes was not so excessive as to indicate passion and prejudice of jury, notwithstanding trial judge stated that he would not have been as liberal as jury.

16. Evidence 🔑543(3)

In condemnation proceeding, testimony of expert witnesses engaged in real estate business within one mile of condemned property was competent for jury's consideration notwithstanding some of the reasons for declaring their valuations were not sound or controlling.

17. Eminent domain 🔑221

In condemnation proceeding, weight of testimony of expert witnesses was solely for jury's determination.

18. Eminent domain 🔑262(3)

An appellate court may not assume that an award of damages for taking of property in eminent domain, which award is supported by competent testimony, is excessive unless it clearly appears that award was rendered through passion or prejudice.

19. Evidence 🔑571(7)

The weight of expert testimony as to value of land condemned in eminent domain depends on reasons assigned for conclusions of the witnesses in light of surrounding circumstances.

20. Evidence ⚷571(7)

Opinions of expert witnesses as to value of condemned land should be received by jury for what they appear to be worth unless opinions appear to be inherently wrong or lack substantial support.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Condemnation proceeding by the People of the State of California, acting by and through the Department of Public Works, against Donald C. McReynolds and others. Judgment against plaintiff for $5,000, and plaintiff appeals.

Affirmed.

Clarence W. Morris, Holloway Jones, Clifford D. Good, Lincoln V. Johnson, and George C. Hadley, all of San Francisco, for appellant.

Carter, Barrett, Finlay & Carlton, of Redding, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants own 245 acres of farm land one mile north of Redding in Shasta county, through which, for many years, the state highway extended. For the purpose of straightening the highway through defendants' property the state condemned a strip of land near the old highway 235 feet in width and 750 feet in length, containing 8.46 acres of land. A jury awarded the defendants damages for the property taken in the sum of $2,500 and severance damages in the additional sum of $2,500. A judgment was rendered against plaintiff for the sum of $5,000. From that judgment the state has appealed.

It is asserted the court erred in refusing to instruct the jury to deduct from the severance damages awarded the value of special benefits acquired by the defendants on account of the change in the course of the highway; that the court erred in unduly restricting the cross-examination of one of the defendants; that the court erred in precluding a witness for plaintiff from testifying to the damages on the ground that he was not qualified to do so, and that the damages which were awarded are excessive.

[1] We are of the opinion the court did not err in refusing to instruct the jury it was entitled to deduct from the severance damages awarded the value of special benefits derived by the defendants on account of the change in the location of the highway. There is no substantial evidence the remaining land of the defendants derived any special benefits from the change in the course of the highway different in character from the general benefits secured by the public at large. The plaintiff's witness, Harper, testified there were no benefits accruing to the defendants' property on account of the improvements. Only one witness testified that defendants' land would be benefited by the change in the locality of the highway. That was a man by the name of Oaks, who, in effect, said that the property would be thereby benefited to the extent of approximately $1,000 "by reason of the fact that the heavy travel was taken off this old road. * * * There might be occasional prospects for a cheap cabin site." This evidence infers that diverting the traffic from the old road to the new highway located a short distance southerly therefrom might enhance the value of the remaining land of defendants as possible sites for "cheap cabins". He said that heavy traffic along the old road would render the adjacent lots undesirable because "it would be unsafe" if the owners "had any children they might get out into the road and be run over." He added the statement that the new route "will make it possible to sell off a few of those little spots in there. * * * A cabin site [might be worth] fifty dollars."

The court refused to instruct the jury that it should deduct from the severance damages awarded the value of the benefits accruing to the defendants' property by virtue of "the construction of the highway".

The foregoing evidence with respect to benefits derived is too remote, uncertain and speculative to furnish substantial proof warranting the court in directing the jury to reduce the severance damages by the value of benefits accruing to the remaining property on account of the change in the locality of the highway. It will be observed the new course of the highway does not divert traffic from the property of the defendants. It merely changes the line of travel from the old highway to the new one located a few hundred feet southerly therefrom. If the enhanced value of lots adjacent to the old road is based on the danger of children or cattle straying upon a busy thoroughfare, the change in the course of the highway merely results in their having to stray a short distance further to encounter that same danger. The defendants' land is located a mile from Redding. There is no evidence that it has been subdivided into building lots, or that there is any reasonable likelihood it will be so subdivided with a prospect of selling the lots even for "cheap cabins". The evidence of benefits to the land not taken, by virtue of the change in the highway, is unsubstantial, remote and speculative. It did not justify the court in directing the jury to take it into account in estimating the severance damages. Coast Counties Gas and Electric Co. v. Miller & Lux Inc., 118 Cal.App. 140, 5 P.2d 34. The court, therefore, did not err in refusing to so instruct the jury.

[2] It is true that the state would be entitled to have the award of severance damages assessed against it diminished in the amount of any proved special benefits which accrued to the defendants' land which was not condemned. Article 1, section 14, of the California Constitution, as amended in 1928, provides in part: "Private property shall not be taken or damaged for public use without just compensation having nrst been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county or the state until full compensation therefor be first made in money or ascertained and paid into court f-r the owner, irrespective of any benefits from any improvement proposed by such corporation."

[3, 4] It clearly appears from the preceding provision that an ordinary corporation may not appropriate a right of way without first compensating the owner therefor *irrespective of any benefits to be derived from the improvement.* But municipal corporations, counties and the state are specifically excepted from that rule. It is clearly inferred that when a right of way is condemned by a municipal corporation, a county or the state, such appropriators are entitled to have the severance damages which are awarded against them reduced in the amount of the benefits which accrue to the property not taken on account of the proposed improvements. However, such benefits must be special in character as distinguished from general benefits enjoyed by the public at large. Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581, 92 Am.St.Rep. 188; Collier v. Merced Irr. Dist., 213 Cal. 554, 571, 2 P. 2d 790; Los Angeles v. Marblehead Land Co., 95 Cal.App. 602, 614, 273 P. 131, 137; sec. 1248, Code Civ.Proc.; 10 Cal.Jur. 348, sec. 62. Special benefits are defined in the Marblehead Land Company case, supra, as those which "result from the mere construction of the improvement, and are peculiar to the land in question. These special benefits must be such as are reasonably certain to result from the construction of the work."

In the present case there is proof of no benefits to the defendants' land in question which will result from a mere change of the highway to a location near by, peculiar in its effect upon their land, different in nature from its result upon the public in general. We can reasonably conceive of no special benefits to the defendants' land by the slight change in the location of the highway, except, possibly, the running of a straight course through the property instead of a former more irregular one. There is no evidence of the value of such benefits. Nor can it be said the defendants' property is benefited by their acquiring the use of the former abandoned roadway. There was no evidence of the abandoning of the former highway. Even if it were to be abandoned, we assume the title theretc would not revert to the former owner thereof, but it would still remain in the state. We are directed to no tangible evidence of the value of special benefits accruing to the land of the defendants by virtue of the construction of the new highway.

[5] It is true that in estimating the damages suffered or the benefits derived on account of the appropriation of land for public use, evidence of its reasonable adaptability for a particular purpose, even though it is not then actually used therefor, is competent. Los Angeles v. Kerckhoff-Cuzner Miller & Lumber Co., 15 Cal.App. 676, 115 P. 654. Under proper circumstances it is competent to show that land which is used exclusively for farming purposes has a market value based on the expectation of subdividing it into town lots or small building tracts. 20 C.J. 774, sec. 229. The uses to which the property may be adapted must, however, be so reasonably probable as to have an effect upon the present market value of the land. A pure-

ly imaginary, remote or speculative value may not be considered. 10 R.C.L. 130, sec. 113. There must be some probability that the land would be used for subdivision purposes within a reasonable time. 20 C. J. 773, sec. 228. There is no evidence in the present case that the defendants intended to so subdivide the property, or that they could, within a reasonable time, sell it for building purposes even for "cheap cabin sites". We are therefore of the opinion the appellant was not prejudiced by the refusal to instruct the jury to take such evidence of a speculative value in consideration in determining the severance damages which were allowed.

[6, 7] It does not appear that the court unduly restricted the examination of the defendant, Frank McReynolds, who was called under the provisions of section 2055 of the Code of Civil Procedure and cross-examined by the plaintiff. In fact, he was examined at considerable length. The rulings of the court with respect to his evidence appear to be entirely fair and impartial. He was permitted to testify that he purchased his 245-acre tract of land from the Southern Pacific Company in 1934 for $1,228.37. He was then asked if he had not sold four acres of that tract to one Eitemiller that same year for $400. That was objected to by adverse counsel, and plaintiff's attorney withdrew the question. He said, "Well, your Honor, I withdrew the question at this time." While there was considerable controversy over that subject, we are unable to find that the question was subsequently renewed. There was much opposition on the part of defendants' counsel to questions regarding a sworn amendment to the answer which was filed. The rulings of the court were favorable to the appellant. The witness admitted that in his first answer he swore that the value of the property sought to be condemned was $500 an acre and the severance damages would amount to $7,500. He also admitted that he swore to an amended answer in which he alleged that the value of the 8.46-acre strip of land sought to be condemned was $1,000 an acre, and that the severance damages amounted to $12,000. He explained that increased demand for damages by saying: "I think that property has gone up a good deal since we first filed." We are of the opinion the motion to strike that answer from the record was properly denied. The latitude permitted in the cross-examination of a witness is largely within the sound discretion of the trial judge. 3 Am.Jur. 536, sec. 976. In the authority last cited it is said in that regard: "The scope and extent of cross-examination rest largely in the sound discretion of the trial court, and its ruling thereon is reviewable only where such discretion has been abused."

[8] The court did not abuse its discretion by unduly restricting the cross-examination of the defendant, Frank McReynolds.

[9-11] The court did not err in holding that the plaintiff's witness, Gover, was disqualified to testify as to the value of defendants' land sought to be condemned. It appears he is a farmer who lives in the southern portion of the County of Shasta some distance from the property owned by the defendants. He owned several large tracts of land in other parts of the county. He admitted that he did not know of sales of land similar to that of the defendants in the vicinity of Redding, within one mile of which their land was located. He had never visited their premises until a few days before he was called as a witness. The determination of the qualifications of a witness to testify concerning the value of land sought to be condemned for public use is addressed solely to the trial judge, and is largely subject to his sound discretion. In the absence of a clear abuse of that discretion the determination of the trial judge that such a witness is or is not qualified to testify to the value of the land sought to be appropriated will not be disturbed on appeal. Vallejo & Northern Railroad Co. v. Reed Orchard Co., 169 Cal. 545, 575, 147 P. 238, 252. In that case it is said: "The question whether or not a witness is qualified to give his opinion, as evidence upon a matter in issue, is submitted to the trial judge in the first instance, and is to be determined by him before such opinion may be given. Fairbank v. Hughson, 58 Cal. 314. It is, in itself, in the nature of a trial of a question of fact, by evidence addressed to the judge alone, and, as in other decisions or questions of fact by a trial court, his ruling thereon is a matter of discretion, and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject."

[12-14] The value of land appropriated by eminent domain is essentially a question of opinion to be established by expert testimony. It is not sufficient that a real es-

tate agent or a farmer may have general knowledge of real estate values. He must be familiar with the market price of similar land in the same neighborhood and he should be acquainted with the property involved in the suit. He should possess special knowledge regarding the particular land in question which will enable him to form an intelligent and fairly accurate estimate of the actual market value of the land sought to be condemned. It will not be presumed that a farmer who owns similar land in another portion of the county remote from the property in question is, therefore, qualified to give his expert opinion of its value. His qualifications must first be established. 18 Am.Jur. 999, secs. 355, 356.

In the present case the court did not abuse its discretion in holding that the witness, Gover, was not qualified to give his opinion as to the market value of defendants' land sought to be condemned. Two other witnesses for the plaintiff testified fully regarding the value of the land.

[15] We are unable to say as a matter of law that the judgment, based on the verdict of the jury, that the value of the 8.46 acres of land appropriated by the state for highway purposes at slightly less than $300 an acre, aggregating the sum of $2,500, is so grossly excessive as to infer that it was the result of passion and prejudice. It is true that the trial judge said: "The jury gave a far more liberal award in this case than the court would have done had it been sitting without a jury."

[16-20] The defendants called five expert witnesses who were engaged in the real estate business at Redding, one mile from the property in question, each of whom fixed the market value of the property taken at a figure in excess of $500 an acre. Some of their reasons for declaring that valuation may not appear to be sound or controlling. But it was competent evidence which the jury had a right to consider. The weight of their evidence was solely for the determination of the jury. Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A.,N.S., 818, Ann.Cas.1913B, 1230; Bennett v. Hardy, 108 Cal.App. 473, 479, 291 P. 903. An appellate court may not assume that an award of damages for the taking of property in eminent domain which is supported by competent testimony is excessive unless it clearly appears that it was rendered through passion or prejudice. May v. Farrell, 94 Cal.App. 703, 715, 271 P. 789. It is true that expert opinions of witnesses often appear to be influenced by partisanship, and that they are subject to inherent infirmities which justify a more critical examination of their effect. But the nature of certain cases requires that necessary facts, such as the value of land sought to be appropriated, shall be established by expert testimony. Such evidence, therefore, has a probative value and may be considered by the jury. Its weight depends on the reasons assigned for the conclusions of the witnesses in the light of the surrounding circumstances. Unless it appears that the opinions are inherently wrong, or lack substantial support, they should be received and considered by the jury for what they appear to be worth. 2 Jones on Evidence, 4th ed., page 739, sec. 392.

It is true that the defendants purchased their 245 acre tract of land in 1934 for $1,228.37, and that they sold four acres of that property to Eitemiller the same year for $100 an acre. But there is evidence that the 8.46 acres involved in this suit is more valuable than other portions of the tract. It also appears the value of land in and about Redding has increased greatly in value since 1934 on account of the construction of the Shasta Dam. There is substantial evidence to support the award of damages for the value of the land appropriated.

The judgment is therefore affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

31 Cal.App.2d 196

TURNER et al. v. LINER et al.

Civ. 10623.

District Court of Appeal, First District,
Division 1, California.
Feb. 24, 1939.

Limitation of actions 🔑179(2)

In action against brokers to recover damages and secret profits made in transaction in which brokers, while acting as plaintiffs' agents in exchange of realty, were in fact the owners of realty, which was represented as belonging to third person, complaint was insufficient to toll the statute of limitations on ground that plaintiffs could not have discovered brokers' fraud any sooner in exercise of due diligence, where land was located in county, plaintiffs had been in brokers' office divers times after the exchange, and no fiduciary relationship was shown.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Walter Turner and Margaret Turner against Irving M. Liner and others to recover damages and secret profits made by defendants in transaction in which defendants, while acting as plaintiffs' agents in exchange of realty, were in fact the owners of the realty, which was represented as belonging to third person. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

Prior opinion, 85 P.2d 585.

Leo A. Sullivan, John G. Robertson, A. K. Whitton, and Charles H. Frost, Jr., all of Oakland, for appellants.

Irving M. Liner, of Oakland, for respondents.

CONLAN, Justice pro tem.

This action was brought by the plaintiffs for the recovery of damages and secret profits in a real estate trade, resulting from the possession by the defendants, who were the plaintiffs' agents, of individual interests in the real estate traded which were adverse to those of the plaintiffs in the course of the transaction, without any knowledge thereof or consent thereto on the part of the plaintiffs.

A demurrer was interposed to plaintiffs' complaint which was sustained. The plaintiffs filed an amended complaint to which another demurrer was addressed and which was likewise sustained. The plaintiffs then filed their second amended complaint and the defendants again demurred thereto. This demurrer was also sustained. Upon failure of the plaintiffs to amend the third time, judgment was thereupon entered in favor of the defendants on May 19, 1937.

Plaintiffs allege in their second amended complaint that on or about August 22, 1928, they employed the defendants to act as their brokers and agents in the matter of an exchange of a certain parcel of real property then owned by plaintiffs (therein referred to as parcel I) for another certain parcel of real property (therein referred to as parcel II); that the defendants accepted this employment; that the defendants represented to them that parcel II was owned by one Annah L. Wood; that thereupon an "Exchange Agreement" was entered into and executed whereby Annah L. Wood deeded parcel II to plaintiffs and plaintiffs deeded parcel I to Annah L. Wood, paid her the sum of $5,000 and executed their promissory note to Annah L. Wood in the sum of $5,000; that on or about February 1, 1934, an action was brought to collect the balance due upon the above mentioned promissory note by the holder in due course thereof; that in said action and on or about February 16, 1934, the plaintiffs herein, through their attorneys, took the deposition of Annah L. Wood and from said deposition ascertained for the first time that Annah L. Wood was not and never had been the true owner of parcel II, but that the defendants themselves were in truth and in fact the owners thereof; that the defendants themselves took and obtained for their own use the above mentioned sum of $5,000 and the above mentioned promissory note; that plaintiffs did not sooner discover that Annah L. Wood was not the owner of said property, but that said property was in fact owned by the defendants, by reason of the following facts: that at all of the times herein mentioned up to the 18th day of February, 1934, plaintiffs reposed great trust and confidence in the defendants and in reliance upon that trust believed and trusted that defendants had acted in the transaction only in the capacity of plaintiffs' agents and brokers; that the defendants have, at all of the times mentioned, held themselves out to be and represented that they acted as the plaintiffs' agents and brokers; that in the "Exchange Agreement" referred to it was provided as follows: "Morris N. Schneider Co. of Oakland, California, is hereby authorized to act as agent for all parties hereto and may accept commission therefrom and should this offer be accepted by the second party the undersigned agrees to pay said agent $500.00 commission for services rendered to become due on the execution of this agreement by all parties hereto. Dated: August 22, 1928. Signed Margaret Turner"; that pursuant to said provision and in reliance upon the representation therein made plaintiffs believed that defendants acted only as their agents and brokers and paid said $500 commission to the said defendants; that in said "Exchange Agreement" wherein and whereby the proposed exchange was set forth, the said Annah L. Wood was described and named as "second party" and owner of the property to be acquired by the plaintiffs; that on several occasions between August 23, 1928, and February 16, 1934, plaintiffs made visits to the offices of Morris N. Schneider Co. and there spoke and conversed with defendants, but at no time did defendants claim to plaintiffs to have any interest in said property; that at no time did defendants claim to have any interest in said property to any persons from whom plaintiffs might have ascertained such fact; that on or about the 23d day of August, 1928, at the time of the exchange of the properties hereinabove referred to, the real property (parcel II) stood in the name of Annah L. Wood on the official records of Alameda county at the office of the recorder of the county of Alameda, state of California; that plaintiffs made visits on several occasions between August 23, 1928, and February 16, 1934, to the offices of Morris N. Schneider Co., but were never apprised of the fact nor did they discover or have knowledge that Annah L. Wood was in the employ of defendants, and it was not until the time of the taking of the deposition of Annah L. Wood, on February 16, 1934, that such fact came to the knowledge of the plaintiffs; that no cause or reason existed for the taking of said deposition until the action of Spencer v. Turner above referred to was brought, and said deposition was then duly, regularly and timely taken to aid these plaintiffs in preparing their defense to said action; that at no time until the taking of said deposition of Annah L. Wood did any facts at all exist which would indicate to the plaintiffs or give them knowledge, grounds for believing, or reasons to believe that defendants were the owners of said property and that Annah L. Wood was not the owner thereof.

In their demurrer to this second amended complaint the defendants urged the bar of the statute of limitations claiming, more specifically that said amended complaint did not allege sufficient facts to show a justification on the part of the plaintiffs for not discovering the fraud sooner than they did, so as to bring the action within the rules of pleading laid down by the case of Lady Washington Consol. Co. v. Wood, 1896, 113 Cal. 482, 45 P. 809, and the more recent case of Haley v. Santa Fe Land Imp. Co., 1935, 5 Cal.App.2d 415, 42 P.2d 1078. The defendants' contention was upheld by the trial court and the demurrer was sustained. Upon the plaintiffs' failure to amend, judgment was entered for defendants and it is upon that judgment that plaintiffs prosecute this appeal.

Appellants state in their opening brief: "Appellants concede as established law in this state the soundness of the rules laid down in the cases of Lady Washington Consol. Company v. Wood, 1896, 113 Cal. 482, 45 P. 809, and Haley v. Santa Fe Land Company, 1935, 5 Cal.App.2d 415, 42 P.2d 1078, to the effect that in cases where relief is sought from fraud by action commenced more than three years after the perpetration of the fraud the complaint must contain allegations as to the time when the fraud was discovered, how the discovery was made and why it was not made sooner. The controversy upon this appeal is whether the second amended complaint meets all the requirements (particularly the latter one) of this rule."

The respondents contend that: "The complaint falls very short of stating any fraud, or deceit or damage. Plaintiffs do not plead any misrepresentation or inducement by defendants to plaintiffs to make the purchase or any fraud or deceit in any form. It seems to be the theory upon which the complaint is drafted that defendants owed to plaintiffs the disclosure of their ownership of the property. However, plaintiffs make no allegation that in the event of such disclosure they would not have purchased the property. It is defendants' contention that, assuming the agency relationship for the purpose of this argument, their only duty was to refrain from misrepresenting the property or using any fraud or deceit to carry the deal through. From the facts alleged in the complaint there is nothing which would show that the actual ownership had a bearing upon the transaction. Plaintiffs by their own admission exercised their own judgment and do not allege that they were influenced by any word or conduct of defendants." Plaintiffs further alleged on information and belief "that the cost to defendants of the property exchanged by them for the property of plaintiffs was $10,000.00 less than the amount for which they sold it to the plaintiffs."

On oral argument the appellants withdrew the point urged by them on appeal that the defendants' demurrer to plaintiffs' second amended complaint did not properly raise the question of the statute of limitations. The plaintiffs did not abandon their contention that the complaint stated facts sufficient to constitute a cause of action to toll the statute of limitations.

In Lady Washington Consol. Co. v. Wood, supra, it is stated: "'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. Martin v. Smith, Fed.Cas.No.9,164, 1 Dill. 85; Wood v. Carpenter, 101 U.S. 135 [25 L.Ed. 807]; Hecht v. Slaney, 72 Cal. 363, 14 P. 88; Moore v. Boyd, 74 Cal. 167, 15 P. 670; Lataillade v. Orena, 91 Cal. 565, 27 P. 924 [25 Am.St.Rep. 219]." [113 Cal. 482, 45 P. 810.]

In the case of Phelps v. Grady, 168 Cal. 73, 141 P. 926, the interveners alleged that Mrs. Phelps was the widow of their mother's brother and because of this relationship they believed she would deal with them in all respects fairly and justly, and that so believing they relied upon these representations and parted with their interest to her. The interveners lived outside of the state of California. The land purchased was situated in San Mateo county, California. The court states, in part, in upholding the contention that the statute of limitations applied and the cause of action was barred, on page 80, 141 P. on page 928: "There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is, of course, no excuse. They were under no other disability."

In the instant case it will be noted that the parcels of land exchanged were in the county of Alameda and that the complaint alleges the plaintiffs were in the office of the defendants divers times after the exchange. In the case of Phelps v. Grady, supra, the relationship of the parties was closer than that of the parties in the instant case, for the agency of the defendants in the instant case was at an end upon the consummation of the exchange.

The case of Lady Washington Consol. Co. v. Wood, supra, is quoted with approval in Haley v. Santa Fe Land Imp. Co., supra.

In the case of Bennett v. Lane Mortgage Company, a corporation, 19 Cal.App. 2d 515, 65 P.2d 953, cited by appellants, the transaction took place in 1928 and the interest payments were kept up until April, 1932. The fraud was not discovered until 1935. It appears from the facts in this case that for twenty years the plaintiff had trusted the defendant Lane with her investments; that "the defendants, who, because of their long years of dealings with the plaintiff, enjoyed her confidence, told her repeatedly to rely on them; that she had only to wait; they would protect her interests; she need not investigate". Defendant Lane was the plaintiff's investment adviser. A fiduciary relation existed. In the instant case no such relation continued to exist after the exchange. The complaint in the instant case does not show that during the several visits between August 23, 1928, and February 16, 1934, made by the plaintiffs to the office of Morris N. Schneider Co., that any person connected with that company acted as an investment adviser for the plaintiffs, or that the plaintiffs were in any infirm, mental or physical condition which would necessitate the advice of the defendants. The allegations of the complaint do show that the plaintiffs were in Alameda county at divers times and were in a position to inquire into the value of this real estate had they chosen to do so.

In the case of Monmouth College v. Dockery, 241 Mo. 522, 145 S.W. 785, cited by appellants, the facts show that the firm of Dockery and Hilbert were investment agents or brokers for the plaintiff; that the notes given in the transaction, as well as notes given in other transactions, were made payable at the office of Dockery and Hilbert; that the plaintiff investigated the reputation of the firm of Dockery and Hilbert and was informed that this firm had an excellent reputation; that plaintiff made Dockery and Hilbert their exclusive agents; and that Dockery and Hilbert collected the interest on the notes and remitted the same to the plaintiff. This case holds that a relation of trust and confidence existed which the defendant could not take advantage of by pleading the five year statute of limitations.

In the instant case the facts as pleaded show no connection of the defendants with the plaintiffs even so far as collecting rents, but on the contrary the facts as alleged show an isolated exchange transaction thereafter accompanied by frequent visits by the plaintiffs to the office of the defendants.

An examination of the case of Victor Oil Co. v. Drum, 184 Cal. 226, 240, 193 P. 243, 249, cited by appellants, shows that at the time of the discovery of the fraud the "defendants were still, if not in complete control of the corporation, at least the most important factors in it, and were its managing officers." This case is not in point.

In the case of Teague v. Hall, 171 Cal. 668, 671, 154 P. 851, 852, cited by appellants, the statute of limitations was not involved. The court states the general rule applicable to fraud where there exists opportunities for examination, or of sources of information, and states that "the doctrine of constructive notice does not apply where there has been such a representation of fact."

The case of Edwards v. Sergi, 137 Cal. App. 369, 30 P.2d 541, cited by appellants, holds that the particular facts in that case, with reference to the statement of Joseph Sergi that a thickly wooded part of the tract was a part of the land for which she was negotiating, were not such as would reasonably put upon inquiry a prospective purchaser. This case states, on page 371, 30 P.2d on page 542, as follows: "Similarly, in Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; Red Path v. Aagaard, 217 Cal. 63, 16 P.2d 998; Consolidated, etc., Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268, the court was dealing with situations where a party had knowledge of facts of a character which would reasonably put upon inquiry a prospective purchaser. This is not the situation here confronting us. Appellants knew of the nature of the tract desired by respondent and that she wanted wooded land for summer homes. Appellant Joseph Sergi took plaintiff upon the land and there pointed out a tract thickly wooded and told her it was part of the land for which she was negotiating. It is well established that a person selling his own land is presumed to know the area and boundaries thereof, and, if the purchaser suffers damage by reason of any misrepresentation on the part of the owner as to the extent or boundaries thereof, the purchaser may recover damages. Eichelberger v. Mills Land & Water Co., 9 Cal.App. 628, 100 P. 117; Del Grande v. Castelhun, 56 Cal.App. 366, 205 P. 18; Harder v. Allred, 61 Cal. App. 394, 214 P. 1017. So, too, while the record of an instrument is constructive notice of its contents, it is not constructive notice of any mistake contained therein. Davis v. Ward, 109 Cal. 186, 41 P. 1010, 50 Am.St.Rep. 29; Anderson v. Willson, 48 Cal.App. 289, 191 P. 1016."

Nor can we agree with appellants that the recent decision in Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383, is here controlling, for the reason that the factual situation there is entirely different from the one here presented. As appears from said decision, the evidence in that case proved and the trial court found that during the existence of a confidential relationship between the plaintiff Mrs. Rutherford and one Taylor, the manager of a bank, which extended over a number of years, Taylor betrayed the trust reposed in him by accepting $2,500 from Robert J. Finnie, to induce Mrs. Rutherford by false and fraudulent representations to sell to Finnie for an inadequate price her valuable ranch, the representations so made by Taylor being that unless she made the sale a delinquent incumbrance on the ranch, and one on her home which was held by the bank, would be foreclosed and she would lose everything. The agreement to sell to Finnie was obtained in December, 1920, but the confidential relationship between Mrs. Rutherford and Taylor continued on up to September, 1927, when she learned for the first time, through certain documents which were shown to her, of the corrupt bargain between Taylor and Finnie; and within two months thereafter she brought her action for damages. As will be seen, there is no similarity of facts between that case and this one; nor do we find any law declared in the decision therein which conflicts with the views herein expressed.

We are of the opinion that the rules laid down in Phelps v. Grady, supra, and Lady Washington Consol. Co. v. Wood, supra, are applicable to the facts as alleged in the instant case. Both parcels of land were situate in Alameda county and there are no allegations in the second amended complaint showing any fiduciary or confidential relation between the parties.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

13 Cal.2d 37

PEOPLE v. GREEN.

Cr. 4189.

Supreme Court of California.
March 2, 1939.

1. Homicide 🔑253(6)

Evidence warranted conviction for murder in first degree on ground that death of deceased resulted from violent homicide committed by accused for the purpose of robbery. Pen.Code, § 189.

2. Criminal law 🔑552(1)

The commission of a crime may be adequately established entirely by circumstantial evidence.

3. Criminal law 🔑734, 1160

It is the function of jury in first instance and trial court after verdict to determine what facts are established, and before verdict of jury which has been approved by trial court may be set aside for insufficiency of the evidence it must be shown that there is no substantial evidence to support conclusion of jury and trial court.

4. Criminal law 🔑1159(2)

A conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence.

5. Criminal law 🔑438

In murder prosecution, admission of picture showing deceased's body lying in grave with piece of pipe, which was allegedly used to kill deceased, beside the body and in the grave was not error where discrepancy between condition of the body at time of death and when pictures were taken caused by medical examination and handling was adequately explained.

6. Criminal law 🔑404(3)

In murder prosecution, admission of piece of pipe found buried with deceased as alleged lethal weapon wielded by the murderer in commission of homicide was not error.

7. Criminal law 🔑404(4)

Generally physical objects which constitute part of transaction or which serve to uphold or explain it may be exhibited in evidence if properly identified whenever transaction is under judicial investigation.

8. Homicide 🔑166(10)

In murder prosecution, admission of testimony as to withdrawals of gold made by deceased from bank in 1932 and 1933 to substantiate prosecution's theory that $10 gold piece used by accused to purchase certain articles was taken by him from deceased was not error as against contention that such evidence was too remote.

9. Homicide 🔑307(3)
Robbery 🔑27(1)

Where jury impliedly found that deceased was bludgeoned to death for purpose of robbery, offense of murder was committed and it was not error to refuse to instruct upon the elements of robbery and murder of second degree. Pen.Code, § 189.

10. Criminal law 🔑829(1)

The refusal of the requested instruction was proper where matter was sufficiently covered in instruction which was given.

11. Criminal law 🔑1119(4), 1129(1)

Propriety of alleged improper argument of district attorney not printed in transcript and to which no assignment of error was taken would not be considered by Supreme Court.

12. Criminal law 🔑1144(15)

Where jury was instructed that they were to determine the cause upon the evidence, it would be presumed that they acted accordingly uninfluenced by alleged improper argument of counsel.

◆

In Bank.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

William Green was convicted of murder in the first degree, and he appeals.

Affirmed.

Ralph Moradian and John Gallagher, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., Burdette J. Daniels, Deputy Atty. Gen., and Dan F. Conway, Dist. Atty., and James M. Thuesen, Chief Deputy Dist. Atty., both of Fresno, for the People.

WASTE, Chief Justice.

After trial before a jury upon a charge contained in an information filed by the district attorney of Fresno county, the defendant was convicted of murder of the first degree and sentenced to pay the extreme penalty. He prosecutes this appeal from the judgment and order denying a new trial.

On April 4, 1938, the body of an elderly man, identified as George W. Leek, was found buried in the vicinity of what is commonly known as "Hobo Jungle" or "Shanty Town", in the city of Fresno. The exact date of death may not be stated, but the evidence tends to indicate that it occurred on or about March 21, 1938. That death resulted from violence appears from the report of the autopsy surgeon giving as the cause therefor "multiple skull fractures and severe bruising and hemorrhage to the brain tissue proper". The doctor was of the opinion that this condition was brought about by a blunt and heavy instrument. A short length of pipe was found buried with the victim's body. Some hair and blood stains found one hundred or more feet from the grave was identified as being similar to and as of the same type as that of the deceased. The blood was still moist when discovered on April 4th, apparently due to intervening rains.

Defendant's connection with the homicide was established solely by circumstantial evidence which, however, was of sufficient probative value to warrant the jury finding him guilty as charged. Leek, the deceased, lived in a shack in "Shanty Town" though the record discloses him to have been a man of some means. There is evidence that in the years 1932 and 1933 he withdrew approximately $3,000 in gold from a bank and in July, 1937, he had withdrawn $5,000. The defendant lived near the deceased in "Shanty Town" and became acquainted with him during the latter part of 1937. Defendant was seen with the deceased on or about March 21, 1938, in the vicinity in which they lived and about one mile from where deceased's body was later found buried in a shallow grave in a brickyard. It was the theory of the prosecution, which finds support in the evidence, that on and shortly after March 21, 1938, when deceased was supposed to have met his death, the defendant appeared in and around Fresno with considerable more money than he was accustomed to possess and which he employed to pay certain debts and to purchase designated articles of personal property. The record also discloses that in the latter part of March, 1938, the defendant appeared at the sheriff's office and informed a deputy that deceased (who was not then known by the authorities to be dead) had promised him a sum of money if he would fire the tents of some Mexicans in "Shanty Town" with whom deceased was having difficulties and if he would also place a bomb in the sheriff's office. Upon this occasion the defendant also stated that he was expecting a letter of instructions from the victim at San Francisco. On or about March 29, 1938, the defendant brought such a letter to the sheriff's office, purportedly written by deceased and expressing the hope that defendant would carry out his instructions and that as soon as the writer read in the newspapers about the destruction of the sheriff's office he would forward $400 to the defendant. Defendant's story and the production of said letter started an investigation which several days later resulted in the recovery of certain personal property belonging to the deceased in the general vicinity of "Shanty Town". Shortly thereafter his body was recovered in its shallow grave a mile or more distant.

The prosecution produced a handwriting expert who, after being shown certain exemplars of the defendant's handwriting, gave it as his "definite conclusion" that the letter purportedly written in San Francisco by the deceased to the defendant, under the name of Ray Davis, under which name defendant had mail addressed to him about this time, was in the same handwriting as the exemplars and was written by the same person. This, and other evidence, is capable of a construction that the defendant, in order to conceal his spending of deceased's money, and to otherwise establish an alibi for himself, resorted to this subterfuge to create the impression that the deceaed was still alive and thus possibly forestall an investigation as to deceased's whereabouts when he should be found to be missing from his usual haunts.

There is evidence in the record that until the latter part of March, 1938, the defendant had practically lived a life of poverty in a tent in "Shanty Town". The testimony discloses that subsequent to the time when deceased met his violent death, the defendant mailed to the Oakland store of Montgomery Ward Company a letter (which the expert declared to be in the defendant's handwriting) containing a $100 bill and requesting the shipment of certain phonograph records and the forwarding of the change from the bill to the Fresno Post Office, General Delivery, under the name of Ray Davis. Defendant also sent an identical sum for somewhat similar purposes to each of two mercantile houses in the middle west. Considerable sums of money were also expended by him at about the same time in Fresno and San Francisco. It appears from the record that while in San Francisco (when he may well have addressed the letter to himself under the name of Ray Davis and purportedly written by the deceased) the defendant purchased a watch by trading a watch that he then had. The latter watch was identified as having belonged to the deceased.

Another incriminating circumstance is the fact that when questioned by a postal inspector as to where and how he had acquired the $100 bill forwarded to the Montgomery Ward Company, defendant replied that he had received it from a sister in Chicago. On cross-examination he admitted this was not the source of its acquisition. At first, he advanced the explanation that he had received the money from the deceased to fire the tents of the Mexicans and to blow up the sheriff's office, but on cross-examination he stated that he received it from the deceased in repayment of sums loaned to the latter. This explanation was offered for the first time when he was in the witness chair, at which time he admitted he had not so previously informed the officers.

[1-4] As is usual, there are conflicts in the evidence. These were for the jury to determine and it resolved them against the defendant, including his defense that he had no knowledge of and did not participate in the crime. The evidence in the record, only some of which is here recited, together with the inferences deducible therefrom, is amply sufficient to warrant the implied findings of the jury that the death of the deceased resulted from a violent homicide committed for purposes of robbery on or about March 21, 1938, and that the defendant was the perpetrator thereof. The degree of such a murder is fixed by section 189 of the Penal Code as of the first. That the commission of a crime may be adequately established entirely by circumstantial evidence is not open to question. People v. Peete, 54 Cal.App. 333, 342, 343, 202 P. 51. It is the function of the jury in the first instance and of the trial court after the verdict to determine what facts are established by the evidence and before the verdict of the jury which has been approved by the trial court may be set aside on appeal for insufficiency of the evidence, it must be made to appear that there is no substantial evidence to support the conclusion of the jury and the trial court. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Hennessey, 201 Cal. 568, 571, 258 P. 49. A conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence. People v. Frahm, 107 Cal.App. 253, 266, 290 P. 678; People v. Bender, 127 Cal.App. 331, 337, 15 P.2d 763.

[5-8] Defendant next urges that the court below erred in admitting into evidence certain exhibits. Complaint is first made of the admission of a picture showing deceased's body lying in the grave with a piece of pipe beside the body and in the grave. The evidence discloses that the pipe was uncovered with the body and the fact that it may have been moved in order to have it appear in the picture could not have been prejudicial. Nor do we think error resulted from the admission of certain other pictures showing the body of deceased. While urging that these pictures were offered for the sole purpose of prejudicing him before the jury, the defendant in his brief concedes "that photographs ordinarily are admissible as a means of assisting the jury in determining whether a criminal agency was used * * *." Any discrepancy between the condition of the body at the time of death and when the pictures were taken, caused by medical examination and handling, was adequately explained in the testimony. We find nothing of a prejudicial nature in the court's ruling. The same is true of the ruling admitting the pipe into evidence. It was the theory of the prosecution that the pipe, which was found buried with deceased, was the lethal weapon wielded by the murderer in the commission of the homicide. Frequently upon a murder trial the medium employed to bring about the violent or untimely death of the victim is placed in evidence as a part of the res gestae. In People v. Bannon, 59 Cal.App. 50, 56, 209 P. 1029, 1032, it is stated that "As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation." The pipe placed in evidence in the present case was identified as the pipe

found in the grave with the body. This distinguishes the present case from People v. Hill, 123 Cal. 571, 56 P. 443, relied on by the defendant, for in the cited case there was no evidence identifying the stick there admitted with the crime under investigation. Defendant also urges that the court below erred when it permitted an employee of a bank to testify that in 1932 and 1933 the deceased made certain withdrawals in gold coins. The evidence is objected to as being too remote. Such objection goes to the weight rather than the admissibility of the evidence. Moreover, the evidence tended to substantiate the theory of the prosecution that a $10 gold piece used by defendant to purchase certain articles was taken by him from the deceased.

[9] Complaint is next made that the trial court erred in giving and refusing instructions. The charge to the jury has been examined. It was full and fair and accurately defined murder of the first degree. If, as contended by the prosecution and as the evidence indubitably tends to show, and as the jury impliedly found, the deceased was bludgeoned to death for the purpose of relieving him of his money and other valuables, all of the elements of murder in the perpetration of robbery are present as that crime is defined in section 189 of the Penal Code. Such offense is there declared to be murder of the first degree and no error or prejudice resulted from the refusal of the trial court to define and instruct upon the elements of robbery and murder of the second degree. People v. Rogers, 163 Cal. 476, 482, 126 P. 143.

[10] As stated above, a mere reading of the evidence in this case, including inconsistencies in some of the defendant's statements, definitely establishes that the only reasonable hypothesis was that pointing to the defendant's guilt and the jury was justified in acting upon that theory. Among other things, the court instructed the jury that the circumstantial nature of the evidence did not militate against it "provided you believe from the evidence that such facts and circumstances pointing to the guilt of the defendant have been proved beyond a reasonable doubt, and are of such a character as to exclude every reasonable hypothesis except that the defendant is guilty". This being so, no prejudice resulted from a refusal to give an additional instruction requested by defendant to the effect that where the evidence leads to "two opposite rational theories, one consistent with the guilt of the defendant and the other consistent with his innocence, it is the duty of the jury to reject the theory which is consistent with his guilt, and adopt the theory which is consistent with his innocence". The matter was sufficiently covered elsewhere. We cannot say, as a matter of law, that the jury's verdict does not respond to the requirements of the law with respect to the test that there is no rational hypothesis upon which defendant may be innocent and the facts and circumstances as proved be true.

[11, 12] Defendant's final contention has to do with asserted prejudicial misconduct on the part of the district attorney occurring in two instances during his argument to the jury. The argument is not printed in the transcript and we therefore have no way of accurately gauging its propriety or impropriety. Nor do we find therein any assignment of error or request that the jury be admonished to disregard the asserted objectionable matter. People v. Gist, Cal.App., 82 P.2d 501. However, the jury was instructed that they were to determine the cause upon the evidence. It will be presumed that they acted accordingly uninfluenced by remarks of counsel.

Examination of the record discloses nothing calling for a reversal.

The judgment and order appealed from are, and each is, affirmed.

We concur: SHENK, J.; EDMONDS, J.; CURTIS, J.

I concur in the judgment: SEAWELL, J.

13 Cal.2d 45

PEOPLE v. McLACHLAN.

Cr. 4184.

Supreme Court of California.
March 2, 1939.

1. Criminal law ⚷1158(4)

In murder prosecution, whether confession was properly obtained was for trial court.

2. Criminal law ⚷1158(4)

Where there was no inherent improbability as to truth of testimony given in support of confession's admission, Supreme Court was not justified in reversing cause on ground that confession was not obtained in manner prescribed by statute.

3. Homicide ⚷234(10)

Evidence, though circumstantial save as to accused's own admission, *held* to establish that accused killed six year old child.

4. Criminal law ⚷1137(2)

Where counsel for accused raised question of his present sanity and treated subsequent inquiry as determinative, counsel were estopped from questioning regularity of proceeding. Pen.Code, § 1368.

5. Homicide ⚷151(1)

Where commission of homicide by accused was shown beyond any reasonable doubt, burden was on accused to show by preponderance of evidence that he was excusable under well-settled rules of law for commission of his criminal act.

6. Homicide ⚷237

Evidence indicating beyond any reasonable doubt that defendant committed homicide, that he concealed body of victim until nightfall, and with some cunning removed it from house to an adjoining unoccupied lot, sustained conviction for murder as against plea of not guilty by reason of insanity. Pen.Code, § 1368.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Charles Augustine McLachlan was convicted of murder and sentenced to death. Appeal was automatically taken by operation of statute.

Affirmed.

George C. Watson and Carl W. Minton, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

This appeal, taken from a judgment imposing the death penalty on appellant, comes to this court by the operation of section 1239, Penal Code, which provides: "When judgment of death is rendered, upon any plea, an appeal is automatically taken without any action by the defendant or his attorney." As a result of the above statute the court has been put to the task of reading approximately five hundred typewritten pages of testimony, and proceedings, much of which is repetitious cross-examination, in order to determine whether the defendant suffered prejudicial error during the trial of the cause, notwithstanding the fact that neither the defendant nor his counsel has made any claim or suggestion that the trial was not in all respects fair, nor that the verdict rendered is not fully supported by the evidence.

The defendant entered a plea of not guilty and not guilty by reason of insanity to the indictment and waived a trial by jury as to each of said pleas, and the court found against him as to each.

The indictment accused the defendant with having murdered, in the county of Los Angeles, on or about April 14, 1938, one Jennie Moreno, a girl of the age of six years and nine months, the daughter of Juan and Dominga Moreno, residents of the city of Downey, county of Los Angeles.

The Moreno family is of Mexican origin and consisted of mother, father, and six very young children. The defendant, Charles Augustine McLachlan, aged fifty-five years, is a native of Arizona, and in blood is half American and half Mexican. By trade he was a master painter and decorator. He had resided with his wife and family for fifteen years at Downey in the Mexican community in which the Morenos and most of the witnesses who testified in the case were residents. Said settlement consisted of a number of Mexican families who lived in small houses or huts in a closely settled area. The defendant's wife died some three years prior to the homicide, leaving surviving her, defendant, a married son, and a daughter by a former husband.

The defendant, with his accumulations, had built two or three small houses upon a lot of land which he had purchased before his wife's death. After her death he gave up the most habitable residence to his son and wife and their small child. He lived nearby in a building referred to as a shack which possessed few, if any, of the comforts of a home.

After his wife's death he became addicted, at times, to spells of intoxication. He was well known by all his neighbors, some of whom had known him for thirty years, and he was well liked by all. The mother of the dead child, who had known the defendant for some thirty years, testified that the defendant was a kindly, well-disposed man, and his previous reputation could not be questioned. Several other neighbors testified to the defendant's good reputation. He had been found on one or two occasions, since his wife's death, quite insensibly intoxicated, but no cruel or unnatural act had ever, to their knowledge, been committed by him. At times he had bought the children in the neighborhood candy and small presents at the community store.

On the morning of April 14, 1938, the defendant apparently arose at his customary hour and, as usual, milked his goat. He went to the drive-in store early in the forenoon at the request of his daughter-in-law to purchase some jello and milk for her young son, who was quite ill. His neighbors did not observe anything unusual about his conduct except as related by the testimony of Mr. James Wood McDonald, an old acquaintance, who resided across the street from the defendant. McDonald first saw him on that day about 9 o'clock a. m. Defendant was cutting weeds in his lot. A little later the defendant called to him from across the street and invited him to come over and join him. He carried a paper bag in which he had a half-gallon jug about half full of wine. McDonald came across the street to talk with the defendant, who offered him a drink of wine and told him he had already had a couple of drinks of whisky. He invited McDonald to walk down the railroad track, which he did, and they had a few drinks of wine. McDonald advised him that drinking wine after drinking whisky would make him very sick. The defendant, however, insisted on taking several drinks of wine and the two walked down the railroad track to where the defendant's step-daughter lived in the Mexican settlement at Downey. The defendant continued drinking the wine and became quite intoxicated. At his step-daughter's home he was placed upon a bench, where he remained for some time. Both the step-daughter and Mr. McDonald testified that the defendant became helplessly intoxicated, and McDonald finally left and did not see the defendant again until the next morning at the sheriff's substation at Norwalk. At the time that McDonald accepted the invitation of the defendant to drink from his demijohn the hour was somewhere near 12 o'clock midday. This was after the child had been killed. McDonald, however, testified that he was visibly affected with intoxicating liquor before the homicide was committed. Other evidence corroborates him as to this statement.

Mrs. Carmen McLachlan, daughter-in-law of the defendant, and the person for whom the defendant went to the store and purchased jello and milk for her sick child, testified that Jennie Moreno, the deceased, and her smaller sister, came into her house about 10 o'clock on the morning of April 14th and gave her a magazine which she had been instructed to deliver to Mrs. McLachlan. After that hour Mrs. McLachlan never saw the little girl again. The houses in this vicinity are quite close together, but there are small door-yards in which the children in the neighborhood frequently gathered for play.

Neither the father nor the mother of Jennie saw the defendant at any time during April 14th. The last time either of the parents saw their child alive was at 11 o'clock a. m., April 14th, as she was preparing to attend church. She failed to return at the noon hour, and her mother became anxious as to the child's welfare as the hours grew on. The neighborhood was soon making search and inquiry as to the whereabouts of the missing child. Suspicion began to point its accusatory finger at the defendant some time about 6 o'clock in the evening. Mrs. Virginia Ortega, who lived nearby, returned to her home at that hour, and some time thereafter she detected an odor which came from the shack of the defendant. Upon the arrival of the officer about 12 o'clock midnight, an investigation was made and smoldering clothing was discovered burning on a piece of sheet iron in defendant's house. The floor was found to be quite wet in spots. There was no chimney nor flue to draw the smoke away from the interior of his house, and the smoke from the slow smoldering fire was probably carried through the open door and apertures of the small house. This, and other suspicious circumstances, caused the neighbors to notify the sheriff's office at Norwalk. When Officer White reached the scene he observed the defendant in his house with the door partly ajar. He entered and ordered the defendant outside and made an inspection of the interior of the house, which he described as 8 feet by 12 feet and containing a bed and a closet. He observed an old stove in the house, turned upside down, and found, in the corner of the room, a large piece of sheet metal upon which there was smoldering clothing partially burned. The floor of the house was practically drenched with water. Blood was on the floor under the bed. Officer White kicked the clothing out of the room. It was examined and found to contain pieces of bedding and some of defendant's wearing apparel, which appeared to bear stains of blood. He thereupon put the defendant under arrest. Presently he heard the father of Jennie Moreno scream as the body of the little girl was discovered. He took the defendant, through a hole in the fence, into the vacant lot adjoining his residence and left him in charge of two Mexicans while he went to the spot where the girl's body lay. Quite a group of Mexicans had gathered near the body. While the officer was gone someone had struck the defendant and knocked him to the ground, cutting the skin about his eye. Upon closer examination of the premises the blood-stained shoes of the murdered girl were found in the toilet at the rear of the defendant's shack. A blood-stained hammer, the property of defendant, was also found, and the bed clothing showed that blood-stained pieces had been cut out of the bed mattress, and also out of the bed clothing, and had been placed in the slow smoldering fire. The mattress was saturated with human blood. Other evidences of the crime were discovered which it is unnecessary here to relate. Chemical analysis showed that the blood stains mentioned herein were stains made by human blood. Officer White testified that the defendant doubtless had been, and was then, under the influence of liquor and he walked with considerable difficulty.

Defendant was taken to the substation at Norwalk where he was afterward interviewed by Sheriff Biscailuz and three other officers. Sheriff Biscailuz admitted that the defendant showed evidence of emerging from a hard drinking spell. However, he thought he understood all that was said and done, and he sought to obtain a confession of the defendant as to the commission of the crime. The defendant, however, stated that he had no memory of any crime being committed, knew nothing about it, and no information was obtained. The sheriff told the defendant that he thought it would be better for him to ease his mind and tell the truth. He also told him that they had all the physical evidence; that they had everything; that there was no doubt in their minds as to who had committed the atrocious murder. He further testified that he told the defendant that whatever he said should be said voluntarily and without any hope of immunity or reward. The sheriff then told him he would have to leave him for a little while, and after the sheriff had been gone about fifteen minutes the officers who had defendant in charge called up the sheriff and told him the defendant was ready to make a confession. The sheriff said he again told him his confession would have to be voluntary, and, after again laying the foundation for a voluntary confession, he asked the defendant if he was ready to proceed and the defendant advised he was. The confession was received in evidence. It was made several hours after the defendant had been taken into custody. The sheriff, however, testified that the defendant had a "sort of a hang-over", but he understood everything said and recognized the sheriff. The defendant, however, had had no sleep or food from the time he was taken into custody to the time the confession was given. The two officers who had the defendant in custody during the absence of the sheriff testified that they confronted him with the facts of the case, and told him of their discovery of the child's shoes in his toilet, and the defendant thereupon said, "It must be me". Thereupon he said that if the sheriff would come he would tell him all.

[1-3] The defendant has insisted throughout the trial that the officers who had him in custody told him it would be better for him to confess, and if he would they would assist in procuring hospitalization for him as he was then suffering from the beating which he received and doubtless from the effect of excessive use of intoxicating liquor. Whatever strength there may have been in the contention that the confession was not voluntary was nullified by the fact that the defendant took the stand at the trial and made admissions which cannot be regarded otherwise than as a confession of his commission of the crime. The question as to whether or not the confession was properly obtained in the presence of the four officers was a matter within the province of the court to decide, and there being no inherent improbability as to the truth of the testimony given in support of its admission, we would not be justified in reversing the cause on the ground that the confession was not obtained in the manner prescribed by the statute. While it is true that the evidence pointing to the defendant as the person who killed Jennie Moreno is circumstantial, save as to his own admission, it belongs to that conclusive class of evidence which convinces the mind beyond all reasonable doubt that he and no one else did commit or could have committed the crime. According to his statement, in the forenoon of April 14th he was cutting grass in his yard, and, becoming weary, he went into his shack to lie down for a few moments. While there the little girl entered the opened door and came to his bed where he lay and commenced to play with him in childish amusement. He took her upon the bed and began to fondle her in an improper way. In his treatment of her he caused her pain and she made an outcry or two, whereupon he reached for a hammer near his bed and struck her two death-dealing blows upon the top of the head, crushing her skull and causing her to die instantly. The defendant admits this much. The other gruesome part of the picture is that he tore her flesh from the vagina to the rectum. This he denies. Whether an instrument was used in accomplishing this mutilation, the doctors were unable to determine. After killing her, he placed her on the bed and covered her with the bed covering, where she remained until nine o'clock at night. He then took her into the vacant adjoining lot, left her remains in quite a heavy growth of weeds, where it was afterward found, as heretofore related. The defendant's bed and bed clothing, mattress, and his personal wearing apparel, as well as the little girl's wearing apparel, were discovered and linked to the crime under such circumstances that there can exist no reasonable doubt of its commission by the defendant. The defense on the grounds of insanity was the only defense not foreclosed by the circumstances of the crime.

[4] Immediately after the case was called for trial, counsel for the defense raised the question of the defendant's present sanity. They represented to the court that the defendant had failed in all ways to cooperate with them, and they were utterly unable to get any assistance from him in the preparation of his defense. They therefore earnestly requested the court to examine into the present sanity of the defendant. The court did not, at any time, express a doubt as to the defendant's sanity (sec. 1368, Pen.Code), but upon the insistence of counsel for the defendant, permitted his attorneys and other witnesses to offer testimony as to his sanity. The testimony given by said attorneys generally was that the defendant was incoherent in speech, and his mind was a blank, and he had become senile from the heavy use of intoxicating liquor; that he was unable to sleep and his health generally was broken; that he complained of hearing witches talking at all times. They also testified that his keepers had placed him in a padded cell for several days while in confinement.

Dr. Lieuallen, a specialist in nervous and mental diseases, called by the People, testified that he had made a physical examination of the defendant and he found a slight edema or swollen condition of the lower extremities; the pupil of the left eye was larger than the right, and the arteries were slightly larger than the right. He found no physical evidence of insanity. He said, however, the physical conditions which he mentioned were matters to be taken into consideration in determining mental soundness. When he first saw the defendant he was very distressed, sad, and evidently suffering great psychic pain. He said the defendant's physical condition was fairly good for a man of his age. He observed no illusions or hallucinations. He was of the opinion that the defendant was sane. On cross-examination he admitted that in his written report as to the defendant's health made near the time of examination he stated that he found some evidence of pre-senility and psychic pain. In explanation of his written report he said that insanity may appear in the presenile stage of life but "pre-senility did not mean there was insanity". In the instant case he thought the pre-senility was mostly physical; the excessive use of alcohol may have predisposed him to presenility; the edematous condition of the lower extremities might indicate the beginning of kidney trouble and the pupil enlargement could be entirely due to alcoholism or arteriosclerosis. On the first examination the doctor had no direct conversation with the defendant. While on the stand the doctor was asked to make an examination forthwith of the defendant. After doing so he reported that his examination had not caused him to change his former opinion. The doctor asked the defendant if he remembered him and he replied, "No". He asked him if he could help him out in any way and the defendant said, "Sure. Sit down." The doctor sat down and asked him if he could help him out in anything and the defendant asked, "When am I going home?" The doctor asked what month it was and he replied, "No, I don't believe I know." He asked him what month he went to jail and he replied that he did not believe he knew. He asked him how old he was and he replied, "About 35." (His age was 55.) The doctor then added: "But his demeanor, his stimulus of responding, he understood what I said, he was in contact, I believe, with reality." The doctor said he thought he was positively malingering during this present examination. The examinations were some three or four weeks apart. The doctor said he asked him what the witches said but he could not tell him anything definite they said. His answer was: "They say most anything."

The prosecution called Dr. Benjamin Blank, the county jail physician, who testified that the defendant had been under his observation since he was lodged in jail, a period of approximately two months. He testified that it was his opinion that the defendant was feigning insanity. He had recently caused considerable disturbance by climbing the rails of the doors in an attempt to get out, and he was placed in the hospital part of the jail for self-preservation and observation. When first admitted to the jail he did considerable talking and his behavior was more or less normal. About two months later his behavior suddenly changed and he had refused to talk with anyone since. The testimony of all other witnesses is that the defendant was at all times in an apparently dazed and confused state and it was with much difficulty that he could be made to speak. He refused to eat for intervals of five or six days, and it became advisable to force him to eat. After one or two processes he began eating again. The doctor said that there was no evidence that the defendant was suffering from any form of insanity. He further said that the defendant had made a very poor attempt, in his opinion, at malingering, but the time may come when, if he continues to worry the way he does at the present time, "this depressing mood he is in may later develop into a condition where he will become insane, that is possible on account of his grief".

This matter being submitted to the court it made an order finding the defendant to be presently sane.

There seems to be some difference between counsel as to whether the proceeding was brought under section 1368 to determine the present sanity of the defendant, or whether the proceeding was instituted not because the court entertained any doubt as to defendant's sanity, or requested the inquiry to be made, but because the defense was desirous of presenting evidence which would create in the court's mind such doubt as would cause it to proceed under said section 1368, Penal Code. The request being denied, counsel proceeded to the trial of the main issue as though the proceeding as to the present sanity of the defendant had not been brought to the court's attention. Be this as it may, counsel treated the entire matter as determinative of the defendant's sanity and were thereby estopped from making any question as to the regularity of a proceeding wholly instituted and directed by themselves. Moreover, the proceeding was in conformity with section 1368, Penal Code.

[5, 6] Several psychiatrists called by the prosecution testified that in their view the defendant was responsible, under the law's test, for the commission of an offense which from every viewpoint shocks human sensibilities. Whether he committed the crime unconsciously of what he was doing and afterwards was awakened to a state of realization of the horror of his act, and therefore suffered psychic pain (defined as a depressing state of remorse occasioned by an accusing con-

science), is a question to which few psychiatrists, if any, may be able to give a satisfactory answer. We have before us the fact that the defendant committed the homicide beyond any reasonable doubt and that he concealed the body until nightfall, and with some cunning removed it from his house to an adjoining unoccupied lot. This, at least, is some evidence that he knew the nature and the quality of the act he had committed, and knew that it was wrong and contrary to law to commit it. The burden was upon the defendant to show by a preponderance of evidence that he was excusable under well-settled rules of law for the commission of his criminal act. This was not done. It therefore becomes the duty of this court to affirm the judgment and such other orders as are deemed appealed from under the provisions of section 1239, Penal Code. Judgment and orders appealed from are accordingly affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; HOUSER, J.

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13 Cal.2d 1

CANFIELD v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SAME.

CATO v. SAME.

L. A. 16085, 16083, 16086.

Supreme Court of California.

March 1, 1939.

Rehearing Denied March 30, 1939.

1. Trusts 🔑12

Spendthrift trusts although not valid at common law are valid in California. Civ. Code, §§ 859, 867.

2. Trusts 🔑152

The statute providing that, where trust is created to receive rents and profits of realty and no valid direction for accumulation is given, surplus beyond sum necessary for education and support of trust beneficiary is liable to claims of beneficiary's creditors, is applicable to discretionary spendthrift trust. Civ.Code, § 859.

3. Appeal and error 🔑1099(4)

The holding on a first appeal from judgment in action to reach surplus of income of discretionary spendthrift trust, that the trust contained no valid provision for accumulation of income, was "law of the case" on subsequent appeal.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

4. Constitutional law 🔑21
Statutes 🔑226

Where state borrows and adopts constitutional or statutory provision from another state, which has received judicial construction in the other state, it does so in view of such judicial construction and acquiesces in its correctness.

5. Trusts 🔑152

Surplus income of spendthrift trust, exceeding amount necessary for beneficiary's support, was subject to claims of beneficiary's creditors though trust was created to receive income from personalty alone or from part personalty and part realty, in view of statute making surplus rents and profits of realty trust so liable, since same rule should apply to trust of personalty. Civ.Code, §§ 859, 867.

6. Trusts 🔑152

Income received by beneficiary of spendthrift trust of personalty, exceeding amount necessary for his support, was not immune from claims of beneficiary's creditors because trust provided that whatever payments should be made to beneficiary above minimum annuity were subject to absolute discretion of trustee. Civ.Code, §§ 859, 867.

7. Trusts 🔑152

Income allocated or paid to beneficiary of discretionary spendthrift trust, which was necessary for reasonable support of the beneficiary, was completely exempt from claims of beneficiary's creditors. Civ.Code, §§ 859, 867.

8. Executors and administrators 🔑315(5)

Where decree of distribution is counterpart of will, decree cannot be given different interpretation than will.

9. Appeal and error 🔑1099(4)

Where decree of distribution was counterpart of will creating discretionary spendthrift trust, decision of District Court of

Appeal interpreting will was authority for interpretation of the decree on subsequent appeal. Civ.Code, §§ 859, 867.

10. Trusts ⚷152

In judgment creditors' actions to reach interest of beneficiary in spendthrift trust, in excess of amount required for beneficiary's support, trial court's finding that $30,000 a year was necessary for beneficiary's support in order to maintain him in station in life to which he was accustomed to live was in conflict with trial court's conclusion that sums paid to beneficiary were necessary to maintain him in station in life to which he was accustomed to live, where amounts paid substantially exceeded $30,000 a year. Civ.Code, §§ 859, 867.

11. Appeal and error ⚷1071(1)

Where findings, conclusions, and judgment contained contradictory irreconcilable provisions, judgment was required to be reversed.

12. Trusts ⚷152

Beneficiary of spendthrift trust is allowed, free from creditors' claims, an amount sufficient to sustain beneficiary and his dependents according to their "station in life," and to care for any affliction from which beneficiary or his family may be suffering. Civ.Code, §§ 859, 867.

13. Trusts ⚷152

The amount allowable to spendthrift trust beneficiary free from creditors' claims varies according to beneficiary's station in life, and is fixed by evidence as to cost of living, wages of servants, medical expenses, and reasonable entertainment and other reasonably necessary expenses, but allowance will not be made for extravagant entertainment nor for unbridled luxuries.

14. Trusts ⚷152

Evidence that $30,000 per year was necessary to support beneficiary of spendthrift trust according to station in life to which he was accustomed was insufficient to sustain judgment awarding such amount to beneficiary free from claims of beneficiary's judgment creditors. Civ.Code, §§ 859, 867.

15. Trusts ⚷152

In judgment creditors' actions to reach interest of beneficiary in spendthrift trust, in excess of amount necessary for beneficiary's support, equitable liens in favor of the creditors attached on respective dates that summons in each action was served on trustee, and trustee was personally liable for sums subsequently paid to beneficiary, in excess of sum necessary for reasonable needs of the beneficiary. Civ.Code, §§ 859, 867.

16. Trusts ⚷152

A judgment creditor's action to reach interest of beneficiary, in spendthrift trust, in excess of amount necessary for beneficiary's support, is a proceeding "quasi in rem" and creates an equitable lien on the property which it seeks to reach, from the moment of service of process. Civ.Code, §§ 859, 867.

[Ed. Note.—For other definitions of "Quasi in Rem," see Words & Phrases.]

17. Creditors' suit ⚷36(1)

A judgment creditor, by filing a bill to subject equitable assets to payment of his judgment, acquires an "equitable lien" on such assets and a priority over any other creditor who has not already filed such a bill.

[Ed. Note.—For other definitions of "Equitable Lien," see Words & Phrases.]

18. Trusts ⚷152

That beneficiary of spendthrift trust had no enforceable interest in the trust income prior to its allocation by the trustee did not preclude judgment creditors from maintaining actions to reach interest of the beneficiary in excess of amount necessary for beneficiary's support, after trustee exercised discretion and made allocation, since after such time beneficiary had equitable right to have the payments made to him. Civ. Code, §§ 859, 867.

19. Trusts ⚷152

Judgment creditors who brought actions to reach interest of beneficiary in spendthrift trust, in excess of amount necessary for beneficiary's support, could reach income allocated by the trustee after service of process as well as income allocated at time of such service. Civ.Code, §§ 859, 867.

20. Judgment ⚷731

An order vacating order appointing receiver in divorce proceeding brought by wife of beneficiary of spendthrift trust and order denying injunction requested by wife in another action were not res judicata on issue of liability of the trust or the trustee for wife's claim against the beneficiary, in wife's subsequent action to reach interest of the beneficiary, in the trust income, in excess of amount necessary for beneficiary's support, where the court in the prior proceedings, only determined that it had no jurisdiction over the trustee. Civ.Code, §§ 859, 867.

21. Trusts 🔑297

A trustee's accounting is a "proceeding in rem."

[Ed. Note.—For other definitions of "In Rem," see Words & Phrases.]

22. Trusts 🔑331

Orders of probate court settling and approving accounts of testamentary trustee, after filing of judgment creditors' actions to reach interest of beneficiary in spendthrift trust, in excess of amount necessary for beneficiary's support, were not res judicata on issue of creditors' rights to recover from trustee excess income paid to beneficiary after the actions were brought.

23. Trusts 🔑152

Where judgment creditors brought actions to reach interest of beneficiary, in spendthrift trust, in excess of amount necessary for beneficiary's support, the creditors were entitled to priority between themselves based upon priority of filing of the respective complaints, as against contention that each action should be considered as a creditor's bill for benefit of all creditors. Civ.Code, §§ 859, 867.

24. Creditors' suit 🔑36(1)

Where creditor discovers and uncovers property which could not be seized on execution, he acquires a lien on such property and becomes entitled to satisfaction of judgment out of the property in preference to other creditors.

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In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Three actions in equity in the nature of creditors' bills, by Pearl S. Canfield, by the Bank of America National Trust & Savings Association, and by Pauline Cato, against the Security-First National Bank of Los Angeles and another to reach the claimed beneficial interest of defendant Charles O. Canfield in a discretionary spendthrift trust being administered by the Security-First National Bank of Los Angeles as trustee. In the first and last named cases, Laura Elaine Canfield McMillen intervened, and in the second-named case, Laura Elaine Canfield McMillen was made a party defendant. The actions were consolidated for trial, and a single judgment was rendered from which the plaintiffs appeal separately.

Judgment reversed, with instructions to proceed in accordance with opinion.

For prior opinion, see 77 P.2d 857.

J. M. Danziger, Charles A. Buckley, and Goodman, Bachrack & Brownstone, all of Los Angeles (Herman A. Bachrack, of Los Angeles, and R. M. J. Armstrong, of San Francisco, of counsel), for appellant Pearl S. Canfield.

Theodore Weisman and Arthur T. Stollmack, both of Los Angeles, for appellant Pauline Cato.

Edmund Nelson, William C. Day, Theodore Weisman, Arthur T. Stollmack, and Freston & Files, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for appellant Bank of America National Trust & Savings Ass'n.

David R. Rubin and Henry Brown, both of Los Angeles, for respondent C. O. Canfield.

Newlin & Ashburn, of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

McAdoo, Neblett & Warner, of Los Angeles, and John G. Sobieski, of San Francisco, for intervener.

WASTE, Chief Justice.

These three actions were brought by plaintiffs as judgment creditors of respondent Charles O. Canfield against Canfield and the respondent Security-First National Bank of Los Angeles. The actions are in the nature of creditors' bills, brought under section 859 of the Civil Code. By them plaintiffs-appellants seek to reach the claimed beneficial interest of respondent Canfield in a discretionary spendthrift trust created by Charles A. Canfield, which trust is being administered by the respondent Security Bank as trustee. The three cases were consolidated for trial, were disposed of below by a consolidated judgment, and are presented on appeal on a single transcript.

The appellant, Pearl S. Canfield, is the former wife of respondent, Charles O. Canfield. In 1930 she secured from Canfield an interlocutory decree of divorce. The decree fixed the property rights of the parties, and, among other things, awarded this appellant $20,000, plus support and maintenance in the sum of $1,000 a month (later reduced to $800) during her lifetime or until her remarriage or until the death of Canfield.

The respondent Canfield having failed to pay either the $20,000 or any part of the monthly award, on September 29, 1931, appellant Pearl Canfield instituted one of the present actions in an attempt to reach the surplus of the income of the trust here involved, and of which respondent Canfield is beneficiary. Summons was served on the bank as trustee on that date. Respondents' demurrers to her complaint were sustained without leave to amend, and a judgment of dismissal entered. Upon Pearl Canfield's appeal the judgment was reversed, the District Court of Appeal holding that in this state, by reason of certain statutory provisions hereafter referred to, a judgment creditor of the beneficiary of a discretionary spendthrift trust of the kind here involved can reach the surplus of the income of the trust in the hands of the trustee beyond the amount necessary for the education and support of the beneficiary. This court denied a hearing. Canfield v. Security First National Bank, 8 Cal.App.2d 277, 48 P.2d 133.

Upon the filing of the remittitur on that appeal, respondents answered, and in February, 1936, the cause was tried on its merits, together with the other two cases. Of course, whatever was decided on the first appeal in the Pearl Canfield action became the law of the case as to that action.

The Cato case was commenced and summons served on the trustee bank on September 13, 1935. Cato is the assignee of a judgment against Charles O. Canfield in the sum of $10,463.46, which judgment was secured in February, 1932.

The Bank of America case was commenced and summons served on the bank on September 19, 1935. The Bank of America is the assignee of a judgment against Charles O. Canfield in the sum of $46,611.41, which judgment was secured on the same date as the Cato judgment.

On the present trial the court found that there was due Pearl Canfield from respondent Canfield the sum of $79,958.66; that there was due to Cato and the Bank of America the amounts of their respective judgments, plus interest and attorneys' fees; that said claims should be paid from the surplus income of the trust, if any; that each of the appellants has a lien on the surplus income from the trust; that said liens, as against respondents, date from the date of entry of the judgment in this case; that as between the three appellants they are entitled to priority in accordance with the order in which the respective complaints were filed; that the sum of $30,000 per annum is necessary to support Charles O. Canfield in the station of life to which he has been and now is accustomed to live; that said sum is exempt from appellants' claims; that the amount of income awarded to Charles O. Canfield as beneficiary of the trust by the trustee under the provisions of the trust rests in the discretion of the trustee; that if the trustee allocates more than $30,000 in any one year to respondent Canfield the surplus is subject to the claims of appellants as provided in the judgment.

The trust here involved was created by the will of Charles A. Canfield, father of respondent Charles O. Canfield. The will disposed of an estate of several millions of dollars. To all of his children other than Charles the testator left outright a legacy of $1,000,000, and these other children were also made residuary legatees. In reference to Charles the will bequeathed $900,000 to the Security Bank as trustee for the benefit of Charles and his two children by a prior marriage, one such child having since died without issue, the other being intervener Laura Elaine Canfield McMillen. The trust thus created for the benefit of Charles was a spendthrift trust, discretionary in character. In the will the testator gave as his reason for thus creating this type of trust that the past conduct and life of his son had been "one of waste, dissipation and extravagance; and that his present associations, conduct and mode of living indicate no existing purpose of reform on his part; and that the probability of his reforming in the future, in my judgment, amounts to no more than a father's hope". A decree of partial distribution in the father's estate was made on March 30, 1914. It embodies practically verbatim the provisions of the will as to the terms and conditions of the trust. It provides that the designated securities are distributed to the respondent Security Bank in trust to "'collect, recover and receive the rents, issues, dividends, profits and incomes of said' estate, investing and reinvesting the principal thereof when necesary or advisable in the judgment of its president or general manager for the time being", and, after paying certain enumerated expenses and charges, "to use, apply and pay over the net income remaining, as follows:

"(a) Out of said income to pay, in monthly installments, twelve hundred dollars ($1,200) per annum only to and into the proper hands of said Charles O. Canfield * * * and not by way of anticipation, nor to any assignee of my said son, nor to or upon any order which my said son shall give, whether such assignment or order be the voluntary contractual act of said Charles O. Canfield or be made pursuant to or by virtue of any legal process in attachment, execution, bankruptcy, or otherwise.

"(b) Out of said net income, in addition to said annual income of twelve hundred dollars ($1,200), to pay and apply, as said trustee shall deem advisable in the judgment of its president or general manager for the time being, * * * whatever sums said trustee may deem proper for the support, maintenance and education of Orville and Laura Elaine Canfield, * * * children of said Charles O. Canfield, in a manner suitable to their station in life, during their respective lives * * *".

Orville Canfield has since died without issue. Acting pursuant to this provision of the decree of distribution the trustee has provided for the education of Elaine and for several years past has paid and is paying about two hundred and fifty dollars a month to her for her support and maintenance, which sum apparently the trustee has determined is all that is now necessary to maintain her in a manner suitable to her "station in life".

Paragraph c of the decree of distribution provides as follows: "If, in the judgment of said trustee, to be exercised by its president or general manager for the time being, said Charles O. Canfield, son of said Charles A. Canfield, deceased, shall hereafter prove himself worthy of being entrusted with the expenditure of a larger annual income or allowance than that above given him, said trustee may, in such event, at any time, and in such proportions and at such time as to payments as it shall deem advisable in the discretion of its said officers, increase the said allowance and pay over such increase to said Charles O. Canfield up to the full limit of the net income of the said trust estate and any unexpended income which may have accumulated in the hands of the trustee, notwithstanding the provision above made as to payments out of the income for the maintenance and education of said Orville and Laura Elaine Canfield, grandchildren of said Charles A. Canfield, deceased."

Paragraph d of the decree provides as follows:

"The foregoing provisions as to the application of the income of said trust estate are intended to commit to said trustee absolute discretion as to, and full power of control over, the application of all of the net income of said trust estate beyond the said sum of twelve hundred dollars ($1200.00) per annum.

"Said Charles O. Canfield shall have no interest or estate in the principal of the trust estate whatsoever, and he shall have no interest or ownership in the income thereof other or further than, or different from, the interest given him in and by this item. No interest of whatsoever nature given said Charles O. Canfield shall be subject to, or subject to be taken for the payment of, any debts whatsoever contracted by him, either before or after the death of said Charles A. Canfield, deceased, and for any purpose whatsoever, and that said Charles O. Canfield shall have no power or capacity to make any disposition whatsoever of any of said income by his assignment or by his order, voluntary or involuntary, and whether made upon the order or direction of any court or courts, whether of bankruptcy or otherwise; nor shall said interest be subject to any process of attachment issued against said Charles O. Canfield, or to be taken in execution under any form of legal process directed against him or against the trustee, or the trust estate, the income thereof, or any part of said income. But the whole of the income of the trust estate mentioned in this item shall go to and be applied by said trustee solely for the benefit of said Charles O. Canfield and of his said two children, Orville and Laura Elaine, free, clear and discharged of and from any and all obligations of said Charles O. Canfield whatsoever." The balance of this paragraph deals with what shall happen to the trust upon the death of Charles, these provisions not now being pertinent.

Since the date of the decree the trustee, as already indicated, has paid a small portion of the income to Elaine and in its discretion, having determined that respondent Charles O. Canfield is "worthy of being intrusted with the expenditure of a larger annual income" than $1,200.00, has paid over to Charles all of the remaining net income, under paragraph C, supra. The amount of these payments has varied over the years. In the year 1914, the year the trust was created, there was paid to Charles O. Canfield $2,000; in 1915 he was paid $6,700; in 1916 he was paid $23,018.-

20; in 1917 he was paid $39,940.87. Thereafter, and down to the date of the filing of the Pearl Canfield complaint in September, 1931, he has been paid various sums each year varying from $47,963.67 in 1919, as a minimum, to $101,521.63 in 1924, as a maximum. Since the filing of the Pearl Canfield complaint and the service of summons on the trustee, down to January 29, 1936, the trustee has continued to pay all of the net income of the trust, after making the payments above mentioned to Elaine, to Charles O. Canfield. These sums were as follows:

9-29-31	to	9-29-32..	$37,256.43
9-29-32	"	9-29-33..	27,701.86
9-29-33	"	9-29-34..	45,743.64
9-29-34	"	9-29-35..	34,017.84
9-29-35	"	1-29-36..	5,585.00

It thus appears that after the service of summons on the Security Bank as trustee, it paid to the beneficiary over $150,000.

It is to be noted that under the provisions of the trust above quoted there is no provision for the accumulation of income. In fact, had such a provision been inserted in the trust as the law existed in 1914, the provision would have been invalid. Sections 722 et seq. of the Civil Code as they read until their amendment in 1929, p. 276.

The first question to be determined is whether the appellants as judgment creditors may reach any portion of the income allocated to Charles O. Canfield by the trustee in view of the spendthrift provisions of the trust and in view of the discretionary powers conferred upon the trustee.

[1] At common law, and in some American states, spendthrift trusts are invalid. These jurisdictions hold that it is against public policy to permit a debtor to have the use and enjoyment of wealth while his creditors go unpaid. As opposed to this view the majority of the American states have recognized the validity of spendthrift trusts, at least within certain limitations, either by judicial decision or by special statute. The general theory of most of these cases seems to be that the donor of property has the right to choose the object of his bounty, and has the right to protect his gift from the creditors of the donee. Occasionally, an additional factor has been emphasized—namely, that the protection of impecunious beneficiaries is in accord with public policy, at least to the extent of keeping such beneficiaries from becoming public charges. See for a general discussion of these principles, Spendthrift Trusts Reexamined, by George P. Costigan, Jr., 22 Cal.Law Rev. p. 471, 482 et seq.; Griswold, Spendthrift Trusts, Chapters 1 and 2; Seymour v. McAvoy, 121 Cal. 438, 53 P. 946, 41 L.R.A. 544; McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 P. 995, Ann.Cas.1917D, 1050; Cutter v. Hardy, 48 Cal. 568; Magner v. Crooks, 139 Cal. 640, 73 P. 585.

In California, prior to the adoption of the Codes in 1872, spendthrift trusts were recognized as valid without limitation. Cutter v. Hardy, supra; Seymour v. McAvoy, supra. Upon the adoption of the codes this type of trust was expressly authorized by the provisions of section 867 of the Civil Code, which provides: "The beneficiary of a trust for the receipt of the rents and profits of real property * * * may be restrained from disposing of his interest in such trust * * *". But while this section authorized the creation of spendthrift trusts, section 859 of the Civil Code, also passed in 1872, placed a limitation thereon. That section as it read until its amendment in 1935, p. 1459, provided that: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, *the surplus of such rents and profits, beyond the sum that may be necessary for the education and support* of the person for whose benefit the trust is created, is *liable to the claims of the creditors of such person,* in the same manner as personal property which cannot be reached by execution."

[2] It has been held that this section applies to spendthrift trusts created under the authority of section 867 of the Civil Code. McColgan v. Walter Magee, Inc., supra; Magner v. Crooks, supra; Canfield v. Security First Nat. Bank, supra. For the same reasons the limitations of section 859 of the Civil Code necessarily apply to discretionary trusts.

Section 859 constitutes a statutory modification—a statutory limitation—on the power to create such trusts. As far as trusts within the purview of the section are concerned, the legislature has determined that the trustor is without power to create any kind of trust—spendthrift or discretionary—that can successfully place the income, except the amount necessary for the "education and support" of the beneficiary, beyond the reach of creditors of the beneficiary. California has thus placed a statutory limitation or restraint on the unlimited power of a donor to give his property to whom he may desire subject to whatever conditions the donor may want. At the same time, in recognition of the fact that public policy also requires that impecunious beneficiaries should be protected from their creditors so as to prevent them from becoming public charges, the legislature has provided that the amount of income necessary for their "education and support" shall be free from the claims of creditors.

[3] There can be no doubt that section 859 is applicable to this trust. On the prior Canfield appeal it was pointed out, first, that this trust contains no valid provision for the accumulation of the income. On the present Pearl Canfield appeal this holding has become the law of the case, while on the Cato and the Bank of America appeals, it stands as a sound precedent. It should also be mentioned that on the present trial the court below expressly found that the trust contains no provision for accumulation of income.

On the prior appeal the respondents contended that the trust was created to receive the income from personal property and not the rents and profits of real property, and that for that reason section 859 of the Civil Code was not applicable. This was one of the main points involved on that appeal. The appellate court held that the contention was incorrect for several reasons:

1. That properly interpreted, section 859 of the Civil Code not only applies when real property is included as part of the corpus at the time of creation of the trust, but also applies whenever it appears from the provisions of the trust that the donor intended or contemplated that during the life of the trust the corpus would or could include real property; that in this case, although the trust as originally created consisted only of personal property, by the wide powers of investment and reinvestment conferred on the trustee, without qualification as to the nature of the property, obviously it was contemplated that real property might become part of the corpus of the trust estate. It should be added that the record herein discloses that although the trustee has never directly invested the trust funds in real property, some portion of the corpus now consists of real property as the result of foreclosures, and other steps taken to protect the trust.

2. That even if the corpus of the trust were specifically limited to personal property, nevertheless section 859 of the Civil Code would be applicable for either of two reasons:

a. First, that section 859 of the Civil Code was copied from a New York statute; that at the time of its adoption in California the New York courts had many times held that its statute applied to trusts of personal property; that under the proper rules of construction, when a statute is adopted from a sister state that has been construed by the courts of that state, the judicial construction is likewise adopted; and that section 859 of the Civil Code must be so construed particularly in view of the annotations of the original California Code commissioners clearly indicating that the New York construction was intended to be adopted.

[4-6] On these points the District Court of Appeal in Canfield v. Security First Nat. Bank, supra, stated at page 284, 48 P.2d at page 136: "Appellant further contends that even assuming the trust herein was created to receive the income from personal property alone, or from part personal and part real property, she may nevertheless maintain the action under the doctrine established and followed by the courts of the state of New York. This contention is based largely upon the fact that at the time of the adoption of our Codes in 1872, our section 859 of the Civil Code was taken from a New York statute (1 N.Y.Rev.Stats. p. 729, § 57), enacted in 1829 (Magner v. Crooks, supra); and that prior to the time of so adopting said Code section the New York courts had held that the provisions of their statute applied to trusts of real and personal property alike (Hallett v. Thompson (1836) 5 Paige (N.Y.) 583; Rider v. Mason, 4 Sandf. Ch. (N.Y.) 351; Sillick v. Mason (1847) 2 Barb. Ch. (N.Y.) 79); and such doctrine has since been followed consistently in that state. [Citing many later New York cases.] Up to the present time the question of whether the New York rule of construction should be followed in this state has not been expressly passed upon; but since the year 1854 the Supreme Court of this state has held by an unbroken line of decisions that when this state borrows and adopts a constitutional or statutory provision from another state, which has received judicial construction in that state, it does so in view of such judicial construc-

tion and acquiesces in the correctness thereof. [Citing cases.] It would seem, therefore, that by adopting the New York statute, this state, impliedly at least, adopted also the rule of construction placed thereon by the New York courts; and this would seem to be especially true in this particular instance because the case of Sillick v. Mason, supra, was one of the cases cited by the Code commissioners in furtherance of the adoption of said section 859. Baranov v. Scudder, 177 Cal. 458, 465, 170 P. 1122."

b. The second reason advanced by the appellate court was that, independently of the above rules of construction, the reasoning of the New York cases is sound, and should on principle be adopted. On this phase of the case the District Court of Appeal stated at page 285, 48 P.2d at page 137: "But aside from the foregoing rule of statutory construction, we are convinced, after analyzing the New York cases above cited, that the reasoning thereof is sound and that the doctrine established thereby is just and equitable, and inasmuch as its adoption here is not a matter for legislative enactment, but one for judicial decision, it is our opinion that it should be followed in this state. In declaring such doctrine, the New York court, in Hallett v. Thompson, supra, said: 'The provisions of the Revised Statutes on this subject, * * * in the connection in which they are there found, are applicable to trusts to receive rents and profits of real estate, and to apply them to the use of the cestui que trust for life, or a shorter period. But courts of justice have always endeavored to preserve the analogy between estates or interests in land, or the income thereof, and similar interests in personal property. By analogy, therefore, to these rules as to the interest of a cestui que trust in the rents and profits of real estate, and the right of a judgment creditor to reach the surplus rents and profits of land beyond what is necessary for the support and maintenance of the debtor and his family, I feel myself bound to hold that a creditor's bill will reach a similar interest of the debtor in the surplus income of personal property, held by another for his use and benefit. * * *'" The appellate court then quotes from several later New York cases to the same effect, one such case being Cutting v. Cutting, 86 N.Y. 522, where the court stated: "'* * * There is certainly much force in the position that one body of law should not declare a different rule for two kinds of property, when there is nothing in the nature of either kind of property, or in the nature and effect of the rule that calls for it. Clearly in the nature of things there is no reason why a gift or bequest of personal property, with a power of disposition, should not be measured by the same rule as a grant or devise of real estate with the same power. Nor is there cited or suggested any express provision of statute law, that stands in the way of the application of the rule of the Revised Statutes to both kinds of property.'" After this quotation the appellate court continued as follows:

"Moreover, it may be stated that the favorable view we have taken of the New York doctrine on this controversial question is in harmony with the conclusions reached by legal authors who have given much thought and study to the subject. As said by Professor Costigan in one of the notes to his treatise on spendthrift trusts (found in "Legal Essays," published by the University of California in tribute to Dean McMurray, p. 110): 'It is true, of course, that logically California need not follow New York except in respect to trusts of real property * * * but naturally, like New York, it will treat alike spendthrift trusts of realty and spendthrift trusts of personal property.' And as further pointed out by him, the decision of the Supreme Court of this state in Estate of Edwards, 217 Cal. 25, 17 P.(2d) 116, 'seems to indicate a desire of the California courts to follow the New York rules as to spendthrift trusts.'

"The respondents argue that the New York doctrine is founded on another early statute of that state which provides that 'limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property.' N. Y. Personal Property Law (Consol.Laws, c. 41) § 11, 5 Birdseye Cons. Laws of N. Y., 1929. But a reading of the decisions in the cases above cited shows that they were placed on other and distinct grounds."

The appellate court likewise directly held that the section is applicable to discretionary trusts. In this connection the appellate court stated at page 287, 48 P.2d at page 138: "Respondents contend also that the New York doctrine cannot be applied to a discretionary trust, such as we have here, which provides that whatever payments shall be made to Canfield over and above the annual sum of $1,200 are subject to the absolute discretion of the trustee. Under the New York decisions, however, such factor does not deny to the creditor the right to maintain an action to collect a certain portion of whatever surplus the trustee might thereafter decide to award the beneficiary over and above the amount necessary for his maintenance. (Hamilton v. Drogo, 241 N.Y. 401, 150 N.E. 496), which amount, in this state, is measured by the so-called 'station-in-life' rule. Magner v. Crooks, supra."

We are in accord with the views expressed by the appellate court on the prior appeal. Respondents spend many pages of their voluminous briefs in an attempt to reargue these points. Clearly, in spite of respondents' contentions to the contrary, in the Pearl Canfield appeal, these holdings have become the law of that case. Even were this not so, we were convinced in denying the hearing in that case that the opinion enunciated the correct principles of law. Upon further deliberation, and upon full consideration of the many ingenious arguments of respondents, we are still convinced of the soundness of that opinion as a precedent, and therefore independently of the doctrine of the law of the case, believe that the prior opinion constitutes a sound precedent and should be followed.

For the foregoing reasons it must be taken as established that:

[7] (1) Whatever income may be allocated or paid to Charles O. Canfield by the respondent trustee, the amount necessary for the reasonable support of Canfield (it being conceded that no sum is now necessary for his education) is completely exempt from the claims of appellants; and

(2) If a sum in excess of this is allocated to the beneficiary, surplus income is subject to the claims of creditors while in the hands of the trustee.

This in no way unlawfully interferes with the discretion vested in the trustee. As already pointed out, by section 859 of the Civil Code the legislature has seen fit to place a legislative restraint on the power of a trustor in creating a trust. No matter what the desires of the trustor may be, he is prohibited from creating a trust of the type here involved that will successfully place the surplus income beyond the reach of the beneficiary's creditors. If, as claimed by respondents, the trustee could, in its discretion, refuse to allocate any portion of the income beyond $1,200 annually to Charles O. Canfield, or beyond the amount necessary for his support, then it is true that the creditors of Charles O. Canfield would get nothing. But when the trustee has exercised its discretion by allocating nearly the entire net income to the beneficiary, the surplus income, under principles already discussed, after such allocation, in the hands of the trustee, is subject to the claims of the creditors of the beneficiary.

[8] Respondents contend that the law announced on the prior Pearl Canfield appeal cannot be held applicable to this appeal for the reason that the present appeal involves the interpretation of the terms of the decree of distribution in the estate of Charles A. Canfield, while the prior appeal involved only the interpretation of the will of Charles A. Canfield. It is the contention of respondents that although the prior appeal may have determined that the provisions of the will must yield to the provisions of section 859 of the Civil Code, it did not decide that the decree of distribution was subject to that section. The provisions of the decree of distribution pertinent to the creation of the trust have been set forth, supra. The decree embodies the provisions of the will verbatim. It is respondents' contention that the provisions of the decree conferring absolute discretion on the trustee, and declaring the spendthrift nature of the trust, are in direct conflict with section 859 of the Civil Code; that the decree having become final must control; that the rule is well settled that a decree of distribution when final, whether correct or erroneous, or whether its provisions are in accord with or in violation of the law, must control the validity of the trust. Stated another way, it is contended that the decree establishes the validity of the trust, and that although the trust as set up in the will was subject to the provisions of section 859 of the Civil Code, when exactly the same language was incorporated into the decree without reference to section 859 the trust became a valid trust unlimited by that section. To state the contention is to refute it. Respondents rely on such cases as Crew v. Pratt, 119 Cal. 139, 51 P. 38; Goldtree v. Allison, 119 Cal. 344, 51 P. 561; Keating v. Smith, 154 Cal. 186, 97 P. 300; Manning v. Bank

of California Nat. Ass'n, 216 Cal. 629, 15 P.2d 746, and others stating the same rule. These cases do establish the conclusiveness of the decree, and do establish that an invalid trust set up in a will may be rendered valid by a final decree of distribution. But these authorities are not applicable here for two reasons. In the first place, the decree of distribution was before the appellate court on the first Canfield appeal. It was mentioned in the complaint there being considered, in the briefs, and the appellate court mentioned it in its opinion. The second, and most important, reason why those cases are not applicable is that we are not here involved with the validity of the trust set up in the decree—the trust is undoubtedly valid—but with one of the incidents of that trust, namely, can the surplus income of such trust be reached by the creditors of the beneficiary? (We are here concerned with the interpretation of the decree.) Inasmuch as the trust set forth in the will is set forth verbatim in the decree, a decision interpreting the trust in the will necessarily interprets the trust set forth in the decree. As was said in Manning v. Bank of California Nat. Ass'n, supra, page 637, 15 P.2d page 750, relied upon by respondents: "Although the decree of distribution supersedes the will as the measure of the rights of the parties, the will is part of the record in a probate proceeding, and, where it is ascertained upon comparison that the decree is a counterpart of the will, without additions or alterations, the decree cannot be given a different or broader interpretation than the will."

[9] The prior decision of the appellate court, even if it merely interpreted the will, would therefore be authority for the interpretation of the decree. Obviously, the probate court in distributing the estate to the trustee did so subject to the law applicable to such trusts—one such law being section 859 of the Civil Code. In entering its decree of distribution it did not purport to pass on the rights of creditors of the beneficiary, the appellants here, who were not creditors at the time, had no right of appeal, and were not then at all interested in the estate.

[10, 11] On the present trial, the court below found that $30,000 a year was necessary for the support of Charles O. Canfield in order to maintain him in the station in life to which he is and has been accustomed to live, and exempted this annual sum from the claims of appellants. All appellants challenge this finding.

This finding would appear to be inconsistent with one of the conclusions of law. In finding VIII the court stated: "It is true that no sum is now necessary for the education of the said defendant, Charles O. Canfield. It is true that the sum of $30,000.00 per annum, payable in such sums during each calendar year as the said Security-First National Bank of Los Angeles * * * shall see fit is necessary, but it is not true that any larger sum than $30,000.00 per annum is necessary for the support of the said Charles O. Canfield in and according to the station in life in which he is, and for a long time prior to the commencement of the Canfield case, and at all times since has been accustomed to live." The same finding declares that any income in excess of $30,000 per annum allocated to Canfield is subject to appellants' claims. In its conclusions (No. IV) the trial court held that whatever sums the respondent bank had paid to Charles O. Canfield since the commencement of the Pearl Canfield action down to November 15, 1935 (the date covered by the last account filed by the bank), "were paid to said Charles O. Canfield to maintain himself in the situation in life to which he had been accustomed, and was accustomed, to live at the time said sums were paid". After the date of filing the Canfield complaint in 1931 down to January 29, 1936, the trustee, except in 1933, paid to Charles O. Canfield each year various sums substantially in excess of the $30,000 a year, the sum found to be the amount necessary to maintain the beneficiary in the station of life to which he was accustomed. The actual amounts so paid have already been set forth in this decision. Obviously, conclusion IV is inconsistent with finding VIII. The judgment itself likewise contains the identical inconsistency—(pars. 5, 6, and 7). The respondent bank seeks to avoid the effect of these inconsistencies by the contention that conclusion IV and the similar provision in the judgment, were inserted in response to this respondent's plea of res judicata based upon the orders by the superior court settling its current accounts as testamentary trustee. As will later appear in the discussion of the question of the personal liability of the trustee, this point is without merit. It follows that since the findings, conclusions and judgment contain contradictory irreconcilable provisions the judgment must be reversed. Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 131, 17 P.2d 712.

We also agree with appellants' contentions that the evidence is insufficient to support the $30,000 finding, and that the trial court adopted the wrong standards in fixing the amount that should be allowed to Canfield free from the claims of appellants.

[12, 13] Under section 859 of the Civil Code the trial court is required to fix the amount necessary for the "education and support" of the beneficiary. The statute fixes no standards by which the amounts necessary for these purposes are to be ascertained. As was pointed out on the prior Canfield appeal, in ascertaining the proper allowance, the courts of New York and of this state have held that the beneficiary is entitled to receive free from the claims of his creditors sufficient income to support himself and those dependent upon him, according to the mode of life to which they have been accustomed, and to care for any affliction from which he or his family may be suffering. No set sum can be fixed to apply to all cases. The amount varies according to the station in life of the beneficiary. This does not mean, however, that the needs of the beneficiary are to be measured by his extravagance or his ability to spend. It does not mean that an allowance is to be made for extravagant entertaining, and for unbridled luxuries. The manner of living of the beneficiary in the past, if such living was unreasonably extravagant and profuse, is no criterion of the reasonable amount necessary for support and maintenance. Evidence as to cost of living, wages of servants, medical expense and reasonable entertainment, and other reasonably necessary expenses fixes the amount.

One of the leading cases on the subject, reviewing many of the early New York cases, is Tolles v. Wood, 99 N.Y. 616, 1 N.E. 251. In that case after pointing out that under the New York statute from which section 859 of the Civil Code was copied, the question is the amount necessary for the support of the beneficiary, the court stated (1 N.E. page 255):

"In Sillick v. Mason, 2 Barb. Ch. 79, the chancellor said: 'The interest of the cestui que trust in such a trust as this, beyond what may be necessary for the support of himself and family, may be reached by a creditors' bill and applied to the payment of his debts.' The case showed that the beneficiary had lived in his father's family, uneducated to any business, and entertaining the idea that a fortune would be provided for him, and had a wife whom he supported. The chancellor said: '* * * And they should not, upon a fair construction of the statute on the subject, be permitted to indulge in extravagant expenditures while the defendant's creditors remain unpaid.'

"The question in this case was objectionable in assuming that the manner of life which Mr. Wood had been in the habit of leading was one of the conditions upon which the amount necessary for his support was to be predicated. His manner of life had been shown by his cousin, and co-trustee and defendant as recklessly extravagant and profuse, and the evidence of all of his witnesses showed that a large part of his annual expenses were incurred in repaying his supposed obligations for social courtesies and civilities extended to him by his associates and acquaintances. However pleasant and agreeable it may be for individuals to incur and repay such obligations, the law is concerned only with real obligations and necessary expenditures, and cannot properly estimate or determine the amount which, according to social requirements, an individual should lavish or expend in voluntary entertainments in repayment of conventional obligations. Doubtless the court may take into account, to a certain extent, the difference existing in the education, habits, and condition of individuals, with a view of ascertaining their respective necessities and wants, in order to determine the amount which may be necessary to supply them; but even in that case, I apprehend, it cannot go beyond the sum needed to discharge real obligations, and pay proper and reasonable expenses for necessary support.

"The evidence sought by the question objected to furnished no information upon the issue tried by the court. Neither the manner in which the party has been accustomed to live, nor the style in which his associates and acquaintances expect him to live, furnishes a just criterion for determining the amount necessary to furnish a suitable support to the cestui que trust."

And again, 1 N.E. at page 256: "It seems to us that the question in issue here was one peculiarly proper for the determination of a court or jury, after hearing evidence as to the character, circumstances, and condition of the party, and the price and value of articles required to furnish suitable food, clothing, shelter, and other necessaries adapted to the condition in life of the person whose support is the subject of inquiry. * * * The subject is one of which every individual has had more or less experience and knowledge, and is neither adapted to nor requires the opinion of persons in special classes of life to elucidate or explain. * * * Few subjects exist where knowledge and information concerning them are so universal and general as those pertaining to the cost and expense of living, and where all are so competent to form an opinion with respect to them. Such questions must, not only from the nature of the subject, but also from the requirements of law, be left to the judgment and experience of the tribunal before whom they are tried."

In Magner v. Crooks, 139 Cal. 640, 73 P. 585, this court adopted the station in life rule, holding that an income of $160 per month from a trust should be exempt from claims of creditors under section 859 of the Civil Code where it was shown that the beneficiary was married; had an invalid wife and two children; was himself suffering from Bright's disease; and that he was brought up by wealthy parents.

There are several cases from New York worth mentioning on this issue. In Sillick v. Mason, 2 Barb. Ch., N.Y., 79, $2,000 of a $2,500 income was held to be exempt, the court emphasizing that the beneficiary was reared in the expectation of ultimately receiving a fortune. In Scott v. Nevius, 1857, 13 N.Y.Super.Ct. 672, the court stated that the creditor could reach the surplus of the income "not required for the * * * judgment debtor, taking into view his condition in life, his health, and other circumstances, and the condition of his family, if any he have." In Genet v. Beekman, 1865, 45 Barb., N.Y., 382, a $1,000 annual income was held totally exempt, the court pointing out that the courts should not place too severe restraint upon expenditures by the beneficiary. In Moulton v. De Ma Carty, 1866, 29 N.Y.Super.Ct. 533, an annual income of $5,000 was held exempt, the court pointing out that the beneficiary had been reared to a life of "leisure" and "refined tastes". In Tolles v. Wood, 1885, supra, it was held that sums paid by the trustee as interest on certain debts of the beneficiary, and on life insurance policies given to secure certain of his debts, were not necessary for the support of the beneficiary. In Kilroy v. Wood, 1886, 42 Hun., N.Y., 636, 638, other creditors sought to reach the income of the same trust involved in the Tolles case. A $3,750 annual income was held exempt. The court pointed out that the beneficiary is "a gentleman of high social standing, whose associations are chiefly with men of leisure, and is connected with a number of clubs, with the usages and customs of which he seems to be in harmony both in practice and expenditure, and it is insisted on his behalf that his income is not more than sufficient to maintain his position according to his education, habits and associations". In commenting on this case, and a later New York one, Griswold in his work "Spendthrift Trusts" at page 346 states: "If this statement does not represent the extreme, it certainly was reached a few years later in Stow v. Chapin, 1889, 51 Hun. 640, 4 N.Y.S. 496, where a creditor was not allowed to reach the surplus of an income of $25,000.00 payable to a beneficiary who was unmarried, and had no children to support, and no house to maintain." Professor Costigan refers to these two cases as being "clearly discriminatory" and as being "indefensible". 22 Cal. Law Review 471, 485; see, also, Brearley School v. Ward, 1911, 201 N.Y. 358, 94 N.E. 1001, 40 L.R.A.,N.S., 1215, Ann. Cas.1912B, 251. Other New York cases are collected in Griswold, Spendthrift Trusts, page 347 et seq. See, also, Gray, Restraints on Alienation, 2d ed., page x, Clark, Spendthrift Trusts in New York, 9 Bench & Bar (N.S.) 6, 68.

From a reading of the New York cases, omitting the extreme cases above mentioned, it will be observed that on the whole the courts of that state have applied common sense in fixing the amount to be exempt predicated upon the station in life rule. No absolute fixed sum can be used to apply to all cases.

The cost of living, cost of housing, medical cost, the manner in which the beneficiary has been reared, the number and health of his dependents, his own health, his entire background—all these and perhaps others should be considered. But cost of lavish entertaining, cost of betting on race horses and cost of obvious luxuries, etc.—these are all false factors.

[14] In the present case the trial court has determined that $30,000 a year is neces-

sary to support the beneficiary, and that sum is made exempt from the claims of creditors. Tested by the standards already set forth, a reading of the record discloses that there is no substantial evidence to support the challenged finding. The following is a summary of all of the evidence offered on this phase of the case. As will be noted, most of the evidence is very general. Joseph Rosenthal, called by Charles O. Canfield, testified that he first met Charles in 1907 during the Ascot race track season; that Charles was then interested in horses; that in the past four years he had seen Charles many times and was conversant with his living habits; that he had visited at Charles' home; that he had observed two or three servants; that Charles owned several automobiles; that Canfield "lived well". Charles O. Canfield, called under section 2055 of the Code of Civil Procedure by Pearl Canfield, testified that in the divorce action he had filed an affidavit which set forth the amount necessary for his support and maintenance; that said affidavit was filed August 3, 1931, and recited that "affiant has estimated the living expenses of his wife and himself at $18,000.00 per annum * * * and includes traveling expenses and miscellaneous expenses, such as physician's bills, hospital bills, clothing for himself and wife, upkeep of the home now occupied by affiant and his wife * * * together with payment of wages to servants, and miscellaneous articles required by affiant and his wife. In addition this sum covers court costs, witness fees, payments for depositions, reporter's fees, including payments for transcripts and briefs on appeal, as affiant is engaged in numerous important lawsuits * * *." Charles O. Canfield's attorney stipulated that the above portion of the affidavit was "true and correct at the time the affidavit was filed". Charles further testified that cost of living has gone up since 1931, and that medical expenses have been higher, but he had no specific data on any of these items; that his expenses in 1932, 1933 and 1934 were substantially the same as in 1931; that in 1935 he had a large income tax to pay for the years 1927–1930 and his medical expenses were larger; that increased expenses for this year totalled $6,000 to $7,500; that his father had died in 1913; that for twenty years, at least, prior to that time he had not lived at home; that he could not itemize his maintenance costs; that since 1914 he has spent every cent allocated to him in maintaining himself in the station in life to which he had been accustomed to live; that in 1921–1923 he lived at the Ambassador Hotel with his then wife Pearl Canfield paying $45 rent per day; that he entertained frequently in that period; that he and his wife at that time took many trips; that several years later he moved to the Talmadge Apartments; that there he paid $650 a month rent and spent $6,400 in remodeling the place; that he entertained frequently; that he bought expensive furniture; that it cost him over $100,000 to furnish this apartment; that he separated from Pearl Canfield in 1925 and lived for a while in New York; that his sisters shared an estate of between 16 to 18 million dollars; that he has been ill since 1929; that he has employed many doctors and spent some time in hospitals; that his present wife was ill in 1935, but is now getting well; that he has several lawsuits pending that have cost large sums of money for attorneys' fees and costs; that his present wife belongs to many clubs and organizations; that he spends considerable money on club dues; that he carries some life insurance; that the premiums total $3,000 a year; that the Security Bank is beneficiary of a $40,000 policy; that his present wife is a beneficiary; that under court order Pearl Canfield is a beneficiary of other policies. On examination by the Security Bank's counsel he testified the $18,000 set forth in the affidavit did not cover taxes, insurance and repairs on his home; that from 1931 on he spent every cent he received and had no surplus income at all; that if all the items of expense were added to the $18,000 his expenses were in fact $63,000 per year.

Mrs. Lloyd Nix, called by defendants, testified she has known Charles O. Canfield and his present wife for about five years; that she has been frequently at their home; that "Mr. and Mrs. Canfield I think are two of the most charming hosts in the City of Los Angeles. They entertain in a most lavish manner; no expense is spared to entertain their guests and their—the very finest entertainers are brought in * * *"; that she has frequently been a visitor at the homes of the wealthy; that from this fact and from her own knowledge she knows what it costs to maintain a home such as that maintained by the Canfields; that to maintain such a home and to entertain as they do costs at least $5,000 a month. On cross examination she admitted she had no personal knowledge of the Canfields' expenses stating "what the expenses were of their home, I would not be so rude as to do that * * *"; that the clothing and jewelry Mrs. Canfield must wear in the society with which she travels costs a great deal; that she could not allocate the various expenses estimated by her at $5,000 per month; that such estimate was based on her general knowledge; that ever since she has known Mr. Canfield "he has always lived extravagantly"; that the parties she attended at the Canfields' house must have cost three hundred or four hundred dollars each; that he gives such parties "very, very often. They do a great deal of entertaining * * *"; that at an average party between fifteen and fifty people were invited as guests; that at such parties there is "always a doorman and lavish floral arrangements"; that there are always entertainers; that they serve marvelous food; that the food cost must be at least $3.50 per plate exclusive of beverages; that the very best cocktails and "all that sort of thing" were served; that they have two servants.

Charles was then recalled by respondent bank and testified that every cent he has received from the trust has gone for "necessities of life" and other miscellaneous items; that until 1925, when he separated from Pearl Canfield, she participated with him in living on the scale of life just described; that he and his present wife have continued to live on that scale, except that the income has been less; that they now live "as well as we can on the income that is there now". On cross examination he testified that for the past two or three years he has lived in Los Angeles in a home on which the respondent bank has a trust deed; that his wife has purchased the property; that he pays no rent as such but pays upkeep, taxes and interest on the loan on the property; that he has spent $10,000 repairing the place; that prior to that he lived at a home owned by his wife's mother; that his present wife has an independent income of her own, but how much he doesn't know; that he couldn't detail his expenditures even for the past month; that he spent all he received; that he has no charge accounts but pays cash for everything; that he keeps no account of his expenditures; that "I have been playing the races all my life" and that costs some money; that he has no income at all other than from the trust unless he happens to be lucky and win in the races. This testimony was generally corroborated by Pearl Canfield.

Frank Garbutt, called by Charles O. Canfield, testified that he knew the Canfields well; that from 1922–1936 Charles lived well; that "he was well dressed, spent money freely"; that he attended sporting events and sat in the "ten and twenty dollar seats".

That is a fair summary of all of the evidence. It is to be noted that Charles himself testified that from 1931–1934 his maintenance expense, including the items set forth in his affidavit, did not exceed $18,000 and in 1935 was between six and seven and a half thousand more. Appellant Canfield in her briefs stipulates that an $18,000 per year allowance would be reasonable. The other appellants do not join in this stipulation.

It is obvious that the above evidence does not sustain the finding that $30,000 per year is necessary for Charles O. Canfield's support. The amount necessary for his support is not to be measured by his ability to spend. It is to be measured by his reasonable needs. Such needs do not include extravagances or luxuries, nor the expenses for lavish entertainment, nor gambling losses. He is entitled to support himself and family in reasonable comfort, but not in extravagant luxury. In determining the amount the trial court on the retrial will consider all of the factors heretofore mentioned in this opinion.

For the purposes of the retrial it is necessary to pass on the question of the personal liability of the trustee, and also on the question of the priority between appellants. The trial court held that the service of process did not "effect equitable liens * * * upon any income of said trust payable to the said Charles O. Canfield at the time of service of process in said respective actions, or at any time prior to judgment herein"; that the equitable liens of appellants shall become operative from the date of entry of the judgment; that the trustee was not personally liable by reason of it having paid Charles all of the net income of the trust after service of process; that after date of entry of judgment appellants have equitable liens upon all income allocated to Charles in excess of $30,000 per year; that as between themselves appellants' liens have priority as follows: First, Pearl S. Canfield; second, Pauline Cato; third, Bank of America.

[15] In so far as the trial court held that the equitable liens of appellants did not attach on the respective dates that summons in each action was served on the bank the trial court was clearly in error. The record discloses that after service of summons in each of the respective actions the trustee continued to pay to Charles O. Canfield large sums of money totalling to the date of judgment over $150,000. In so far as the sums so paid exceeded whatever sum may be determined to be the amount necessary for the reasonable needs of Charles O. Canfield, the trustee violated the rights of appellants and must be held personally liable therefor. The trustee could have protected itself by payment of the income allocated by it to Charles into court as expressly prayed for in the Pearl Canfield complaint.

[16, 17] On principle and authority, in view of the provisions of section 859 of the Civil Code, upon the filing of the complaints and upon service on the trustee, the plaintiffs secured equitable liens on all future surplus income allocated to the beneficiary by the trustee. The plaintiffs when they filed their complaints were judgment creditors of Charles. Section 859 of the Civil Code expressly provides that the surplus income "is liable to the claims of the creditors * * * in the same manner as personal property which cannot be reached by execution". Actions under this section are equitable in nature. They are in effect creditor's bills to reach equitable assets. Such a proceeding is quasi in rem and creates an equitable lien on the property which it seeks to reach from the moment of service of process. As was stated in Seymour v. McAvoy, 121 Cal. 438, 441, 53 P. 946, 947, 41 L.R.A. 544: "A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill." That case was one by a judgment creditor to reach in the hands of the trustee, income of a spendthrift trust. The trust was created in 1869 prior to the adoption of section 859 of the Civil Code. The court refused to give retroactive effect to section 859, and so the creditor in that action did not prevail.

In Tolles v. Wood, supra, 99 N.Y. 616, 1 N.E. page 252, a case where a judgment creditor was seeking to reach surplus income of a beneficiary of a discretionary spendthrift trust, the court stated: "The creditor of such a beneficiary acquires a lien upon the accrued and unexpended surplus income, or that subsequently arising from such fund, superior to the claims of general creditors or assignees of the cestui que trust, by the commencement of the action in equity to reach and appropriate it to the satisfaction of his judgment." See, also, Spellman v. Sullivian, D.C., 43 F.2d 762; Metcalf Bros. v. Barker, 187 U.S. 165, 23 S.Ct. 67, 47 L.Ed. 122.

Under these cases, by disregarding appellants' rights, and paying the entire income over to Charles after service of summons upon it, the trustee became liable to the appellants in its personal capacity. In addition to the authorities already cited, the Restatement of the Law of Trusts, section 155, expressly so provides. Section 155 is the section dealing with discretionary trusts. It provides in subsection two that:

"Unless a valid restraint on alienation has been imposed in accordance with the rules stated in sections 152 and 153, *if the trustee pays to or applies for the beneficiary any part of the income* or principal with knowledge of the transfer *or after he has been served with process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.*" In the comment on subsection two it is stated: "Although in the case of a discretionary trust a transferee or creditor of the beneficiary cannot compel the trustee to pay over any part of the trust property to him, yet if the trustee does pay over or apply any part of the trust property to the beneficiary with knowledge that he has transferred his interest or after the trustee has been served with process in a proceeding by a creditor of the beneficiary to reach his interest, the trustee is personally liable to the transferee or creditor for the amount so paid or applied, except so far as a valid provision for forfeiture for alienation or restraint on alienation has been imposed. * * *" As already indicated, under section 859 of the Civil Code, the extent of the valid restraint on alienation that is permitted in California, is the amount reasonably necessary for the education and support of the beneficiary —beyond that, the trustee is personally liable if it pays any sums over these amounts to the beneficiary after receipt of service of process.

Although it is true as urged by respondents that the restatement does not constitute a binding authority, considering the circumstances under which it has been drafted, and its purposes, in the absence of a contrary statute or decision in this state, it is entitled to great consideration as an argumentative authority. It purports to accurately reflect the general common law of United States, and where there is a conflict, to state the general and better rule on any given subject. For these reasons, in the absence of contrary authority in this state, and in view of the dicta in the Seymour case, supra, and in view of the soundness of the doctrine announced, we are inclined to and do follow the rule announced in section 155.

[18] Respondent trustee urges that a creditor's bill will not lie, because the beneficiary of a discretionary trust has no enforceable interest in the income. This is so until such income has been allocated to the beneficiary. Neither the beneficiary nor the creditor can compel such allocation, but after it has been allocated the creditors can prevent its payment to the beneficiary, as already discussed at length. After allocation of the income and after the trustee exercised its discretion, Charles O. Canfield had the equitable right under this trust to have the payments made to him, and it is this equitable right to which the lien of appellants attached.

[19] The argument that a creditor's bill only reaches income allocated at the time of service of process, and does not reach subsequently acquired and allocated income is obviously unsound, and is completely answered by Tolles v. Wood, supra.

The trustee urges many other reasons why it should not be held personally liable for having paid the entire income to Charles after service of process upon it, and thus effectively deprived appellants of payment of their judgments. We have considered all these objections and find them all to be without merit. Many of them are so clearly unsound as not to warrant further discussion. Most of them have been answered in the discussion, supra, dealing with the interpretation of section 859 of the Civil Code, and in the discussion of the nature of the beneficiary's interest and the creditors' rights to the surplus income of a discretionary spendthrift trust. Several of the points, however, require some mention.

[20] In the Pearl Canfield divorce action Pearl Canfield secured the appointment of a receiver for the purpose of having the trustee make payments to Charles only in the presence of the receiver. This order appointing the receiver was later vacated with prejudice. It is contended that this order by the trial court was entered on the theory that the trust income could not be reached by Pearl Canfield; that as to Charles O. Canfield and Pearl Canfield the entire subject of the liability of the trust is res judicata, and that such defense is available to the trustee. A similar argument is predicated upon a denial of an injunction requested by Pearl Canfield (by another department of the superior court) in the other action.

The obvious answer to these contentions is that the liability of the trustee to creditors of the beneficiary, and the liability of the trust for payments due Pearl, were not involved or adjudicated in the receivership or injunction proceedings. The court in those proceedings apparently only determined it had no jurisdiction over the trustee. This left Pearl Canfield with her proper remedy—a proceeding under section 859 of the Civil Code.

[21] Respondent trustee also claims that the record discloses that it as trustee filed reports and accounts current with the proper court dealing with the period after the filing of the Pearl Canfield action; that these reports and accounts disclosed that the entire net income of the trust had been paid to Charles Canfield; and that the court entered its orders settling and approving the accounts. It is contended that these orders settling these reports and accounts, having become final, constitute adjudications in rem in favor of the trustee of the lawfulness of the payments made to Charles, and of the propriety of the failure to make payments to anyone else—including all of the appellants. The trustee relies on the rule that a trustee's accounting is a proceeding in rem. Security-First National Bank v. Superior Court, 1 Cal.2d 749, 37 P.2d 69; Ringwalt v. Bank of America, etc., Ass'n, 3 Cal.2d 680, 45 P.2d 967. It contends that in those proceedings the propriety of disbursements was properly passed upon; that such adjudication is binding on all parties in interest; that the probate jurisdiction extends to granting relief under section 859 of the Civil Code; that the creditor of a beneficiary is therefore a person in interest in the accounting proceedings who could have appeared therein; that not having done so he is barred by the final orders in those proceedings.

[22] The entire fallacy of this line of argument is apparent. Appellants' rights are given to them by section 859 of the Civil Code—that is by creditor's bill in equity. All of the accounts and orders referred to by the trustee were filed and approved, and covered periods, subsequent to the filing of the Pearl Canfield complaint. In none of those accounts was any reference made to any indebtedness due any of the appellants, nor to the filing of the various superior court actions by appellants. Clearly the probate court, in passing on the accounts of respondent trustee, did not purport to pass on the propriety of appellants' claims. The probate court had no jurisdiction of the issues involved in these cases. The creditors of the beneficiary were not parties in interest in the accounting proceedings. Assuming, without deciding, that the probate court, had this matter been properly presented to it, could have granted the equitable relief here involved, its jurisdiction is not exclusive. Kingsbury v. Ross, 217 Cal. 484, 19 P.2d 784; McGee v. Allen, Southwestern Creditor's Association v. Allen, 7 Cal.2d 468, 60 P.2d 1026. Moreover, it is equally obvious that in approving the accounts the probate court did not attempt to decide, nor could it decide, what Charles Canfield's station in life was or what was necessary for his support.

The other points raised by respondents on this issue have been all considered and found to be without merit. In holding that the trustee is personally liable to the appellants for all sums paid to Charles after service of summons upon it in excess of what is ultimately determined to be a reasonable sum for his support, we do not decide whether after payment to the appellants the trustee is entitled to reimbursement from the trust for such expenditures. That is a matter which will have to be determined in a proceeding between the beneficiary and trustee, and is not now involved.

[23, 24] As to the priority between the respective appellants, it is clear that under the circumstances here disclosed appellants are entitled to priority between themselves based upon the priority of the filing of the respective complaints. It is the contention of appellants Cato and Bank of America that each of these actions must be considered as a creditor's bill for the benefit of all the creditors, and that all the equitable liens must be deemed effective from the date of the filing of the first complaint. It is well settled that where a creditor discovers and uncovers property which could not be seized on execution he acquires a lien on such property and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors. See 15 Cor.Jur. sec. 183, p. 1441, and cases cited. It is contended that this rule is only applied to cases in which there has been a concealment or a fraudulent conveyance, and that priority is only accorded as a reward for uncovering secreted assets. No such qualification is suggested in Seymour v. McAvoy, supra, page 441, 53 P. page 947, where it is stated in referring to this type of action: "A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill." See, also, Title Insurance, etc., Co. v. California Development Co., 171 Cal. 173, 152 P. 542. Moreover, even if priority can only be recognized as a reward of diligence, clearly the present case presents such a situation. Pearl Canfield, by the ingenuity and persistence of her counsel, as a result of this long drawn out litigation, has uncovered an asset apparently unknown to other creditors.

The many other points raised and discussed by counsel, in view of our disposition of the main points involved on this appeal, need not be discussed.

For the foregoing reasons the consolidated judgment appealed from is reversed, with instructions to the trial court to proceed in accordance with the views herein expressed.

We concur: CURTIS, J.; SEAWELL, J.; SHENK, J.; NOURSE, Justice pro tem.

EDMONDS, HOUSER, and LANGDON, JJ., did not participate in the consideration and decision of these cases; NOURSE, J., sitting pro tem. for the latter justice, disqualified.

CANFIELD v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

L. A. 15630.

Supreme Court of California.
March 1, 1939.
Rehearing Denied March 30, 1939.

Appeal and error 🔑1157

Where plaintiff filed action largely to cure possible defects in original complaint, which stated cause of action according to subsequent determination of District Court of Appeal, and plaintiff's rights were fully protected by a decision filed in companion cases, judgment dismissing the action would be reversed so that issues presented could be tried with issues remaining to be tried in companion cases.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Pearl S. Canfield against the Security-First National Bank of Los Angeles and others to recover sums due under property settlement incorporated in divorce decree. From an order dismissing the action, the plaintiff appeals.

Reversed.

For prior opinion, see 77 P.2d 866.

J. M. Danziger, Charles A. Buckley, and Goodman, Bachrack & Brownstone, all of Los Angeles (R. M. J. Armstrong, of San Francisco, and Herman A. Bachrack, of Los Angeles, of counsel), for appellant.

David R. Rubin and Henry Brown, both of Los Angeles, for respondent Charles O. Canfield.

Newlin & Ashburn, of Los Angeles (A. W. Ashburn, of Los Angeles, of counsel), for respondent Security-First Nat. Bank.

Dockweiler & Dockweiler & Finch and George A. Dockweiler, all of Los Angeles, for respondent Laura Elaine Canfield MacMillan.

WASTE, Chief Justice.

This is an appeal by the plaintiff from a judgment of dismissal entered after order sustaining demurrers to the amended complaint without leave to amend. The case is a companion case to 87 P.2d 830, this day decided.

The complaint here involved was filed after entry of judgment against plaintiff in the first Canfield case, and while the appeal from the judgment in that case was pending. Apparently plaintiff filed this present action largely to cure certain possible defects in her original complaint. The trial court in the present case sustained the demurrers before the determination by the District Court of Appeal on the first Canfield appeal (Canfield v. Security First National Bank, 8 Cal.App.2d 277, 48 P.2d 133) that a similar complaint did state a cause of action.

Respondents contend that the determination of the validity of the complaint filed in the prior Pearl Canfield case is not decisive here for several reasons. In the first place it seeks to reargue the several points decided on the prior appeal. In the second place respondents contend the present complaint pleads the terms of the decree of distribution in the estate of Charles A. Canfield, while the prior complaint was based on the provisions of the will. These contentions were also urged in the companion cases this day decided, and found to be without merit.

The present complaint was filed apparently out of an abundance of caution to protect appellant Canfield's rights while the prior complaint was being tested on appeal, this appellant's rights have been fully protected by the decision this day filed in the companion cases. There would appear to be no reason why all the issues presented by this complaint should not be tried with the companion cases. Undoubtedly this cause will be consolidated for trial with the other cases.

For the foregoing reasons the judgment appealed from is reversed.

We concur: CURTIS, J.; SEAWELL, J.; SHENK, J.; NOURSE, Justice pro tem.

EDMONDS, HOUSER, and LANGDON, JJ., did not participate in the consideration and decision of this case: NOURSE, J., sitting pro tempore for the latter justice, disqualified.

13 Cal.2d 75

DRUMMEY et al. v. STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS et al.

S. F. 16050.

Supreme Court of California.
March 3, 1939.

1. Health 🔑20

The undertaking and embalming businesses or professions are sufficiently of public nature that Legislature may regulate and control them under police power. St.1929, p. 258, as amended.

2. Licenses 🔑7(1)

The statute authorizing suspension or revocation of funeral directors' and embalmers' licenses for unprofessional conduct in soliciting dead bodies is not unconstitutional as arbitrary or discriminatory, but is reasonable regulation bearing definite relation to public welfare. St.1933, p. 771, § 15, subd. 2(c).

3. Evidence 🔑14

It is matter of common knowledge that during period while person's death is impending or immediately thereafter people involved are distraught and emotionally distressed.

4. Statutes 🔑47

The language of statute authorizing suspension or revocation of funeral directors' and embalmers' licenses for unprofessional conduct in soliciting dead bodies is not so uncertain, indefinite, and unintelligible as to render it unconstitutional and void. St. 1933, p. 771, § 15, subd. 2(c).

5. Statutes 🔑47

A statutory provision capable of any reasonable and practical construction will not be held too vague to be enforced.

6. Constitutional law 🔑287

The statute authorizing suspension or revocation of funeral directors' and embalmers' licenses by state board "after proper hearing and notice to the licensee" is not unconstitutional as denying due process because of failure to specify form, manner, extent or duration of such notice. St.1933, p. 771, § 15.

7. Constitutional law 🔑309(1)

"Due process" does not require any particular form of notice or method of procedure, but statutory provision for reasonable notice and reasonable opportunity to be heard is sufficient.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

8. Certiorari 🔑1

Certiorari will lie only to review judicial action. Code Civ.Proc. § 1068.

9. Certiorari 🔑21

Certiorari is not proper remedy to review action of general state-wide administrative boards in suspending or revoking licenses, as such boards do not exercise judicial or quasi-judicial powers. Code Civ. Proc. § 1068; Const. art. 6, § 1.

10. Prohibition 🔑6(2)

Prohibition is not proper remedy to review action of general state-wide administrative board, as in suspending licenses of funeral director and embalmers for unprofessional conduct in soliciting dead bodies. St.1933, p. 771, § 15, subd. 2(c).

11. Mandamus 🔑3(1)

Mandate is only remedy of persons aggrieved by administrative rulings, such as orders of State Board of Funeral Directors and Embalmers, suspending funeral directors' and embalmers' licenses for unprofessional conduct in soliciting dead bodies, in absence of statutory provision for trial de novo in superior court or other proper method of review. St.1933, p. 771, § 15, subd. 2(c).

12. Mandamus 🔑3(2), 10

The writ of mandate will issue to do justice in all cases where there is specific legal right and no specific legal remedy for enforcing it.

13. Mandamus 🔑87

Mandamus is proper remedy to secure restoration of professional license, of which petitioner has been improperly deprived by administrative board, where no other remedy exists.

14. Mandamus 🔑72

The rule that discretion, conferred on administrative boards, cannot be controlled by mandamus, except to prevent abuse thereof, applies only where true discretion is conferred by statute, as where board is given discretion as to whether it will take certain action after ascertaining facts and its determination is declared final.

15. Mandamus 🔑71

The functions of officer required by statute to do prescribed act on prescribed contingency are ministerial, and writ of mandate may be issued to control his action on happening of such contingency.

16. Mandamus 🔑172

The court to which application is made for mandate, commanding State Board of Funeral Directors and Embalmers to restore suspended embalmers' and directors' licenses, must weigh evidence before board and exercise independent judgment on facts as well as law. St.1933, p. 771, § 15.

17. Officers 🔑103

It is essence of judicial action that finality is given to findings based on conflicting evidence.

18. Licenses 🔑38

The statute authorizing State Board of Funeral Directors and Embalmers to suspend or revoke embalmers' and funeral directors' licenses after proper hearing and notice cannot be construed as making board's action, predicated on conflicting evidence, in cancelling or suspending license, binding on court, as such construction would render it unconstitutional. St.1933, p. 771, § 15.

19. Mandamus 🔑172

In weighing evidence, on which administrative board's findings were based, on application for mandate to restore professional license suspended by such board, courts can and should be assisted by board's findings.

20. Mandamus 🔑168(2)

The findings on which administrative board suspended professional license come before court in mandamus proceeding for restoration of license with strong presumption of their correctness, and burden rests on complaining party to convince court that board's decision was contrary to weight of evidence. Code Civ.Proc. § 1963, subd. 15.

21. Officers 🔑103

The findings of administrative board holding formal hearing come before courts with strong presumption in their favor primarily because of statutory presumption of regular performance of official duty. Code Civ.Proc. § 1963, subd. 15.

22. Officers 🔑103

Courts should give considerable weight to findings made by experienced administrative bodies after full and formal hearings, especially in cases involving technical and scientific evidence.

23. Courts 🔑207(4)

Normally, applications or writs of mandate to review actions of administrative boards should be filed in trial courts, whose normal function is to determine and ascertain controverted fact issues.

24. Mandamus 🔑187(9)

A judgment granting peremptory writ of mandate, commanding State Board of Funeral Directors and Embalmers to restore embalmers' and funeral directors' suspended licenses, must be affirmed by Supreme Court on appeal, if supported by any substantial evidence in record. St.1933, p. 771, § 15.

25. Mandamus 🔑187(9)

On appeal from judgment granting peremptory writ of mandate, commanding State Board of Funeral Directors and Embalmers to restore embalmers' and funeral directors' suspended licenses, it must be conclusively presumed that trial court weighed evidence and gave due weight to presumption in favor of board's findings, on which its orders suspending licenses were based, but nevertheless found against board in exercise of court's independent judgment. St.1933, p. 771, § 15.

26. Mandamus 🔑187(9)

The trial court's determination on conflicting evidence that embalmers and funeral director, whose licenses were suspended by State Board of Funeral Directors and Embalmers, were not guilty of unlawfully soliciting dead bodies as charged, is binding on appeal from judgment granting writ of mandate commanding board to restore licenses. St.1933, p. 771, § 15, subd. 2(c).

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Proceedings by William P. Drummey and another for a writ of review, prohibition, or mandamus to review orders of the State Board of Funeral Directors and Embalmers suspending petitioners' embalmers' and funeral directors' licenses. From a judgment granting a peremptory writ of mandate, commanding the board to dismiss the proceedings against petitioners and restore their licenses, the board and its members appeal, and from orders and judgments sustaining demurrers to the petitions for writs of review and prohibition, petitioners appeal.

Petitioners' appeals dismissed, and judgment granting peremptory writ of mandate affirmed.

For prior opinion, see Cal.App., 77 P.2d 912.

Tinning & De Lap, of Martinez, and Bianchi & Hyman and A. B. Bianchi, all of San Francisco, for petitioners.

George A. Martinelli, Morettini & O'Neill, D. T. Jenkins, and Randall O'Neill, all of San Jose, amici curiæ.

Frank J. Barry, of Los Angeles, for respondents.

WASTE, Chief Justice.

William P. Drummey and Aubrey Wilson were duly licensed embalmers. Wilson was also a duly licensed funeral director, doing business under the name of Wilson and Kratzer. The State Board of Funeral Directors and Embalmers, after complaints had been filed, notice given and a hearing held, found both of the above named parties guilty of several violations of the Funeral Directors and Embalmers Law, St.1929, p. 258, as amended, in that, on each of several specified occasions, they unlawfully solicited business in violation of section 15 of the act as amended in 1933, St. of 1933, pp. 763, 771. So far as pertinent here section 15 as then amended provides that:

"The board shall also have the power to suspend or revoke licenses after proper hearing and notice to the licensee, upon such licensee being found guilty of any of the following acts or omissions: * * *

"2. Unprofessional conduct which is hereby defined to include: * * *

"(c) Solicitation of human dead bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs after death or while death is impending; provided, this shall not be deemed to prohibit general advertising."

As already indicated, the board, at the conclusion of the hearing, found each of the named parties guilty of several of the counts set forth in the complaints. It ordered the embalmer's licenses of Drummey and Wilson suspended for one year on each count, and the funeral director's license of Wilson and Kratzer suspended for one year on each count. All periods of suspension were ordered to run concurrently, and it was also provided that the funeral director's license, after ten days of such suspension, should be restored to good standing, but should immediately be suspended for the remaining portion of the year upon violation by Wilson within two years of any of the provisions of the act. It should be here noted that although Wilson and Drummey were found guilty on several counts, it is now conceded by all concerned that all of the offenses charged, except that contained in the so-called Shannon count, were committed before the act was amended so as to prohibit solicitation. It is conceded that the findings of the board must be sustained, if at all, by reference to the evidence produced on the Shannon count, and cannot be sustained by reference to the evidence produced on the other counts.

Drummey and Wilson, in the trial court, filed petitions for writs of review. During the pendency of the proceedings this court decided the case of Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119. Thereafter, the petitioners filed amended pleadings seeking to invoke review, prohibition or mandamus. The board interposed demurrers to the petitions. The trial court sustained the demurrers to the petitions for writs of review on the authority of the Standard Oil case, supra, and also sustained the demurrers to the petitions for writs of prohibition on the authority of the then recently decided case of Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1. It overruled the demurrers to the petitions for writs of mandate, and issued its alternative writs. Upon the hearing, by stipulation, the cause was tried on the evidence produced before the board. After consideration of the record, the trial court entered its judgment directing the issuance of a peremptory writ of mandate commanding the board to dismiss the proceedings, and to restore petitioners to the use of their respective licenses. From this judgment the board, and its members, have prosecuted the present appeal. Wilson and Drummey prosecuted appeals from the judgments and orders of the trial court made and entered upon the sustaining of the demurrers to their petitions for writs of review and prohibition. These last mentioned appeals have been abandoned by the named appellants and should be dismissed.

[1] On the appeal from the judgment directing the issuance of the peremptory writ of mandate we are left in doubt as to the theory of the trial court, inasmuch as the parties waived the making of findings. Drummey and Wilson, in addition to contending that mandate is the proper remedy to secure the restoration of their licenses, and that the evidence sustains the action of the trial court, contend that the act, and particularly section 15 thereof, is unconstitutional. This contention is unsound. Clearly, the undertaking and embalming businesses or professions are sufficiently of a public nature so that, under the police power, the legislature may regulate and control them. See cases collected and discussed in State ex rel. Kempinger v. Whyte, 177 Wis. 541, 188 N.W. 607, 23 A.L.R. 71; Prata Undertaking Co. v. State Board of Embalming, 55 R.I. 454, 182 A. 808, 104 A.L.R. 402. Drummey and Wilson do not seriously contend that these businesses in some of their aspects are not subject to the police power, but do contend that section 15, in so far as it prohibits solicitation, has no reasonable relation to the protection of public health, safety or welfare; that it is arbitrary and discriminatory; and, further, that it is fatally uncertain, indefinite and unintelligible.

[2, 3] We find nothing arbitrary or discriminatory in the provisions of section 15 prohibiting the direct solicitation of human dead bodies after death or while death is impending. This provision appears to be a reasonable regulation bearing a definite relation to the public welfare. It obviously is aimed at preventing the commercialization of death at a time when those concerned are emotionally upset and easily imposed upon. The legislature acted well within its powers in providing for the protection of the public from the annoyance of direct solicitation of the bodies of members of the family during the period while death is impending or immediately thereafter. It is a matter of common knowledge that during that period the people involved are distraught and emotionally distressed. The obvious purpose of the section is to prevent embalmers and undertakers from taking unfair advantage of their patrons at a time when such patrons are in no condition to withstand pressure. It is to be noted that the prohibition as to solicitation is not absolute. Solicitation by general advertising is expressly permitted, and solicitation while death is not impending, by implication, also is permitted. The prohibition involved does not prohibit the business—it is simply a reasonable regulation of the business. We find no case directly in point, but in the well reasoned case of Prata Undertaking Co. v. State Board of Embalming, 55 R.I. 454, 182 A. 808, 104 A.L.R. 389, the Rhode Island court upheld as against a similar attack a provision prohibiting undertakers from paying money to others for the securing of business—a provision obviously having the same general purpose as the one here involved.

[4, 5] There is also no merit in the contention that the language of subsection (c) of subdivision 2 of section 15 is so uncertain, indefinite and unintelligible as to render it unconstitutional and void. The purpose of the challenged section is obvious, and the language used is sufficiently certain to carry out the expressed purpose. Even if it be conceded that some of the words used are ambiguous, this does not necessarily render the section invalid. If the provision is capable of any reasonable and practical construction it will not be held to be too vague to be enforced. County of Tulare v. City of Dinuba, 188 Cal. 664, 667, 206 P. 983; Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217. The section easily meets this test.

[6, 7] Drummey and Wilson further contend that the section denies them due process. In this connection it is urged that the act fails to provide for a proper notice of hearing, although it is conceded that reasonable notice was in fact given. The act provides that the power to revoke or suspend licenses shall be exercised "after proper hearing and notice to the licensee". It is contended that the act is unconstitutional because, although it provides for notice, it does not specify the form, manner, extent or duration of notice, and that this is required under the due process provisions of the state and federal constitutions. The contention is untenable. Due process does not require any particular form of notice or method of procedure. If the statute provides for reasonable notice and a reasonable opportunity to be heard, that is all that is required. Eley v. Gamble, 4 Cir., 75 F.2d 171; Brecheen v. Riley, 187 Cal. 121, 200 P. 1042. The other arguments of these parties as to the constitutionality of the act, or as to the procedure adopted by the board are clearly unsound and need not be discussed.

The board, in attacking the judgment of the trial court, contends that mandate is not available to one who has been improperly deprived of a license by an administrative board to secure the restoration of that license, and further, if it be determined that mandate is the proper remedy, on the record, it was improper to issue the peremptory writ in this case.

[8, 9] The solution of the problem as to the proper remedy of those aggrieved by the action of general state-wide administrative boards in suspending or depriving holders of existing licenses to secure a "review", in its broadest sense, of the board's action, is one that finds no positive answer in the cases heretofore decided. Many years ago it was held that certiorari was not the proper remedy inasmuch as such boards do not and cannot exercise judicial powers. Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874; see also Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076. The doctrine of the Tulare case was reaffirmed by this court in the Standard Oil case, supra. In spite of the clear-cut holding in the Tulare case, prior to the decision in the Standard Oil case, it had been assumed in some cases, and expressly held in others, that such administrative boards exercise at least quasi-judicial functions, and that certiorari could be used to review their determinations. In view of the clear-cut holding to the contrary in the Standard Oil case, the above mentioned cases must be deemed to have been overruled. The theory of the Tulare and Standard Oil cases is that, if the legislature attempted to confer judicial or quasi-judicial power on state-wide administrative boards, the statutes would be unconstitutional as in violation of section 1 of article 6 of the state Constitution, which vests the entire judicial power of the state in the courts, except as to local boards, and the railroad and industrial accident commissions, which are governed by special constitutional provisions. Based on this premise it was concluded that state wide administrative boards do not exercise judicial or quasi-judicial powers. See, also, Cullinan v. Superior Court, 24 Cal.App., 2d, 468, 75 P.2d 518, 77 P.2d 471. Certiorari as presently provided for in the Constitution, and as defined by section 1068 of the Code of Civil Procedure will lie only to review judicial action. It is obvious therefore that certiorari is not the proper remedy.

[10] As a necessary corollary to this rule, it was held in the Whitten case, supra, that the writ of prohibition cannot be used to restrain administrative boards from taking action, even though it be alleged that such board is acting unlawfully and in excess of its powers, for the reason that the office of the writ of prohibition is limited by the Constitution to the restraint of a threatened exercise of judicial power in excess of jurisdiction, and does not lie to a board or officer exercising purely administrative or ministerial functions. Prohibition is therefore not the proper remedy.

[11-13] There is no provision in the statute here involved for a trial de novo in the superior court such as is provided in Deering's General Laws of 1937, Act 3796, section 46, in connection with the review of some of the decisions of the state board of equalization. Under such circumstances, in the absence of a proper statutory method of review, mandate is the only possible remedy available to those aggrieved by administrative rulings of the nature here involved. This was pointed out in the Whitten case, supra. The conclusion therein stated is sound. Historically, the writ of mandate was invented to provide a remedy where no other remedy existed. As is stated in 9 Halsburys' Laws of England 744, section 1269, in speaking of the writ of mandamus: "Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice will be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right." See, also, 16 Cal.Jur. 764, section 4. From an early date in this as well as other states it has been held that, where no other remedy is available, mandamus is the proper remedy for one improperly deprived of a professional license by an administrative board to secure the restoration of such license. People ex rel. Mulford v. Turner, 1 Cal. 143, 52 Am.Dec. 295; People ex rel. Field v. Turner, 1 Cal. 190; see annotation 95 A.L.R. 1424; 16 Cal.Jur. 275, sec. 58.

Although these and other authorities establish that mandamus is the proper remedy to secure the restoration of a professional license of which the petitioner has been improperly deprived, where no other remedy exists, the authorities do not clearly establish the scope of the review on mandamus. In most jurisdictions it is held that such administrative boards exercise at least quasi-judicial functions and that certiorari is the proper remedy. On such a review (by certiorari) findings of the board based on substantially conflicting evidence are binding on the courts. The cases holding that the findings of such boards are binding on the courts, are sound, in those jurisdictions where such boards properly exercise judicial powers, but they are of no weight in jurisdictions like California where the boards do not, and constitutionally cannot, exercise judicial powers. In such jurisdictions the scope of the review must be determined by principles other than those involved in jurisdictions where such boards are in effect special trial courts properly exercising judicial power.

[14] It is frequently stated that the discretion conferred upon administrative boards cannot be controlled by mandamus, except to prevent an abuse thereof. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784, and cases therein reviewed. This rule applies only where a true discretion has been conferred by the statute. A proper illustration of this rule would be, where an administrative board is given power, if certain facts are found to exist, to take certain action, the statute providing directly or indirectly that the board is given discretion as to whether it will act after the facts have been ascertained, and providing that the board's determination shall be final. In such a case the determination as to whether the board will act is purely administrative, and its discretion cannot be controlled by mandamus. Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A. 1917F, 514, Ann.Cas.1917C, 643; People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3.

[15] As distinguished from the above cases, it is equally well settled that where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial, and upon the happening of the contingency the writ may be issued to control his action. Stockton & V. Railroad Co. v. Stockton, 51 Cal. 328; Wood v. Strother, 76 Cal. 545, 18 P. 766, 9 Am.St.Rep. 249; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; 16 Cal.Jur., p. 812, sec. 30.

[16-18] Neither of these rules is controlling in the present case. We are here dealing with a statute which confers certain fact-finding powers on the board, with no indication that the legislature intended the facts so found to be binding on the courts, and, upon ascertaining the facts, the board is authorized to cancel or suspend the license theretofore possessed by the person charged. No method of review is provided in the statute. The only possible remedy of the person adversely affected is by writ of mandate. We are thus presented with the question as to what weight the courts should give to the findings of the board—or, stated another way, are the findings of the board, if based on substantial although conflicting evidence, binding on the courts in the mandamus proceeding, as they would be in a certiorari proceeding or on an appeal? After considering the various possibilities, we can see no escape from the conclusion that in such a proceeding the court to which the application for mandate is made must weigh the evidence, and exercise its independent judgment on the facts, as well as on the law, if the complaining party is to be accorded his constitutional rights under the state and federal constitutions. The state constitutional provision discussed, supra, prohibits the conferring of judicial power on such administrative boards. If it should be held that the board's action in cancelling or suspending an existing license is binding on the courts, if such action is predicated on conflicting evidence, we would be necessarily holding that such board is exercising at least quasi-judicial powers. It is the essence of judicial action that finality is given to findings based on conflicting evidence. If the statute be so construed it would violate the state Constitution. Moreover, for a purely administrative board to deprive a person of an existing valuable privilege without the opportunity of having the finality of such action passed upon by a court of law, would probably violate the due process clause of the federal Constitution. Although there is some confusion in the federal cases, the more recent decisions by the United States Supreme Court have indicated that if binding fact-finding power is conferred on purely administrative boards, and if the courts in reviewing the administrative board's actions do not exercise an independent judgment on the facts as well as on the law, then the party adversely affected, at least where constitutional rights are involved, has been deprived of due process. In St. Joseph Stock Yards Co. v. U. S., 298 U.S. 38, 52, 56 S.Ct. 720, 726, 80 L.Ed. 1033, that court stated: "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to politi-

cal demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." See, also, Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908; Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598.

[19, 20] In view of these principles, it necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise an independent judgment on the facts. This does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort. As was pointed out in the St. Joseph Stock Yards case, supra, in weighing the evidence the courts can and should be assisted by the findings of the board. The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence.

[21-23] We think the limitations on the rule that the court must exercise its independent judgment on the facts in such cases, suggested by the United States Supreme Court in the St. Joseph Stock Yards case are sound. The findings of a board where formal hearings are held should and do come before the courts with a strong presumption in their favor based primarily on the disputable presumption contained in section 1963, subsection 15 of the Code of Civil Procedure "That official duty has been regularly performed". Obviously, considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence. Another limitation on the rule also suggests itself. Normally applications for such writs should be filed in the trial courts, whose normal function it is to determine and ascertain controverted issues of fact.

This procedure where the courts in reviewing, in its broadest sense, the actions of administrative boards are given the power to weigh the evidence is not unknown to our present law. The recent amendments to the liquor law have been referred to, supra. Somewhat similar provisions are contained in various tax statutes providing for payment under protest and suit in the superior court, where the tax controversy is tried de novo. The State Bar disciplinary cases in which the court has power to weigh the evidence offer another illustration. (See cases collected 9 Cal.Jur.Supp., p. 467, Sec. 103.)

[24, 25] Applying these principles to the facts of the present case it is obvious that the judgment of the trial court ordering the issuance of a peremptory writ commanding the board to reinstate the respective licenses of Drummey and Wilson must be affirmed. No findings were made by the trial court, findings having been waived. The cause was tried in the court below, by stipulation, on the record before the board. Under principles already discussed, if any substantial evidence is found in the record to support the trial court's judgment, the judgment must be affirmed. It must be conclusively presumed on this appeal that the trial court weighed the evidence giving due weight to the presumption in favor of the board's findings, but nevertheless, exercising its independent judgment, found against the board.

As already pointed out, on this appeal, there is involved solely the so-called Shannon count. Although there is considerable evidence in the record that, on numerous occasions prior to the adoption of the 1933 amendment to the act prohibiting solicitation, Drummey, on behalf of his employer, solicited business, that evidence is not involved on this appeal. All counts supported by that evidence, as already pointed out, have been properly abandoned by the board.

[26] The record in reference to the Shannon count, which is the only count now before this court, shows the following:

Drummey was not only manager of Wilson, who was doing business as a funeral director under the name of Wilson and Kratzer, but was also a deputy of the coroner, the latter maintaining his official office at the funeral parlors of Wilson. Several informal complaints had been made to the board by other funeral directors operating in the city of Richmond where Wilson maintained his offices. Several of these complaints involved other matters than solicitation, and several of them dealt with alleged solicitation when such act was not a punishable offense. Most of the complaints, including the one involving the body of Mrs. Shannon, were predicated on the charge that Drummey as deputy coroner would investigate violent deaths in his official capacity, and would then use his official position to secure the business for Wilson and Kratzer. Before the board caused a formal complaint to be filed against either of the licensees, it held an informal investigation, at which Drummey was present but Wilson was not. At this hearing a representative of the board made the statement that "an argument came up, and this is not a complaint—simply to straighten out the matter". The testimony of several witnesses was taken and transcribed. So far as the Shannon case is concerned it appears that Mrs. Shannon was killed in an accident; that Drummey as deputy coroner investigated; that the family of the deceased authorized Wilson and Kratzer to conduct the funeral; that pursuant to this authorization the body was placed in a casket; that thereafter the family authorized another funeral director to conduct the funeral; that the body was not delivered to this second funeral director for five or six days. The main grievance of the complaining funeral director had nothing to do with solicitation, but was predicated on the charge that the body had not been turned over to the relatives for several days, and that Wilson and Kratzer had used undue haste in placing the body in a casket. The coroner explained that the body had been detained at his express and official orders at the request of various law enforcement bodies that were investigating. The circumstances concerning the placing of the body in the casket were fully and reasonably explained. Drummey voluntarily testified and fully explained all of the facts surrounding his connection with the Shannon case. So far as solicitation is concerned he testified that as deputy coroner he investigated the Shannon death; that he interrogated the family concerning the death; that after securing the necessary official data from the family he told them: "Now I am representing Wilson and Kratzer who have this establishment here. What are your wishes in regard to the service? Have you an undertaker in mind?" Upon being informed that they desired Wilson and Kratzer to handle the case, arrangements were made by Drummey. While this testimony may be susceptible of the interpretation that Drummey was guilty of improper solicitation it is also capable of a contrary interpretation.

After this informal hearing, a formal complaint was filed against Drummey and Wilson. At the formal hearing on the charges contained in this complaint neither Drummey nor Wilson was represented by counsel. The attorney for the board introduced into evidence the transcript taken at the informal hearing. On the Shannon count no member of the Shannon family was called as a witness. No witness testified that Drummey improperly solicited the Shannon body. Drummey again testified. His testimony on this count dealt only incidentally with solicitation. In so far as solicitation is concerned his testimony is clearly susceptible of the interpretation that no improper solicitation was indulged in by him. Reading the record as a whole we cannot say that the evidence without conflict establishes improper solicitation on this count. Under such circumstances, the trial court having power to weigh the evidence, we must conclusively presume that the trial court performed its duty, gave full weight to the presumption of validity of the board's findings, but nevertheless found against the board on this count. The determination of the trial court on conflicting evidence on the facts is binding on this court on this appeal.

The appeals by Wilson and Drummey from the judgments and orders of the trial court made and entered upon the sustaining of the demurrers to their petitions for writs of review and prohibition are dismissed. The judgment directing the issuance of a peremptory writ of mandate is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

I concur in the judgment: HOUSER, J.

31 Cal.App.2d 335

KEEFER v. KEEFER.

Civ. 2162.

District Court of Appeal, Fourth District, California.

March 3, 1939.

1. Appeal and error 🔑883

In divorce action, where defendant sued for annulment in another county and moved for change of venue and plaintiff moved for allowance of court costs and attorney's fees, both of which motions were submitted under a signed stipulation, defendant could not complain of order granting costs and attorney's fees. Code Civ.Proc. § 396b.

2. Appeal and error 🔑883

Appellant could not complain of rulings of trial court assented to and acquiesced in by appellant. Code Civ.Proc. § 396b.

3. Appeal and error 🔑790(3)

Where defendant in divorce action sued for annulment in another county, and, after defendant's appeal from order denying his motion for change of venue, court granted plaintiff's unopposed motion to consolidate annulment proceeding and divorce action, and judgment granted annulment, question involved on appeal became moot requiring dismissal of appeal.

4. Appeal and error 🔑781(1)

An appellate court will not review questions which are moot and of only academic importance.

5. Appeal and error 🔑781(1)

An appellate court will not undertake to determine abstract questions of law at request of a party who shows that no substantial rights can be affected by the decision either way.

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Divorce action by Lillian Keefer against Robert Keefer. From an order denying defendant's motion for change of venue, and granting plaintiff's motion for allowance of court costs and counsel fees, defendant appeals.

That portion of the order awarding court costs and attorney's fees affirmed, and appeal from remaining portion dismissed.

Walter H. Robinson, of Beverly Hills, for appellant.

Karl F. King, of San Bernardino, for respondent.

GRIFFIN, Justice.

An action for divorce was filed in San Bernardino county on November 24, 1937. Summons was served on the defendant in Los Angeles county. Appellant, after service of summons, commenced an action in Los Angeles county for the annulment of the marriage between appellant and respondent, which action was transferred to San Bernardino county on motion of the respondent herein.

The appellant, after service, failed to appear and answer in the present action within the time prescribed by law and his default was duly entered. Subsequently, appellant moved to set aside the default, which motion the court granted and allowed appellant to file his answer to the complaint "nunc pro tunc". Appellant then filed a motion for change of venue to Los Angeles county which was also ordered filed "nunc pro tunc" as of the same date. Respondent filed a motion for allowance of attorney's fees and court costs. Both motions were submitted to the court for decision under a signed stipulation between counsel. The motion for allowance of attorney's fees and court costs was submitted subject to the defendant's objection to the court hearing the same until it had passed on the motion for change of venue and "subject to the question whether it is not proper that such motion for attorney's fees and costs should be passed on only by the court to which said case may be transferred if said motion for change of venue is granted, and if not granted, that it be submitted to the above entitled court". On January 31, 1938, the court in a minute entry, simultaneously and as one act, denied appellant's motion for change of venue and granted respondent's motion for allowance of court costs and counsel fees and ordered appellant to pay to respondent the sum of $75 attorney's fees and $15 as and for costs of suit, and held that the county of San Bernardino was the proper county for the trial of the action after reviewing the affidavits and counteraffidavits submitted with the respective motions. Appellant now appeals from those separate portions of the order and from the whole thereof.

The gist of appellant's affidavit and the sole ground for change of venue is based on the claimed fact that he resided in Los Angeles county at the time the action was filed. Respondent opposed this motion on the ground that an answer had been filed in the action and that the ends of justice would be better promoted by retaining jurisdiction in San Bernardino county.

[1, 2] By virtue of the stipulation and the circumstances here related, the argument of appellant as to the jurisdiction of the court to enter judgment for costs and attorney's fees, by force of its own weight loses its character of legitimacy. Sec. 396b, Code Civ.Proc. This portion of the order should be affirmed. Appellant cannot upon this appeal complain of rulings assented to and acquiesced in by him. Realty Bonds and Finance Co. v. Point Richmond, etc., Co., 171 Cal. 238, 152 P. 433.

[3-5] In considering the remaining point, i. e., whether the court erred in denying the motion for change of venue, our attention has been called to the fact that since this appeal has been perfected the superior court of San Bernardino county granted an unopposed motion by respondent in this action to consolidate the annulment proceeding and the divorce action for the purpose of trial. The two cases were subsequently tried together. The judgment was for an annulment of the marriage and a dismissal of the divorce action excepting from the order of dismissal the order allowing attorney's fees and court costs. The decree of annulment has become final. The question of error in the ruling of the court in the divorce action in the denial of the motion for change of venue is moot. An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who shows that no substantial rights can be affected by the decision either way. Adams v. Prather, 176 Cal. 164, 167 P. 867; 2 Cal. Jur. § 472, p. 803.

That portion of the order awarding court costs and attorney's fees from which this appeal is perfected is affirmed. For the reasons stated, the appeal from the remaining portion of the judgment is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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31 Cal.App.2d 245

BACON v. KESSEL

Civ. 10822.

District Court of Appeal, First District, Division 1, California.

Feb. 28, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Wills ⚷230

In action for sister's breach of agreement to pay brother one-eighth of what she would receive from father's estate or its equivalent value in consideration of brother's forbearance of contest of father's will, evidence justified finding that sister made promise alleged.

2. Wills ⚷230

Mutual agreement that brother would not contest father's will if sister would pay him one-eighth of her share of estate constituted concurrent consideration for promises by each sufficient to support contract as against contention that forbearance was insufficient consideration in absence of express promise to forbear. Civ.Code, § 1605.

3. Payment ⚷9

Statute defining "payment" as performance of obligation for delivery of money only is not exclusive and does not preclude use of term to express delivery of things other than money. Civ.Code, § 1478.

> "Payment" is that which is paid, the thing given to discharge a debt or an obligation or in fulfillment of a promise.

4. Wills 🔑230

Under agreement of brother to forbear contest of father's will in consideration of sister's "payment" of one-eighth of what she would receive from estate or its equivalent in value, meaning of word "payment" not restricted to performance of obligation for delivery of money. Civ.Code, § 1478.

[Ed. Note.—For other definitions of "Payment," see Words & Phrases.]

5. Pleading 🔑18

A complaint alleging defendant's breach of agreement by which plaintiff consented to forbear contest of father's will in consideration of defendant's "payment" to him of part of estate received by defendant was demurrable for ambiguity in use of word "payment."

6. Appeal and error 🔑1040(10)

Overruling of demurrer to complaint on ground of ambiguity was not reversible error in absence of showing that defendant was misled or prejudiced.

7. Wills 🔑230

Variance between complaint alleging defendant's breach of agreement to pay plaintiff one-eighth share of portion of estate received by her from father's estate in consideration of plaintiff's forbearance of contest of father's will, and proof of defendant's promise to assign to plaintiff one-eighth of her share of estate or its equivalent, was not reversible error in view of defendant's testimony as to understanding of agreement and extended adjournment during trial. Code Civ.Proc. §§ 469, 470.

8. Wills 🔑230

In action for defendant's breach of agreement to pay plaintiff one-eighth of her share of father's estate in consideration of plaintiff's forbearance of contest of father's will, evidence justified finding as to value of interest distributed to defendant.

9. Evidence 🔑340(3)
Judgment 🔑564(1)

In action for defendant's breach of agreement to pay plaintiff one-eighth of her share of father's estate certified copy of decree of distribution from which no appeal had been taken was properly admitted on issue of value of interest distributed to defendant, since decree was "final judgment." Code Civ.Proc. § 1905.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

10. Executors and administrators 🔑315(6)

Decree of distribution from which no appeal was taken was determinative of facts which were or might have been presented therein and conclusive on parties or their privies as to those facts when incidentally put in issue between them in relation to different matter in any court.

11. Appeal and error 🔑843(3)

Question whether testimony was improperly received was not required to be determined upon appeal where there was competent evidence on issue in the record.

12. Appeal and error 🔑931(1)

In action tried to court without jury, reviewing court must accept view of trial court on facts where evidence is conflicting.

13. Frauds, statute of 🔑144

Action for defendant's breach of oral contract to pay plaintiff one-eighth of share of father's estate in consideration of plaintiff's forbearance of contest of father's will was not barred by statute of frauds where plaintiff in reliance on defendant's promise was induced to refrain from contesting will until time for contest had expired, since principle of "equitable estoppel" was applicable. Code Civ.Proc. §§ 1971, 1973, 1973a.

[Ed. Note.—For other definitions of "Estoppel in Pais," see Words & Phrases.]

14. Frauds, statute of 🔑144

Fact that plaintiff's brothers gave plaintiff assignment of one-eighth of their interest in father's estate did not preclude operation of equitable estoppel against defendant's assertion that action for breach of her oral agreement to pay plaintiff part of her share of father's estate in consideration of plaintiff's forbearance of contest of father's will was barred by statute of frauds, where terms of assignment of brothers' interest to plaintiff in no way obligated plaintiff to refrain from contesting will.

15. Appeal and error 🔑909(5)

In action for breach of oral agreement to pay plaintiff one-eighth of share of father's estate in consideration of plaintiff's forbearance of contest of father's will, wherein plaintiff alleged that defendant refused to execute assignment to plaintiff of one-eighth of her interest in father's estate when assignments were presented to defendant and to plaintiff's brothers, reviewing court could assume on appeal that terms of assignment executed by brothers were similar to terms of assignment submitted to defendant.

16. Limitation of actions ⟹27

Two-year statute of limitations was applicable to action for breach of oral contract to pay plaintiff one-eighth of share of father's estate distributed to defendant in consideration of plaintiff's forbearance to contest father's will. Code Civ.Proc. § 339, subd. 1.

17. Limitation of actions ⟹27

Statute of limitations would not run against cause of action for breach of oral contract to pay plaintiff one-eighth of father's estate distributed to defendant in consideration of defendant's forbearance to contest father's will until expiration of two years from time when cause of action accrued. Code Civ.Proc. § 339, subd. 1.

18. Limitation of actions ⟹46(6)

An action, commenced in September, 1935, for defendant's breach of oral contract to pay plaintiff one-eighth of defendant's share of father's estate, was not barred by limitations, where defendant did not inform plaintiff of repudiation of agreement until time of distribution of father's estate on February 1, 1934. Code Civ.Proc. § 339, subd. 1.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Robert H. Bacon against Kathryn B. Kessel for breach of an oral agreement to transfer to plaintiff one-eighth of property received by defendant in distribution of estate of father of plaintiff and defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

John L. McNab, and Robert Littler, both of San Francisco, for appellant.

Edward J. Silver and H. Raymond Hall, both of Oakland, for respondent.

GEARY, Justice pro tem.

Plaintiff and defendant are brother and sister and two of the heirs at law of Frank P. Bacon, deceased. The latter died on or about April 4, 1928, leaving an estate of real and personal property. By the terms of his last will, Frank P. Bacon bequeathed the sum of five hundred ($500) dollars, and no more, to his son Robert H. Bacon, respondent herein. By his will the decedent left a life estate in one-half of his estate to his widow, and devised and bequeathed the other half-interest in his estate in equal shares to seven other children, and provided that from each of said shares there should be deducted such sums as had been theretofore advanced to each of these children during the lifetime of decedent. According to the will and the codicil, these advances amounted to as much as $30,353.24 advanced to Henry D. Bacon down to the sum of $5,802.94 advanced to Joseph C. Bacon. The will further provided that upon the death of decedent's widow, one-half of the remainder should be distributed share and share alike to the seven designated children, and the other half thereof, or one-quarter of his total distributable estate, was left to various charitable organizations. The respondent herein had received no advances from his father during the latter's lifetime and was highly resentful at what he considered was his unfair treatment by the terms of the will.

The evidence for respondent and appellant is in direct and hopeless conflict. The testimony of respondent to material facts is corroborated by that of his brothers Thomas P. Bacon and Joseph C. Bacon. The testimony of appellant in some particulars was in conflict with the testimony of her husband, a witness on her behalf. Accepting that view of the evidence adopted by the trial court, it appears that respondent's feeling of resentment of the terms of the will was shared by his brothers Thomas P. and Joseph C. Bacon, and by his sister the appellant herein. Respondent visited these brothers and the appellant and declared his purpose to contest the will unless some "arrangement" were made whereby he should receive his proper share of the estate. Appellant advised the respondent that it would not be necessary to contest the will; that he should have an instrument prepared whereby she and the brothers Thomas P. and Joseph C. Bacon would assign to him a one-eighth portion of their shares of the estate. Respondent thereupon had such document prepared which the brothers signed, and with the terms of which they thereafter complied. Appellant demurred at signing the instrument, however, stating that she had been advised by her attorney that it might complicate the settling of the estate, but told him that she would see he got a one-eighth share of her portion of the estate, or the equivalent, at the time the estate was distributed. Respondent relied upon this statement and did not file a contest. Thereafter, and when the estate was distributed, appellant repudiated the agreement with respondent and refused to give him the equivalent of a one-eighth share thereof or any portion of the property received by her. Respondent thereupon instituted this action.

In the complaint it is alleged that, upon being informed of the terms of the last will and upon advice of counsel, plaintiff intended to contest the same and "plaintiff and defendant entered into an agreement and understanding whereby plaintiff consented to forbear contest of said last will and testament in consideration of payment to plaintiff by defendant of a one-eighth share of that portion of the estate received by defendant at the final settlement and distribution of said estate; that a similar agreement was made and entered into at said time by plaintiff and the brothers of plaintiff who were legatees under said Last Will and Testament, * * *." "That in consideration of the agreements aforesaid plaintiff forbore contest of said probate proceeding, relying upon said agreements; that final distribution was made on February 1, 1934." It is further alleged that defendant's distributive share amounted to approximately $22,659.24, and that plaintiff is entitled by the agreement to the sum of $2,832.40 which defendant refused to pay. The demurrer to the complaint being overruled, defendant by answer specifically denied the allegations of the complaint. By a subsequent amendment to the answer it is alleged the action was barred by the provisions of Code of Civil Procedure, sections 337, 338 and 339 and sections 1971, 1973 and 1973a.

[1] The court found, and there is evidence to support the finding, that "defendant promised and assured plaintiff that if he would not contest the will that she would pay him one-eighth of what she would receive from the estate or its equivalent value; that plaintiff relied implicitly in defendant and trusted her completely and fully believed that she would keep her word in said matters and in consideration thereof and solely by reason thereof plaintiff did forbear filing a contest of said Will and probate proceedings". The court further found that defendant did not advise plaintiff she would not abide by the agreement until long after the time had expired in which he could have filed a contest, determined defendant's distributive share to be of the value alleged and that there was due, owing and unpaid from defendant to plaintiff a one-eighth thereof, or $2,832.40; that the action was not barred by either or any of the provisions of the sections of the Code of Civil Procedure as alleged in the answer, and rendered judgment accordingly.

[2] Appellant's first contention is that the complaint did not allege, the evidence did not establish, and the court did not find, that plaintiff promised defendant to forbear suit; that mere forbearance alone is not a sufficient consideration for defendant's promise to share her legacy with plaintiff, unless the forbearance is pursuant to an express promise to forbear. Tiffany & Co. v. Spreckels, 202 Cal. 778, 790, 262 P. 742; Estate of Thomson, 165 Cal. 290, 296, 131 P. 1045; Schumann-Heink & Co. v. U. S. National Bank, 108 Cal.App. 223, 236, 291 P. 684, 292 P. 547. The complaint alleges and the finding thereon as framed expresses the mutual agreement of the parties which constituted concurrent considerations for the promises made, and one will support the other. This is sufficient. Civ.Code, sec. 1605; Papadakos v. Soares, 177 Cal. 411, 412, 413, 170 P. 1114; Garratt v. Baker, 5 Cal.2d 745, 748, 56 P.2d 225; Security-First National Bank v. Howland, 11 Cal.App.2d 567, 569, 54 P.2d 53.

[3–7] The complaint alleges respondent agreed to forbear contesting his father's will in consideration of "payment" to him by appellant of a one-eighth share of that portion of the estate received by her at final distribution. Appellant insists that by the use of the term "payment" the respondent was limited to the recovery of a one-eighth interest of the money she received on distribution. Civ.Code, sec. 1478. That section is not exclusive in its scope, and does not purport to provide that the use of the term may not include the delivery of things other than money. Le Baron v. Berryessa Cattle Co., 78 Cal.App. 536, 547, 248 P. 779. Hamilton v. Hollman, 102 Cal.App. 166, 168, 282 P. 977. It is variously defined by Webster as, "That which is paid; the thing given to discharge a debt, or an obligation, or in fulfillment of a promise", and its common use goes far beyond the definition insisted upon. It was doubtless so used by the parties herein, and unfortunately by the pleader as well. The variance—if any—between the promise alleged and the promise proved is slight and while the demurrer to the complaint upon the ground of ambiguity might well have been sustained in the interest of proper pleading, it does not appear that appellant was misled or materially prejudiced by the court's ruling thereon. Bank of Lemoore v. Fulgham, 151 Cal. 234, 237, 90 P. 936; Taylor v. Morris, 163 Cal. 717, 724, 127 P. 66. The complaint herein was filed in September, 1935. The trial commenced January 21st, 1936, and adjourned in the afternoon of that day to February 11, 1936, upon which date it was completed. Appellant denied having heard respondent declare his intention to contest the will and denied that she at any time made any promise to pay, give or assign any portion of her interest in the estate, or the equivalent of a one-eighth share therein to him. In view of appellant's testimony the variance could hardly have misled her, and the extended adjournment during the trial permitted the action to be fully and fairly tried upon the merits. A consideration of the findings convinces the trial court must have adopted such a view of the matter, which under the circumstances it was authorized to do. The variance is not such as to constitute reversible error. Code Civ.Proc. secs. 469, 470; Bollinger v. Bollinger, 154 Cal. 695, 702, 99 P. 196; Carter v. Rhodes, 135 Cal. 46, 48, 66 P. 985; Grossetti v. Sweasey, 176 Cal. 793, 795, 169 P. 687.

[8–11] The finding of the court as to the value of the interest distributed to appellant is supported by competent evidence. The certified copy of the decree of distribution In the Matter of the Estate of Frank P. Bacon, deceased, was offered and received in evidence. It appears therefrom the probate court adopted the stipulation executed by the devisees and legatees, including the parties herein, and found pursuant thereto, the value of the respective distributive shares of said estate. The decree of distribution from which no appeal was taken is a final judgment, and the certified copy thereof was properly admitted. Code Civ.Proc. sec. 1905. That decree is determinative of the facts presented or which might have been presented therein, and is conclusive upon the parties or their privies as to those facts when incidentally put in issue between them in relation to a different matter, in the same or any other court. Estate of Clark, 190 Cal. 354, 360, 212 P. 622; Estate of Bell, 153 Cal. 331, 339, 340, 95 P. 372; Estate of Blake, 157 Cal. 448, 456, 108 P. 287; Todhunter v. Smith, 219 Cal. 690, 694, 28 P.2d 916; Transmarine Corp. v. R. W. Kinney Co., 123 Cal.App. 411, 422, 11 P.2d 877; Hardy v. Rosenthal, 2 Cal.App.2d 442, 444, 445, 38 P.2d 412; White v. Lantz, 126 Cal.App. 693, 695, 696, 14 P.2d 1041. There being competent evidence of the value of appellant's distributive share of the estate in the record, it is unnecessary to determine whether other testimony addressed to this question was improperly received.

[12–15] Accepting the view of the trial court as indeed we must in view of the conflict in the testimony presented, the action was not barred by the provisions of sections 1971, 1973 and 1973a of the Code of Civil Procedure. The conduct of appellant, as found by the court, presents a situation wherein by reason of and reliance upon her promises the respondent was induced to agree to refrain from pursuing a legal right until the time within which he might do so had expired, at which time he was advised the promise would not be fulfilled. Under such circumstances the principle of equitable estoppel will apply. Carpy v. Dowdell, 115 Cal. 677, 686, 687, 47 P. 695; Seymour v. Oelrichs, 156 Cal. 782, 793-800, 106 P. 88, 134 Am.St.Rep. 154; Notten v. Mensing, 3 Cal.2d 469, 474-477, 45 P.2d 198; Wilson v. Bailey, 8 Cal.2d 416, 422-423, 65 P.2d 770. The rule enunciated in the cases of Baker v. Bouchard, 122 Cal.App. 708, 711, 10 P.2d 468; Blanc v. Connor, 167 Cal. 719, 724, 141 P. 217, and O'Brien v. O'Brien, 197 Cal. 577, 587, 241 P. 861, is not applicable herein. In the instant action no other contract than the one sued upon appears to which the forbearance of respondent is referable. The terms of the assignments by which the brothers gave respondent a portion of their interest in their father's estate—which we may properly assume was similar to the one submitted to appellant—in no way obligated respondent to refrain from contesting the will.

[16–18] The action being one for damages for breach of an oral contract, section 339, subdivision 1, Code of Civil Procedure, is applicable and the statute of limitations did not run until the expiration of two years from the time when the cause of action accrued. Crawford v. Duncan, 61 Cal.App. 647, 650, 215 P. 573. Hence the action was not barred.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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31 Cal.App.2d 345

PEOPLE v. SISCHO et al.

Civ. 5987.

District Court of Appeal, Third District, California.

March 6, 1939.

1. Joint-stock companies and business trusts 🔑17

Generally, trustees of Massachusetts business trust are personally liable for the obligations of their trusts except when specifically exempted, either expressly or by implication.

2. Licenses 🔑28

A liquidated demand for amount of sales tax duly levied by state board of equalization upon a retailer which is a Massachusetts business trust is a claim on which trustees are personally liable.

3. Bills and notes 🔑123(2)

Under statute, a trustee of a business trust who signs a negotiable instrument as trustee disclosing the identity of the trust for which he is acting is exempt from personal liability. Civ.Code, § 3101.

4. Pleading 🔑67

A plaintiff need not negative a defense founded upon an exception to a general rule.

5. Licenses 🔑32(2)

Where it was sought to impose individual liability upon trustees of business trust for sales taxes allegedly due the state and complaint alleged all necessary elements to constitute the liability, showing of exemption should be made in answer.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by the People against R. R. Sischo, L. A. Sischo and E. F. Crumrine, individually and as trustees of the Sischo Motor Car Company, a trust estate, to collect certain delinquencies on sales taxes allegedly due from the defendants. From a judgment in favor of defendants as individuals, the People appeal.

Reversed and remanded, with directions.

Earl Warren, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Atty. Gen., for the People.

R. R. Sischo, of Merced, for respondents.

ROSS, Justice pro tem., delivered the opinion of the court.

This action was brought by appellant to collect certain delinquencies on sales taxes amounting to $1,446.80 plus interest allegedly due from the defendants, who were named "Sischo Motor Car Co., a trust estate, R. R. Sischo, L. A. Sischo and E. F. Crumrine, individually and as trustees of said Sischo Motor Car Co."

The trial court sustained a demurrer to the amended complaint as to R. R. Sischo and E. F. Crumrine as individuals, and overruled the same as to said persons as trustees and as to the trust estate, and gave judgment in favor of said three persons as individuals, from which judgment this appeal is taken.

The record here presents the amended complaint only, but both parties mention the fact that the only difference from the original complaint is that a copy of the trust agreement by which the trust estate was created, which was annexed to and made a part of the original complaint, was omitted from the amended complaint, and both parties in their briefs refer to the fact that the trust agreement provided that the trustees should not be personally liable for obligations, etc., of the trust.

Appellant contends that any defense of the individual trustees based on this provision of the agreement should have been raised by answer, and that, the amended complaint having omitted all reference to said trust agreement, the demurrer was improperly sustained. Respondents point out, however, that the complaint on its face shows that the claim sued on was not based on contract, but was a liability imposed by the sovereign state, and that the board of equalization had recognized the trust estate as being the party liable by issuing its license or permit to said Sischo Motor Car Company, a trust estate, which trust estate, and not the trustees or individuals, was the retailer.

This is a Massachusetts or business trust, and both parties recognized the case of Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871, as the leading California case on the subject. That case holds that the trustees of a Massachusetts trust are personally liable on all contracts with third persons in the absence of an express or implied agreement with the creditor to the contrary and that mere knowledge of a provision in the trust agreement that persons having dealings with the trustees shall look only to the property of the trust for payment will not release the trustees from personal liability in a case where they have not stipulated against it.

Respondents urge that the holding of Goldwater v. Oltman, supra, applies only to contracts, and that a tax levied by the state is not a contractual obligation. They cite the old case of Perry v. Washburn, 20 Cal. 318, a Civil War days case, in which it was held that taxes are not debts within the meaning of a law, declaring United States notes to be legal tender for all debts.

But, as aptly stated in 24 Cal.Jur., page 21: "The qualities of a debt may, however, by legislative action, be made to apply to taxes. (San Francisco Gas Co. v. Brickwedel, 62 Cal. 641.) And aside from this, in a popular sense a tax duly levied becomes a liquidated demand or debt due * * * and may be embraced within the word 'debt' as used in a statute."

[1, 2] We hold that such a liquidated demand or obligation as the amount of sales tax duly levied by the state board of equalization upon a retailer which is a business trust is a claim on which the trustees of said business trust are personally liable, under the general rule that trustees of such trusts are personally liable for the obligations of their trusts except when specifically exempted, either expressly or by implication.

[3] As to negotiable instruments, by virtue of section 3101 of the Civil Code, a trustee who signed as such, disclosing the identity of the trust for which he was acting, would be, however, exempted from personal liability. Charles Nelson Co. v. Morton, 106 Cal.App. 144, 288 P. 845.

[4, 5] Any possible showing of exemption in the instant case should properly be made in an answer. The amended complaint alleges all the necessary elements to constitute the liability. A plaintiff need not negative a defense founded upon an exception to a general rule. The general rule is that trustees of a Massachusetts trust are personally liable for the obligations of the trust.

The demurrer should have been overruled. The judgment in favor of respondents individually is therefore reversed and the cause remanded with directions that the demurrer be overruled and suitable time given them to answer the amended complaint.

We concur: PULLEN, P. J.; THOMPSON, J.

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31 Cal.App.2d 272

SMITH v. SMITH.

Civ. 6100.

District Court of Appeal, Third District, California.

Feb. 28, 1939.

1. Evidence 🔑**61**

A party's character is presumed to be good until the contrary is shown.

2. Appeal and error 🔑**1078(5)**

The claim that evidence did not support one of findings was waived by failure to present issue in briefs on appeal.

3. Courts 🔑**479**

Where superior court in divorce suit had granted custody of minor child to mother, subsequent appointment of mother as guardian of person and estate of child by probate court in another county did not preclude superior court from thereafter modifying divorce decree by awarding custody to another party, regardless of juvenile court's jurisdiction. Civ.Code, § 138; Probate Code, § 1400 et seq.; St.1915, p. 1225; St.1937, p. 1030, § 700.

4. Divorce ⚷303(3)

An application for change of custody of minor child of divorced parents should ordinarily be made to court which rendered divorce decree.

5. Guardian and ward ⚷10

A minor child under 14 years of age possessed no statutory right to nominate her guardian. Probate Code, § 1406.

◆

Appeal from Superior Court, Yuba County; Raglan Tuttle, Judge.

Divorce suit by Elaine T. Smith against Sidney V. Smith, Jr. From an order modifying the final decree of divorce with respect to the custody of the parties' minor daughter, plaintiff appeals.

Order affirmed.

Charles A. Wetmore, Jr., of Marysville, and Edward F. Treadwell and Treadwell & Laughlin, all of San Francisco, for appellant.

Loyd E. Hewitt and James R. McBride, both of Yuba City, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from an order modifying a final decree of divorce with respect to the custody of a minor daughter.

The parties to this action were divorced by a decree rendered by the superior court in Yuba county, October 24, 1927. The final decree awarded the custody of their infant daughter, Elaine, to her grandmother, Anna Trenberth. December 16, 1932, that decree was modified by granting the custody of the child to her mother "until the further order of the court". From time to time the decree was modified with respect to the amount of maintenance which the defendant was required to pay for the care of the child. November 2, 1933, while the mother still had custody of the girl, she was appointed guardian of her person and estate by the probate court of Alameda county. The child then had the prospect of inheriting a small estate.

February 5, 1937, the defendant cited plaintiff to show cause why she should not be deprived of the custody of their child on the ground that she was an unfit person to retain her care and training. That proceeding was heard on the affidavits of the respective parties and upon oral evidence which was also adduced. The plaintiff's affidavit incidentally averred that she was appointed guardian of the person and estate of their daughter, Elaine, by the superior court of Alameda county on November 2, 1933. No further proof of that appointment was adduced. The plaintiff, however, objected to the jurisdiction of the Yuba county court to interfere with the custody of the child since she was awarded to her in the guardianship matter. The objection was overruled.

Five witnesses were examined regarding the fitness of the respective parties to assume or retain custody of the minor. July 1, 1937, the court adopted findings determining that neither spouse was qualified or fit to assume the custody of the child. The custody of the daughter, Elaine, who was then thirteen years of age, was awarded to Ethel Rodda, the wife of John E. Rodda, whom the court found to be a fit and proper person to entrust with the child's care. Mrs. Rodda is a sister of the plaintiff. From that order modifying the final decree of divorce the plaintiff has appealed.

It is contended the evidence fails to support the finding that plaintiff is not a fit or proper person to have the custody of her minor child, and that the decree of the probate court of Alameda county appointing plaintiff as guardian of the person and estate of her daughter ousted the Yuba county court of jurisdiction to subsequently modify the final decree of divorce with respect to the custody of the child.

The record contains an abundance of evidence in support of the order modifying the final decree of divorce by depriving the appellant of the custody of the minor on account of her unfitness to retain her care. The evidence conclusively shows that the conduct of the mother would be detrimental to the welfare of the child. Both Mr. and Mrs. Rodda and Jack Menz testified to facts clearly indicating that the conduct and influence of the plaintiff would be most harmful to the child. It is not necessary to recite the facts upon which the court concluded the mother is unfit to retain the custody of her daughter. The record leaves no doubt of the correctness of the finding in that regard.

[1] There is no merit in the claim that the evidence does not support the finding that Mrs. Ethel Rodda, to whom the child was awarded, is a fit and proper person to assume her custody. She was a witness at the hearing. The court then had an opportunity of observing her conduct and

appearance. Her character was not questioned. In Jones on Evidence, (3d ed.), page 208, section 158, it is said: "The law presumes the character of a party to be good until the contrary is shown and he can safely rest on that presumption."

[2] Moreover, the appellant waived that assignment of lack of evidence by failing to present the issue in her briefs on appeal.

[3] We are of the opinion the Yuba county court which rendered the final decree of divorce in this case, by the terms of which the minor child of the spouses was awarded to her mother, retained jurisdiction to modify that decree with relation to the custody of the child, notwithstanding the subsequent appointment of the mother as guardian of the person and estate of her daughter by a probate court in another county. Sec. 138, Civ.Code; Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719. Section 138, above cited, specifically provides that the court which grants a divorce may at any time during the minority of a child of the marriage make or modify an order for the care, custody, maintenance or support of the minor when it appears to be for the temporal, mental or moral welfare of the child to do so. That principle recognizing the jurisdiction of a divorce court to modify its decree with relation to the custody of minor children for their welfare is so thoroughly established as to require no further authorities to support the assertion. Our statute preserves the authority of a divorce court over minor children of the separated spouses because society is interested in protecting them from harmful influences which affect their mental or moral welfare. This control is retained to sustain the character of their citizenship and to prevent them from becoming public charges.

It is true that for other specific purposes, under proper circumstances, the juvenile court may assume jurisdiction and award the custody of delinquent or dependent children to the probation officer, as provided by section 700 of the Welfare and Institutions Code of California, St. 1937, p. 1030, Division 4 of the Probate Code authorizes the appointment of guardians of the persons and estates of minor children under circumstances therein specified. A writ of habeas corpus may also properly issue to determine the custody of a minor under proper circumstances. Subject to certain restrictions recognized by the law, each of the proceedings above mentioned may be properly maintained to determine the custody of minor children. It is true that a delinquent or dependent child may be declared a ward of the court under the Juvenile Court Act, St.1915, p. 1225, even though the child has been previously awarded to the mother in a divorce proceeding. It may also be true that when a juvenile court first assumes jurisdiction over a delinquent or dependent child a divorce court has no authority to subsequently award the custody of the child to a person contrary to the order of the juvenile court. 78 A.L.R. 317, note; 11 A.L.R. 147, note. However, in the case of Ross v. Ross, 89 Colo. 536, 5 P.2d 246, 78 A.L.R. 313, it was held that the pending of proceedings in the juvenile court did not prevent a divorce court from modifying its final decree with respect to the custody of the same child.

[4] Delinquent and dependent children come peculiarly within the jurisdiction of the juvenile court. Such proceedings are quasi-criminal in their nature. But ordinarily a divorce court does not lose jurisdiction to modify its decree of divorce with respect to the custody of minor children of the marriage for their mental or moral welfare, by the mere subsequent appointment of a guardian of the person and estate of the child. The purpose of the appointment of the guardian in the present case was primarily to take charge of a small estate which it was expected the child would inherit. The mother had been previously awarded custody of her daughter in the divorce proceeding. Certainly the appointment of the guardian did not have the effect of thereafter ousting the divorce court of jurisdiction to modify its final decree with respect to the custody of the child for its welfare. The application for a mere change of the custody of a minor should ordinarily be made to the court which renders the decree of divorce. (9 R.C.L. 477, sec. 291; 19 C.J. 352, sec. 811.) In the authority last cited it is said: "An application for a modification of a decree as to the custody of the children should be made to the court in which the decree was rendered."

It has also been held that the authority of a divorce court over the custody and care of the minor children of the marriage may not be interfered with by means of habeas corpus. 82 A.L.R. 1146, note; 76 A.L.R. 657, note. In re Morgan, 117 Mo.

249, 21 S.W. 1122, 1123, 22 S.W. 913, the court said: "The general rule is that, where one court has acquired jurisdiction over the parties and subject-matter of the suit, other courts will not interfere by the writ of habeas corpus, while the suit is pending and undetermined."

Even though a court by means of habeas corpus does assume to determine the right of custody of a minor child, that order does not become res adjudicata to prohibit a divorce court which previously assumed jurisdiction of the child from modifying its final decree of divorce with respect to the child's custody, at least, for the welfare of the child on account of conditions which are shown to have changed since the writ of habeas corpus was granted. 110 A.L.R. 745, note; Stewart v. Stewart, 32 Idaho 180, 180 P. 165, 166. In the case last cited it is said: "A decision in a habeas corpus proceeding, whereby the custody of a child is awarded as between its parents, does not make the question of such custody res adjudicata, where a subsequent change of conditions is shown, nor preclude the court, in a subsequent suit for divorce between the parents, from making a further decree in regard to the custody of such child."

With respect to the right to appoint a guardian of a minor child in spite of the previous award of the minor to the custody of another person by the terms of a final decree of divorce, all that our Supreme Court has said is that the divorce court does not have exclusive jurisdiction over the child. No case which has been called to our attention holds that the probate court has paramount jurisdiction over the person of a minor in preference to that of the divorce court, or that an order appointing a petitioner guardian of the person and estate of a minor who was formerly awarded in a divorce proceeding to the custody of another person, thereby ousts the divorce court of jurisdiction and prevents it from thereafter modifying the final decree for the welfare of the child.

[5] The case of Collins v. Superior Court, 52 Cal.App. 579, 199 P. 352, relied upon by the appellant, is not in conflict with what we have said regarding the jurisdiction of a court to modify its final decree of divorce with respect to the custody of a minor child. In the Collins case the court merely held that a mandate would issue to require the superior court of Monterey county to hear and determine a petition for the guardianship of a minor who was over fourteen years of age and who had nominated his father as guardian of his person and estate notwithstanding the fact that a suit for divorce was then pending in the superior court of Marin county. It does not appear in that case that the Marin county court had actually awarded the custody of the minor to any person. The supreme court merely held that "the authority of the Superior Court of Marin County to award the custody of the minor to one of the parties in the divorce action was not exclusive". The writ of mandate was issued in that case for the designated reason that the minor "is fourteen years of age, and has the absolute right to select and nominate his guardian, who, if approved by the court, must be appointed". Sec. 1406, Probate Code. At least, the probate court in Monterey county had jurisdiction to appoint a guardian of the estate of the minor, regardless of the jurisdiction of the Marin county court to award the custody of the minor in the divorce proceeding. In the present case the Yuba county court previously assumed jurisdiction and actually awarded the custody of the child to her mother in the divorce proceeding, and therefore retained jurisdiction to modify that decree for the moral welfare of the minor. The minor in the present case was under fourteen years of age and therefore possessed no statutory right to nominate her guardian. She did not attempt to do so.

The jurisdiction of the probate court in the appointment of the appellant as guardian of the person and estate of the minor does not appear to conflict with the right of the divorce court to subsequently modify its final decree by awarding the child to the custody of Mrs. Ethel Rodda, for the general welfare of the minor on account of changed conditions with respect thereto.

The order is affirmed.

I concur: PULLEN, P. J.

31 Cal.App.2d 178

STATE FARM MUT. AUTOMOBILE INS. CO. v. CARPENTER, Insurance Com'r.

Civ. 10707.

District Court of Appeal, First District, Division 2, California.

Feb. 21, 1939.

Hearing Denied by Supreme Court April 20, 1939.

1. Appeal and error ⚿846(5)

Where parties waived findings, District Court of Appeal would assume that evidence supported judgment on issue of fact.

2. Taxation ⚿140

Under constitutional provision and statute enacted pursuant thereto requiring payment of tax on gross premiums by insurance companies, membership fees which formed no part of "premiums" collected by mutual insurance company are not subject to tax, since "premiums" mean amount paid as consideration for insurance. St.1935, pp. 529–531, §§ 900–909; Const. art. 13, § 14.

[Ed. Note.—For other definitions of "Premium," see Words & Phrases.]

3. Appeal and error ⚿1010(1)

Trial court's statement in memorandum, supported by substantial evidence, was conclusive upon appeal, even if findings had not been waived.

4. Taxation ⚿140

Membership fees charged to all applicants for membership in mutual insurance organization, which charge did not entitle applicant to receive insurance but entitled him to apply and was not returnable if insurance was rejected, and which did not entitle applicant to insurance unless specified premium was paid, did not constitute consideration for insurance and could not be included as "gross premiums" subject to tax on insurance companies as contemplated by Constitution and statute. St.1935, pp. 529–531, §§ 900–909; Const. art. 13, § 14.

[Ed. Note.—For other definitions of "Gross Premiums," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Suit by the State Farm Mutual Automobile Insurance Company against Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, to restrain defendant from including membership fees collected by plaintiff in annual report of gross premiums for tax purposes. From an adverse judgment, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS and EDMONDS, JJ., dissenting.

U. S. Webb, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for appellant.

Burbank & Laumeister, of San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Plaintiff had a permanent injunction restraining the defendant, as insurance commissioner, from including membership fees collected by plaintiff in the annual report of "gross premiums" for tax purposes. The cause was heard upon answer filed and the record contains the evidence on this issue of fact. The parties waived findings. On this record we assume that the evidence supports the judgment on all issues of fact raised.

The controversy rests on section 14 of article 13 of the Constitution and sections 900–909 of the Insurance Code, St.1935, pp. 529–531, which take the place of the Political Code sections in force at the time, but which are of the same purport and hence referred to for convenience. The constitutional provision reads in part: "Every insurance company * * * shall annually pay to the State a tax, * * * upon the amount of the gross premiums * * * received upon its business done in this State * * *." Section 909 provides that the annual statement required by section 905 of the code shall show the income of the company during the preceding year specifying: "(1) Cash premiums received. (2) Notes received from premiums. (3) Interest money received, specifying the source. (4) Income received from all other sources, specifying the source." The question thus arises whether the company may specify the income received from membership fees separately from the "cash premiums received", and whether the former should be included in the "gross premiums" and thus become subject to the constitutional tax.

[2] In resolving the issue in favor of the respondent the learned trial judge expressed his reasons in a memorandum opinion with which we are in full accord and which we adopt as our reasons for an affirmance of the judgment. This reads:

"Are the membership fees here involved a part of the gross premiums of plaintiff within the meaning of California Constitution, Section 14, Article 13?

"There can be no question that in ordinary usage 'the word "premium" in the law of insurance * * * means the amount paid to the company as consideration for insurance'. (32 C.J., p. 1192, Sec. 324; 14 Cal.Jur., p. 469, Sec. 42.)

"Under the testimony in this case (affidavit of Beedle admitted by stipulation) and the language of the application and policy I am satisfied that the membership fee is no part of the consideration for the insurance.

"However, it is argued that under Bankers' Life Co. v. Richardson, 192 Cal. 113, 218 P. 586, it has been held that the tax on insurance companies under the constitution is a 'gross earnings' tax and hence includes these membership fees whether premiums or not. But the language in the Bankers' Life case must be read in connection with the point actually decided, i. e., whether 'assessments', where insurance was written on the assessment plan, were taxable as 'gross premiums'. Considering the legislative history the court held that they were, and in so doing characterized the tax as a 'gross earnings tax'. But it must be remembered that 'assessments' in that plan of insurance are equally the price paid for the insurance coverage, as are 'premiums' in the ordinary policy; and I do not feel that the Supreme Court meant to go further in characterizing the tax as a 'gross earnings tax' than to mean gross earnings from the writing of insurance. So construed it would not cover the membership fees here in question."

[3, 4] The statement in the memorandum that the membership fee is no part of the consideration for the insurance is fully supported by substantial evidence, and this would be conclusive upon this appeal even if findings had not been waived. Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599. It appears from the reporter's transcript without controversy or dispute that these membership fees are charged to all applicants for membership, that, though a membership entitles the holder to apply for insurance, it does not entitle him to receive it, and that the membership fees paid are not returnable if insurance is rejected. It appears equally that if the member elects to exercise his option he may purchase insurance upon payment of the required premium, but that if he does not so elect, and does not pay the specified "premium", he receives no insurance protection.

This evidence, taken with all the inferences which are available to respondent, is sufficient to support the implied finding of the trial court that the membership fees are no part of the consideration for the insurance, and hence are not to be included in the specification of "gross premiums" as contemplated by section 14 of article 13 of the Constitution.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

GENOLA v. BARNETT et ux.*

Civ. 10967.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1939.

Rehearing Denied March 29, 1939.

Hearing Granted by Supreme Court April 27, 1939.

1. Automobiles 🔑217(6), 226(2)

An elderly woman who attempted to cross street at night in middle of block where automobiles were parked, and who failed to yield statutory right of way to approaching motorist, was barred from recovering for her injuries on ground of contributory negligence which was the proximate cause of her injuries. St.1935, p. 188, § 562.

2. Negligence 🔑82

Where negligence of plaintiff consists in violation of a statute or ordinance, he must be held to have foreseen that violation of a law enacted to avoid the happening of such a casualty might reasonably result in casualty's occurrence.

3. Automobiles 🔑201(2), 227(5)

Where an elderly woman, wearing a dark coat attempted to cross street at night in middle of block where automobiles were parked, and, after taking a step backward, stood about eight feet from curb in path of

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*For subsequent opinion see 93 P.2d 109.

an approaching automobile, speed of automobile was not proximate cause of woman's injuries, and doctrine of last clear chance was not applicable. St.1935, p. 188, § 562.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Suit by Lena Genola against Arthur A. Barnett and his wife for injuries sustained when plaintiff was struck by defendants' automobile. The defendants were granted a nonsuit, and plaintiff appeals.

Judgment affirmed.

Ingemar E. Hoberg and George J. Zech, both of San Francisco, for appellant.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for personal injuries, and at the close of her case the trial court granted defendants a nonsuit. The appeal raises the question of the sufficiency of the evidence to sustain the court's conclusion that the plaintiff was guilty of contributory negligence as a matter of law.

At the time of the unfortunate accident plaintiff was an elderly woman residing at an apartment house numbered 1808 Pacific avenue. She left her place of abode at about 6 o'clock p. m. of February 3, 1938, intending to cross the street to enter a grocery store. She walked a few feet westerly from the door of the apartment house, stopped at the curb to look in both directions for traffic, and then proceeded about eight feet into the street passing an automobile parked at the curb, and again stopped and looked to her left. Two eyewitnesses looking from across the street saw her then take a step backwards, and then she was hidden from their vision by defendants' automobile which was traveling westward on the avenue. The only evidence as to the point of contact is that plaintiff was struck by the right side of the front fender. She was knocked to the pavement and was found lying in a position parallel to, and eight feet distant from the curb, at the same spot where she had theretofore been seen standing. Plaintiff's witnesses all agreed that defendant Mrs. Barnett was driving at an unlawful rate of speed, that the lights on her car were lighted, and that the approach of the car could be easily seen. They also agreed that several cars were parked along both the north and south curbs, but disagreed as to their exact location. They also agreed that the car traveled in a straight line in its proper lane and did not swerve or deviate from its course until after the collision. The plaintiff wore a dark grey coat and was not seen by the operator of defendants' car until after the impact.

[1, 2] Giving to the plaintiff every reasonable inference which could be drawn from the facts proved, the only reasonable conclusion which any court or jury could reach is that plaintiff, after coming from behind the parked cars, saw the vehicle approaching at such a distance and at such a speed as to make it dangerous to cross in front of it. She then stepped back about a foot and stood motionless in its path until struck. She was attempting to cross the street in the middle of the block. It was her duty, of course, to yield the right of way to the vehicle. Section 562 California Vehicle Code, St.1935, p. 188. Plaintiff's evidence thus demonstrates that she stepped from a place of safety directly into the path of danger and stood there in violation of the statute which was enacted expressly to save her from such a mishap.

The facts of the case bring it within the settled rule found in Chase v. Thomas, 7 Cal.App.2d 440, 443, 46 P.2d 200; Gibb v. Cleave, 12 Cal.App.2d 468, 471, 55 P.2d 938; Meincke v. Oakland Garage, 11 Cal. 2d 255, 258, 79 P.2d 91; Gaston v. Hisashi Tsuruda, 5 Cal.App.2d 639, 643, 43 P.2d 355, and similar authorities. There is no escape from the conclusion that plaintiff failed to yield the right of way, but she now argues that the statute is not applicable because the defendants were at fault in exceeding the speed limit. The argument might be good if we were testing the negligence of defendants, but this we have assumed, though it must be patent that the speed of the car was not a proximate or any cause of the collision. But, in reference to the question of plaintiff's contributory negligence, the statute is a plain and simple statement of a rule of reasonable conduct to be observed by pedestrians under these circumstances, and it is a rule made for their benefit and protection. To this subject we may quote from the recent decision in Meincke v. Oakland Garage, supra, as follows: "Where the negligence of the plaintiff consists in the violation of a statute or ordinance designed to prevent casualties of the very sort which follows, he must be held as a person of ordinary prudence to have foreseen that the violation of the law enacted to avoid the happening of such a casualty might reasonably result in the casualty's occurrence. To hold otherwise would be to largely nullify laws which are adopted for the safeguarding of the public from types of injury which are of such frequent recurrence as to lead legislative bodies to adopt regulatory measures to prevent them." [11 Cal.2d 255, 79 P.2d 93.]

[3] Plaintiff suggests that if the cause had been left with the jury she might have had the benefit of the last clear chance doctrine. There is no room for the application of this doctrine upon the evidence presented here. Ramsperger v. Los Angeles M. C. Co., 4 Cal.App.2d 673, 675, 41 P.2d 562; Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36; Meincke v. Oakland Garage, supra.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

PRAGER v. ISREAL.*

Civ. 10891.

District Court of Appeal, First District, Division 2, California.

March 1, 1939.

Hearing Granted by Supreme Court April 27, 1939.

1. Automobiles 🔑181(2)

Where a party accepts a ride in the conveyance of another he is either a "guest passenger" or a "paying passenger," who is one who travels in a conveyance by virtue of a contract express or implied as to the payment of a fare or that which is accepted as an equivalent.

[Ed. Note.—For other definitions of "Passenger," see Words & Phrases.]

2. Automobiles 🔑181(2)

When a party accepts a ride in another's motor vehicle, he is a "passenger" for the duration of the ride and whether he is a "guest" or a "paying passenger" depends on whether he has paid compensation for the ride. St.1931, p. 1693, § 141¾.

3. Automobiles 🔑181(2)

One who accepts a ride in a motor vehicle without compensation is a "guest passenger" until he may alight in safety. St. 1931, p. 1693, § 141¾.

4. Constitutional law 🔑70(1)

The automobile guest statute must be applied as written. St.1931, p. 1693, § 141¾.

5. Automobiles 🔑181(1, 2)

Where automobile driver and companion parked automobile on public highway, and moved from front to rear seat where they lunched, after which they started to alight for purpose of returning to front seat but automobile moved forward, causing companion to fall to ground, the companion was a "guest" within automobile guest statute which precluded recovery. St.1931, p. 1693, § 141¾.

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for personal injuries by Violet Prager against E. M. Isreal. Judgment for plaintiff and defendant appeals.

Judgment reversed and cause remanded with directions.

Theodore Hale and Carroll B. Crawford, both of San Francisco, for appellant.

Jerome L. Schiller of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff had a verdict for $7,500 for injuries resulting in a broken hip-bone. She and the defendant were mutual friends who had been in the habit of taking pleasure drives in defendant's automobile. On a Sunday in June, 1935, defendant called at her place of abode at about two o'clock of the afternoon, and invited her to ride with him. They drove about the city for a couple of hours then parked on a public highway overlooking the ocean beach. They moved from the front to the rear seat of the machine where they ate a lunch prepared by plaintiff. At about five o'clock they agreed to continue their drive and visit a theatre down town. The plaintiff, seated on the right side of the rear seat, opened the door on that side of the car and stepped to the ground, intending to again seat herself in her former position on the front seat. At the same time defendant alighted on the left side to resume his position as driver. As the plaintiff had one foot on the ground and one on the running board, the car moved forward and she fell to the ground. She filed four complaints, the first charging wilful misconduct on the part of the defendant, and the third amended complaint charging that the injuries were caused by defendant's negligence in "failing to set and apply the brakes on said automobile". The answer pleaded specially the guest relation between the parties and denied that there was any wilful misconduct on the part of defendant.

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*For subsequent opinion see 98 P.2d 729.

Several grounds are urged for a reversal of the judgment, but we will confine our discussion to this issue of the guest relationship as our conclusion upon that issue requires a direction of judgment for the appellant.

Throughout the trial the presiding judge took the position that this relation did not exist because the automobile was not "moving upon" a public highway at the time, and for this reason refused to permit counsel for appellant to argue or present the issue to the jury, and refused to instruct the jury on the application of this statute. The ruling was based upon the first portion of section 141¾ of the California Vehicle Act (St.1931, p. 1693), which was the applicable statute at the time the injuries were incurred. This portion of the section read: "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle". The court overlooked the last portion of the section which read: "For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor".

[1] Where a party accepts a ride in the conveyance of another he is either a paying passenger or a "guest passenger". A paying passenger has been defined as one who travels in a conveyance by virtue of a contract, express or implied, as to the payment of fare, or that which is accepted as an equivalent. (4 R.C.L. 1002; 10 Am.Jur. sec. 953, p. 26; 4 Cal.Jur. 899.) A guest passenger, as applied to motor vehicle carriage, was defined in the applicable statute as "a person who *accepts a ride* in any vehicle without giving compensation therefor". Italics ours.

[2, 3] The cases involving liability of common carriers are uniform in holding that the passenger relation once established continues to exist while the passenger is engaged in alighting from the conveyance and until he has had a reasonable time to reach a place of safety. (4 Cal.Jur. 901; 10 Am.Jur. sec. 1004 p. 53.) Thus, when a party "accepts a ride" in another's motor vehicle he is a passenger for the duration of the ride, and whether he is a "guest" or a paying passenger depends upon whether he has paid compensation for the ride. But, as one who accepts a ride upon a common carrier and pays his fare is still a passenger until he reaches his destination and has a reasonable opportunity to alight in safety, so one who accepts a ride without compensation is still a guest passenger until he may alight in safety.

[4, 5] We can attach no importance to the use of the word "moving" in the portion of the section quoted. The legislature had had some difficulties in defining the terms "automobiles", "motor vehicle" and "vehicle" in other portions of the act. The expression "any vehicle moving upon any of the public highways" was apparently used to limit the word "vehicle" to those only which used the public highways, but to extend it to include all vehicles so moving, though they may not be self-propelled motor vehicles as these are defined in the act. It is obvious that it was not inserted with the intention of altering the well settled rules governing the passenger-carrier relation above referred to. It would be absurd in the extreme to hold that one who has accepted a ride with another, and had thus become his guest, immediately changed to a paying passenger or a mere trespasser as soon as the wheels of the car stopped turning at a highway intersection, or when the parties have voluntarily stopped for gas, lunch or similar conveniences. The party becomes a guest by accepting "the ride" and is still a guest, or passenger, as the case may be, as long as he is riding in the vehicle and until he has had a reasonable opportunity to alight in safety. But, if we were to adopt the rule of strict construction of this statute for which respondent contends on the authority of McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, and similar cases, it would not avail her.

The statute refers to vehicles "moving upon any of the public highways" and to guests injured "while so riding". Here the conceded facts are that the vehicle was moving on the highway at the time of the injury and that respondent was riding on the running board at the time. The statute does not require that the driver shall be in the front seat with his hands on the steering wheel and his foot on the accelerator. Nor does it require that the guest be seated upon one of the cushioned seats provided for that purpose. The strict construction of the statute which would require that the vehicle be moving at the time cannot legislate into the statute any particular manner of movement or any particular method or form of riding. And, since the respondent concedes that these elements of the statute were present, her case falls clearly within the terms of the statute as written. This court must take it as written.

Respondent relies upon Moreas v. Ferry, 135 Cal.App. 202, 26 P.2d 886, but the distinction is clear. There the plaintiff had accepted a ride as a guest and without compensation, but, after the parties had reached their destination and were preparing to return home, the defendant was unable to start his car and asked the plaintiff to "crank" it for him. In performing this service the plaintiff was injured, and the court, apparently basing its ruling on the theory that this was a service to the owner, held that the passenger was not then a guest "without compensation". Similar authorities in this and other jurisdictions might be cited where the question of what is "compensation" under these statutes has arisen, among which are McCann v. Hoffman, supra, page 285, 70 P.2d 909; Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Christ v. O'Neil, Cal.App., 83 P.2d 96. But the respondent concedes that no compensation was paid for the ride, and such concession brings her squarely within the statute. No evidence has been offered to show wilful misconduct, and that claim having been abandoned in the amended complaint, it follows that respondent has not made a case for recovery under the statute. For these reasons the motion for a directed verdict should have been granted.

The judgment is reversed, and the cause is remanded with directions to enter judgment for the defendant.

I concur: STURTEVANT, J.

I concur in the judgment: SPENCE, J.

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31 Cal.App.2d 161

In re GREUNER'S ESTATE.

GREUNER v. WELLS FARGO BANK & UNION TRUST CO.

Civ. 10361.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1939.

1. Wills ⚿303(6)

Failure to call subscribing witness to contested will is circumstance to be considered on question of undue influence, but not fatal to contestant's cause, if evidence of undue influence is presented.

2. Wills ⚿164(7)

Testator's age and health and time elapsing between execution of contested will and testator's death are important circumstances to be considered, but not entirely controlling, on question of undue influence.

3. Wills ⚿155(1)

To invalidate will, undue influence must have been used with intent to violate legal or equitable rights and for improper purpose, such as destruction of testator's desire, intention and determination at time and in very act of making will.

4. Wills ⚿158

A party using undue influence over testator need not be present in person at time of execution of will to invalidate it, if such influence is present to constrain testator from exercising his free will.

5. Wills ⚿166(12)

Evidence of use of undue influence over testator may be circumstantial, but there must be substantial proof of pressure which overpowered testator's will.

6. Wills ⚿155(1)

The mere fact that testator was influenced by arguments or entreaties of another is insufficient to constitute undue influence, but pressure must have reached point where testator's mind gave way before it, so that his action in response thereto did not represent his conviction or desire, but that of another.

7. Wills ⚿155(1)

The true test of undue influence invalidating will is whether it overcame testator's will without convincing his judgment.

8. Wills ⚿324(3)

Whether testator's wife exercised undue influence over him *held* for jury under evi-

dence in his son's contest of will bequeathing testator's entire estate to wife with provision for equal division thereof among his children if she predeceased him.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Proceeding by Philip Greuner to contest William M. Greuner's will, filed for probate by the Wells Fargo Bank & Union Trust Company, executor. From a judgment of nonsuit, contestant appeals.

Reversed.

Alfred Nelson, of Oakland, for appellant.

Heller, Ehrman, White & McAuliffe and Martin Minney, Jr., all of San Francisco, for respondent.

WARD, Justice.

The sole question presented on this appeal from a judgment of nonsuit is whether or not there was presented sufficient evidence to entitle the contestant Philip Greuner, in a contest to the probate of his father's will, to the submission to the jury of the issue of undue influence.

The evidence shows that for many years the decedent W. M. Greuner had engaged extensively in the operation of real estate holdings. Decedent resided in friendly relations with his wife and five children. In 1931 he permitted his wife, Louise P. Greuner, to read a will that he had made providing bequests for his wife, children, relatives and numerous other parties. This will had evidently been made four or five years prior to 1931 and at a time when Greuner's real estate holdings, etc., were worth from five to ten million dollars. In 1932 the estate was probably worth less than two million. On May 24, 1932, Greuner executed a will under the terms of which all of his estate was bequeathed to his wife, with the provision that should the wife predecease him the estate should be divided equally among his children. Respondent herein, Wells Fargo Bank and Union Trust Company, was named executor. Appended to the will is a written election signed by the wife to take under the will and a waiver of her interest in the community property disposed of by the will. In 1934, possessed of three small pieces of property only, Greuner died at the age of forty-seven years. The last will was filed for probate and resulted in this contest by the eldest son Philip.

[1, 2] No evidence was introduced supporting the first two grounds of contest, namely, lack of testamentary capacity and that the will had not been properly executed and hence may be disregarded. Supporting the allegation of undue influence exercised by the wife, the following testimony appears: That at the time the will was executed testator's possessions were dwindling and decedent was greatly worried and distressed. The subscribing witnesses to the will were not called. Respondent contends that, in the absence of any evidence from the attesting witnesses, this court may properly conclude that the judgment of nonsuit was properly granted. The failure to call a subscribing witness to the execution of a will is a circumstance to be considered (Estate of Higley, 64 Cal.App. 664, 222 P. 626; Estate of McDonnell, 109 Cal.App. 577, 293 P. 651), but is not fatal to a contestant's cause if evidence of undue influence is presented. Likewise the age, condition of health, and the period of time elapsing between the date of the execution of the will and the date of death of the testator are important circumstances to be considered, but are not entirely controlling. Estate of Doolittle, 153 Cal. 29, 94 P. 240.

[3-7] Undue influence, if used, must be with the intent of violating a legal or an equitable right; an influence used for an improper purpose, such as the destruction of the desire, intention and determination of the party at the time and in the very act of making the testament. The party using the undue influence need not be present in person at the time of the execution of the document if the influence is present to constrain the party from exercising his free will. The evidence of the use of undue influence need not be direct. It may be circumstantial, but there must be substantial proof of pressure that overpowered the will of the testator. Estate of Donovan, 140 Cal. 390, 73 P. 1081; Estate of Rickey, 64 Cal. App. 733, 222 P. 628; Estate of Hamburger, 126 Cal.App. 455, 464, 14 P.2d 802; Estate of Short, 14 Cal.App.2d 258, 58 P.2d 186; Estate of Grant, 8 Cal.App.2d 232, 47 P.2d 508; Estate of Finkler, 3 Cal.2d 584, 46 P. 2d 149; In re Hess's Will, 48 Minn. 504, 51 N.W. 614, 31 Am.St.Rep. 665. In this case the wife was present at the time of the execution of the will. The rule is well stated in Estate of Anderson, 185 Cal. 700, 707, 198 P. 407, 410: "The mere fact that one person has been influenced by the arguments or entreaties of another is not enough

to make the influence an undue one. It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person, taken in response to the pressure, does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another. As was said in Estate of Donovan, 140 Cal. 390, 394, 73 P. 1081, quoting from Chaplin: 'The true test of undue influence is that it overcomes the will without convincing the judgment.' "

[8] Louise P. Greuner, the widow, testified as follows:

"Q. Now, Mrs. Greuner, between you and Mr. Greuner throughout your married life, and particularly in later years, there was a very deep and confidential relationship, was there not? A. Yes, there was.

"Q. And is it not true, also, Mrs. Greuner, that during the spring of 1932 he was very much worried and distressed over his financial difficulties? A. Very much.

"Q. He was broken down and somewhat impaired physically and mentally, was he not? A. Very much worn and tired by all.

"Q. So he did not during that time have the same force and energy and determination that he had in his more active years, did he? A. No, he did not.

"Q. And is it not true that when you talked to him about this question of the will he would very often, if not always, become rather irritated by your discussion of it? A. Yes, that is true.

"Q. You repeatedly got after him on every trip you were away from home, did you not? A. I did until I finally won out.

"Q. But on each of those occasions he was very greatly irritated about bringing up the thought of changing that will. Isn't that so? A. Yes.

"Q. You mean over the Saturday and Sunday of that week end? A. Yes.

"Q. That was the last time you argued with him over the question of changing that will? A. I think it was.

"Q. And is it or not true then that he then told you that to change the will and write the will that you wanted was contrary to his judgment, in substance and effect? A. I think he did.

"The Court: Q. Well, did he say he would change the will finally? A. He did.

"Q. Then it was not contrary to his judgment, was it? A. I think it was, but I think he did it to satisfy me at the time."

"Q. You wanted it that way? A. Yes.

"Q. And he did not want it that way? A. No.

"The Court: Q. What did he say about it? A. I don't think he thought it was necessary to change it.

"Q. What did he say about it? A. He said it wasn't necessary."

"A. Well, he always said that there wasn't a doubt but that he would get back all that he had lost; that other property he had was just as valuable. He had an indomitable amount of energy in this business, so he took a good deal of wearing down in the changing of his will, but it had to be changed."

"Q. And he said he would make his will in that manner? A. He never was entirely pleased over the thought, though.

"Q. Well, he did say he would do that, didn't he? A. To quiet me."

"Q. Why, may I ask, when this matter came up, did you not call this matter to the attention of Mr. Bingaman rather than to Mr. Clark? A. Why I think the idea was that an absolute stranger would be the person that we would go to at the time.

"Q. Well, isn't this also true, that you thought possibly Mr. Bingaman would make some resistance on his part? A. Very probably would have been some. * * *

"Q. But the thought that you had in mind at the time was that you might have some difficulty getting that prepared in the manner you desired by Mr. Bingaman, and a total stranger would not? A. Well, a total stranger wouldn't know any of the former setup at all.

"Q. You took that into consideration, did you not? A. Why, yes."

That there was evidence that pressure influenced decedent appears in the testimony of Philip Greuner:

"Q. And what was the conversation in substance and in effect? A. Dad told me that we had come over to San Francisco for the purpose of making a new will, that Mother had been after him for a long time to do so, and that while it was not his judgment to do it, he was doing it that way now and that is why they were here, and they were going up to Mr. Clark's office to accomplish that result. He explained that she wanted everything left to her and that that was not his desire in the matter, but that that was the way she wanted it and in order to accomplish the result of pleasing her, he was doing it that way.

"Q. Did he say anything else about her at that time, anything mentioned as to any conversation that he and she had had in the past? * * * A. In substance he said that she had been after him for a long time to do it and that he was perfectly satisfied with things as they were, but that because of her insistence and her constant bringing up and discussion of the matter, he was making the new will to free himself from that pressure, so to speak, of her."

On the issue of undue influence there was evidence from which a reasonable inference might be drawn that the will was more favorable to the wife than the first will, and direct evidence that the procurement of the will offered for probate was the result of improper, persistent persuasion. In substance and effect the will was contrary to the judgment of the testator. This issue should have been submitted to the jury.

The judgment on the order of nonsuit is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

31 Cal.App.2d 312

SCHUBKEGEL et al. v. DUNN.

Civ. 12090.

District Court of Appeal, Second District, Division 2, California.

March 2, 1939.

Hearing Denied by Supreme Court May 1, 1939.

1. Appeal and error 🔑931(1)

On plaintiffs' appeal from judgment in favor of defendant, reviewing court was under duty to examine evidence in light most favorable to defendant.

2. Automobiles 🔑245(90)

In motorcycle guest's action against motorist for injuries sustained when motorcycle collided with automobile at intersection, where guest was riding on seat and operator of motorcycle rode on gasoline tank, question whether accident was proximately caused by violation of ordinance relating to positions when riding on motorcycle was for jury.

3. Automobiles 🔑246(22)

In motorcycle guest's action against motorist for injuries sustained in intersectional collision between automobile and motorcycle, instruction on unavoidable accident was not error.

4. Appeal and error 🔑1050(1)

In motorcycle guest's action against motorist for injuries sustained in intersectional collision, admission of motorist's personal report to police department after accident, which stated that motorist was practically stopped at time of impact, although error, was not reversible, in view of other evidence that motorist had stopped at time of impact. St.1935, p. 173, § 488.

5. Appeal and error 🔑201(2)

Question of impropriety of attitude and utterances of trial court could not be raised for first time on appeal.

6. Appeal and error 🔑201(2)

Any error based on allegedly prejudicial attitude and utterances of trial court should have been called to trial court's attention and request made for instruction to disregard such remarks.

7. Trial 🔑105(6)

Court may, of its own motion and in interests of justice, exclude incompetent and inadmissible evidence.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Conrad Schubkegel, a minor, by Andry Schubkegel, his father and guardian ad litem, and Andry Schubkegel, against E. B. Dunn to recover for injuries sustained when a motorcycle on which the minor plaintiff was riding collided with defendant's automobile. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Irwin H. Roth, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellants.

C. F. Jorz, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

[1] This is an appeal by plaintiffs from a judgment entered upon the verdict of

a jury in a case arising out of a motor vehicle collision. It is the contention of the plaintiffs that the court erred in giving certain instructions to the jury and in refusing other instructions and in its conduct and demeanor before the jury during the progress of the trial. It is our duty under the circumstances to examine the evidence in the light most favorable to the defendant.

The accident occurred at the intersection of Twenty-fourth and Catalina streets between an automobile owned by the defendant and a motorcycle owned and driven by one who is not made a party to the action. The plaintiff, Conrad Schubkegel, was a passenger on the motorcycle. The defendant was driving his automobile in a northerly direction on Catalina street in the lane of travel ten feet out or west of the curb on his right, and when he entered the intersection he was going at a speed of 15 or 17 miles per hour. Before reaching the southerly curb line of Twenty-fourth street, the defendant looked to his left and observed that there was no eastbound vehicular traffic. He then looked to his right and observed a motorcycle upon which plaintiff was riding. The motorcycle was then 70 or 100 feet east of Catalina street and proceeding westerly on Twenty-fourth street at a speed of 30 miles per hour. The defendant observed nothing about the manner in which the motorcycle was being driven that caused him to drive other than normally across the street, so he continued through the intersection, but another occupant in defendant's automobile did observe that when the motorcycle was 80 feet east of the intersection both the boys on the motorcycle were laughing, and the driver of the motorcycle had his head turned to the side or south. When the front end of defendant's automobile was crossing the streetcar rails on the north half of Twenty-fourth street, the defendant heard quite a noise to his right and again looked right and saw the motorcycle within a few feet away. The defendant immediately applied the brakes and brought his automobile to a complete stop before the impact. The motorcycle swerved to the right or north, and after striking the front bumper and right front fender of the defendant's automobile came to a stop near the northwest corner of the intersection. There was only one seat on the motorcycle and two persons were riding on said motorcycle. The plaintiff was riding the seat and the owner and driver was forward, riding the gasoline tank. There was introduced into evidence section 80.27 of the Los Angeles Municipal Code, which reads as follows: "Riding on motorcycles and bicycles: The person operating a motorcycle or bicycle shall not ride other than upon the permanent and regular seat attached thereto, nor carry any other person upon such motorcycle or bicycle other than upon a firmly attached seat to the rear of the operator, nor shall any person ride upon a motorcycle or bicycle other than as above authorized."

The court gave an instruction which read to the effect that if you find from the evidence that the operator of the motorcycle and the plaintiff Conrad Schubkegel violated the foregoing ordinance, and if you find that such violation, if any, was a proximate and contributing cause of the accident, then the plaintiff cannot recover.

[2] The plaintiffs' first and primary contention is that the court erred in giving this instruction because the plaintiff's position on the motorcycle had nothing whatever to do with the occurrence of the accident and that from the manner of the collision such plaintiff would have been injured in any event, whatever character of seat on the motorcycle he might have been occupying. In our view the questions whether in view of the fact that there was only one permanent seat on the motorcycle and that by reason of the cramped position which the driver was forced to occupy in front of his regular holds and leverages, the handling of the motorcycle was seriously impeded and such impediment was apparent to an ordinarily prudent person seated in the position of the plaintiff, were questions of fact to be submitted to the jury. The instruction itself was proper and followed the rule announced in Lorry v. Englander, etc., Co., 108 Cal.App. 116, 291 P. 467. See, also, Schultheiss v. Los Angeles Railway Corp., 11 Cal.App.2d 525, 54 P.2d 49, and Reeves v. Lapinta, 25 Cal.App.2d 680, 78 P.2d 465.

[3] It was not error to give the instruction on unavoidable accident. Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 297, 77 P.2d 311; Pearce v. Elbe, 98 Cal. App. 101, 105, 106, 276 P. 389.

[4] The plaintiffs contend that the court erred in giving several other instruc-

tions and in the refusal to give certain instructions which were requested by the plaintiffs. But in our view said instructions were correctly given and the refusal to give the instructions asked for by the plaintiffs was proper either because they are not correct in law or because the theory presented by them was correctly given elsewhere.

The court admitted into the evidence over the objection of the plaintiffs the defendant's personal report made to the police department after the accident. The plaintiffs contend that this was reversible error, citing section 488 of the Vehicle Code, (St.1935, p. 173), which provides in effect that no such report shall be used as evidence in any trial arising out of an accident, and upon the further ground that no one may make evidence for himself. The only part of the report which it is claimed was prejudicial was the statement, "He [defendant] was practically stopped at time of impact." It was error to admit this report into the evidence, but not reversible error. There was other substantial evidence establishing the fact that the defendant was in fact stopped at the time of impact. The defendant himself testified, "I stopped. I believe I was at a complete stop at the time of the impact." And Mrs. Dunn, who was an occupant of defendant's car, testified in this regard that, "I would say our car was absolutely still." The jurors would understand that the defendant's statement in the report was no better than and did not improve upon his statement on the witness stand. The admission of such erroneous testimony would not justify a reversal of the case. Perumean v. Wills, 8 Cal.2d 578, 67 P.2d 96; Conner v. East Bay, etc., Dist., 8 Cal. App.2d 613, 47 P.2d 774, 48 P.2d 982.

[5, 6] Next the plaintiffs contend that the attitude and utterances of the court throughout the trial were prejudicial to the plaintiffs' case and deprived them of a fair trial by conveying to the jury an impression of the court's bias and opinion against them and their case and their contentions therein. The plaintiffs do not show that any of the rulings or remarks of the trial court were excepted to or that a request was made to the trial court to instruct the jury to disregard the alleged erroneous remarks. This question cannot be raised for the first time on appeal. Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 77 P.2d 311. There is little in the court's conduct of which to complain. If the court erred in this regard his attention should have been called to it and a request made for him to instruct the jury to disregard his remarks. Such an instruction would have obviated the alleged misconduct.

[7] Finally, the plaintiffs complain because the court sustained objections not interposed by counsel for the defendant. This objection is not tenable. It is the law that the court may in the interests of justice exclude incompetent and inadmissible evidence. Bodholdt v. Garrett, 122 Cal.App. 566, 10 P.2d 533; Parker v. Smith, 4 Cal. 105.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

WRIGHT v. LOS ANGELES RY. CORPORATION et al.*

Civ. 11684.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1939.

Hearing Granted by Supreme Court April 27, 1939.

1. Street railroads 🔑81(4), 99(1)

Except that a street car runs only on tracks laid for it, and therefore has a better right to that portion of street upon which it travels, it is generally recognized that duties of a motorman on approaching an intersecting street and those of a motorist about to cross the tracks are reciprocal and that each is required to approach with due regard for the rights of the other.

2. Street railroads 🔑81(4), 99(1)

Whether street railroad company or motorist is responsible for crossing collision must be determined by the factual situation of each case.

3. Street railroads 🔑99(7)

Woman motorist who made left-hand turn in front of approaching street car traveling on private right of way *held* contributorily negligent.

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*For subsequent opinion see 93 P.2d 135.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid and Fletcher Bowron, Judges.

Action by Olive Wright against Los Angeles Railway Corporation and another for personal injuries sustained by plaintiff as result of collision between her automobile and streetcar. From a judgment for $7,500 for plaintiff, the defendants appeal.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for appellants.

Ira J. McDonald, of Los Angeles, for respondent.

YORK, Presiding Justice.

A jury returned a verdict in favor of respondent for the sum of $7,500 damages for personal injuries sustained by her as the result of a collision between her automobile and a street-car of appellant corporation which was being operated by appellant Sherman. From the judgment thereafter entered in accordance with said verdict, this appeal is prosecuted.

The collision occurred between the hours of one and two o'clock in the afternoon of October 12, 1936, at the intersection of Fifty-seventh street and Pacific boulevard, which is located in a business district in the city of Huntington Park, where appellant corporation operates an electric street-car line upon its own private right of way. At the time and place in question, appellant Sherman was operating an electric car southerly along said private right of way in the center of Pacific boulevard in the block north of Fifty-seventh street. Respondent likewise was operating her automobile in a southerly direction along the west side of Pacific boulevard adjacent to and parallel with the street-car tracks. When respondent reached Fifty-seventh street she made a left-hand turn in an easterly direction across the southbound tracks of said electric railway where the collision occurred.

At the close of respondent's case and again at the end of the trial, appellants challenged the sufficiency of the evidence by moving for a judgment of nonsuit and for a directed verdict, respectively, which said motions were denied, as was also appellants' motion for a new trial.

It is here contended that the court erred in denying the motions for nonsuit and directed verdict for the reason that respondent was guilty of contributory negligence as a matter of law and was not entitled to have her case submitted to the jury. It is further contended that the court erred in its instructions to the jury.

It was stipulated between counsel for the opposing parties hereto that at the time the accident occurred, an ordinance of the city of Huntington Park was in full force and effect providing that it should be unlawful to operate any street-car at a speed greater than 15 miles per hour in business districts. It was also stipulated that the district from Fifty-sixth street southward to Fifty-seventh street is a business district; that from Fifty-seventh street to Fifty-eighth street is a school zone and on the south side of Fifty-seventh street across Pacific boulevard there is a marked school crossing.

Appellants urged that the evidence is wholly insufficient to sustain the verdict for the reason that said electric railway tracks are laid upon a private right of way and are utilized by an interurban electric street-car line, and therefore presents a situation to which the rule of the steam railroad, requiring respondent to stop, look and listen before attempting to cross said private right of way, is applicable. Huntington Park is a suburb located southerly of the city of Los Angeles, and the record reveals that the car line in question is the ordinary "yellow" car line operated by appellant corporation throughout the city of Los Angeles and its environs, and that the only basis for the application of the so-called steam railroad rule is that said car line connects the city of Los Angeles and the city of Huntington Park and is maintained upon its own private right of way through the particular district in question.

It appears from the bill of exceptions upon which this appeal is presented that respondent, according to her own testimony, was proceeding south along Pacific boulevard and when about half a block north of Fifty-seventh street she gave a signal for a left-hand turn and then dropped her hand to indicate that she was stopping at the intersection. She then came to a full stop, shifted into low gear and made a signal for a left-hand turn. As she started into the intersection she looked back along the side of her automobile and saw the street-car which, so she testified, had not entered the intersection of Fifty-sixth street (which was an entire block to the north). She then shifted to second gear, gave her signal for a left-hand turn and proceeded to make such left-hand turn across the tracks. When she had almost crossed said tracks and the rear wheels of her automobile were just about in the center thereof, she heard a bell ring, whereupon she looked around and saw the street-car just a few feet from her automobile. She said that there was then no time to do anything and it was just an instant until the car struck her. She testified that she was driving at a speed of 15 miles per hour prior to the time she stopped at the intersection, and around 10 miles per hour when she was struck. From the time she stopped until she started to make her left-hand turn across the tracks, except when she shifted gears and looked back, she was observing a northbound street-car which had stopped at the southeast corner of the intersection as well as an officer with some children standing at the said southeast corner. She testified that the point of impact was in the center of the intersection. A witness for respondent testified that the point of impact was 15 feet south of the paved portion of the right of way on the north side of the crossing. (Fifty-seventh street is 40 feet wide.) A passenger on the southbound street-car which was involved in the collision testified that the impact took place about the center of Fifty-seventh street, about the middle of the intersection; that when he first noticed the automobile it was a block north of Fifty-seventh street and was running along parallel with the street-car and that both were traveling about 18 miles an hour; that about 100 feet from Fifty-seventh street the automobile speeded up and the street-car slightly slackened its speed; that the automobile arrived at the intersection 12 or 15 feet ahead of the street-car.

Another witness testified that when the car entered the intersection it was going between 15 and 17 miles an hour, although when it was half a block north of Fifty-seventh street its speed was 30 miles an hour. Another witness, who was a passenger on the street-car, testified that midway in the block the street-car was traveling at a speed of 18 miles an hour and slowed down at the crossing to about 12 or 14 miles; that he saw the automobile when it turned from a southerly to an easterly direction and that there was approximately 20 feet between the front of the street-car and the automobile when the automobile got on the tracks after it made the turn; that when the automobile started to turn, the motorman rang the bell and applied the brakes; and that the car and automobile traveled almost across the intersection after the impact. Said witness on cross-examination testified that for half a block north of Fifty-seventh street the automobile was practically even with the street-car until the latter started to slow down for the intersection when the automobile passed the street-car and made the left turn; when the automobile entered the intersection of Fifty-seventh street, the street-car was approximately 20 feet north thereof; that he felt the brakes applied when the street-car was about 20 feet from the automobile and that the impact took place approximately south of the center of Fifty-seventh street.

The appellant Sherman, who was operating the street-car at the time of the collision, testified that when the street-car was about half a block north of Fifty-seventh street he saw the automobile traveling south in Pacific boulevard midway of the safety zone; that the street-car was traveling at about 20 miles per hour and that the automobile was just barely moving. When he first saw the automobile on the track in front of him, it was about 10 feet from the front end of the street-car; that the street-car continued at about the same speed, to-wit, 15 to 20 miles. From the time he saw the automobile back in the middle of the block until it reached the intersection, appellant was watching it to see what move it was going to make. "There was no hand signal whatever and I didn't think she was going to whirl right around in front of the street-car, right in front of the private right of way, which was done. * * * When I observed the automobile on the track in front of the street-car I threw off the power and tried to stop as soon as I could." However, he testified that he did not slow the speed of the street-car any from the time he first saw respondent's machine in the middle of the block until it reached the intersection. He also testified that as respondent started across the tracks she was not moving at a speed greater than about a mile an hour—"just barely moving around the corner"; that the street-car was about 10 feet from the corner when he observed respondent making a left-hand turn; that he watched the automobile from the time it was opposite the loading zone on Pacific boulevard, before stopping at the intersection, until it crossed in front of his car. "I saw it all the time, as I said a while ago. I saw it from the time it was going right along there by the safety zone until it swung right around in front." Also, "when I first saw it on the track, the left side of the automobile was right up against the south end of the loading zone".

[1, 2] Except for the fact that a street-car runs only upon the tracks laid for it, and therefore has a better right to that portion of the street upon which it travels to which others must yield when necessary, it is generally recognized that the duties of a motorman on approaching an intersecting street and those of a driver of an automobile about to cross the tracks at such intersection are reciprocal, and each is required to approach with due regard for the rights of the other. The question as to whether the defendant company or the driver of the vehicle is responsible for a collision must be determined by the factual situation of each individual case.

[3] The record herein reveals facts from which it must obviously be concluded that respondent was guilty of contributory negligence which proximately caused the accident herein. The evidence stands uncontradicted that respondent traveled parallel with the street-car until she was within half a block of Fifty-seventh street at which time she passed the car and reached the intersection something like 20 feet ahead of it, having seen the said street-car and knowing that it was also approaching the said intersection. While it is true that she stopped when she reached the intersection and, as she started to turn, was watching a street-car which was also nearing the intersection from the opposite direction, nevertheless, she continued without looking to see in how close proximity to the intersection the said street-car then was until she was directly upon the tracks and the car too close to be avoided.

This evidence convinces us that reasonable people could draw only one conclusion, namely, an inference pointing unerringly to the fact that had respondent used ordinary care for her own safety and looked immediately prior to driving upon the street-car tracks, the accident would have been prevented and she would not have been injured. Grandy v. Southern Pacific Co., 9 Cal.App.2d 441, 443, 49 P.2d 1127. The testimony here shows beyond question that respondent was negligent in driving upon the tracks of the railway company directly in front of an oncoming street-car which was plainly in view at the time she made the left turn and proceeded upon the tracks had she chosen to glance in the direction of the car which she had passed only a short time prior thereto. In Moss v. Boynton Co., 44 Cal. App. 474, 476, 186 P. 631, 632, it was said: "It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away." This statement was based upon the holding in Sheldon v. James, 175 Cal. 474, 479, 166 P. 8, 2 A.L.R. 1493, and has been followed without disagreement in subsequent cases. Wright v. Foreman, 86 Cal.App. 595, 604, 261 P. 481; Bullock v. Western Wholesale Drug Co., 91 Cal. App. 369, 372, 266 P. 978; Chase v. Thomas, 7 Cal.App.2d 440, 444, 46 P.2d 200; Deike v. East Bay Street Railways, Ltd., 7 Cal.App.2d 544, 550, 46 P.2d 812; Finkle v. Tait, 55 Cal.App. 425, 432, 203 P. 1031; Horton v. Stoll, 3 Cal.App.2d 687, 690, 40 P.2d 603; Koeppel v. Daluiso, 118 Cal.App. 442, 448, 5 P.2d 457. This, of course, does not mean that it is a duty to look one way and to continue so to look, but rather to look in the direction or directions of anticipated danger, and to continue to be alert to safeguard against injury. Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518. In the instant case respondent being aware of the approaching car, was required to look in the direction from which it was coming before placing herself in a position of danger by driving on to the tracks upon which the street-car was traveling.

The facts in the instant case differ from those in a case where the driver of an automobile traveling along an intersecting street attempts to cross street-car tracks at a right angle. In such a case, the motorman is at least put on notice that the automobile may attempt to cross the intersection in front of his car. Here, however, respondent made her left-hand turn in front of the approaching car deliberately moving from a position of safety to one of danger, at a time when the motorman was justified in believing that she would continue to wait until his car had passed.

The motion for directed verdict should have been granted. The judgment is therefore reversed.

We concur: DORAN, J.; WHITE, J.

31 Cal.App.2d 279

TUTTLE et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 10985.

District Court of Appeal, First District, Division 2, California.

March 1, 1939.

1. **Workmen's compensation** 🔑459

The children of deceased employee were entitled to benefit of conclusive presumption that they were wholly dependent, as respects right to compensation, but children by a former marriage of deceased employee's second wife were not entitled to that presumption. St.1937, p. 268, § 3501.

2. **Workmen's compensation** 🔑459

Whether children by a former marriage of deceased employee's wife who were in good faith members of employee's household were wholly dependent or only partially dependent upon employee was to be determined under facts shown by evidence without aid of any presumption. St.1937, pp. 268, 269, §§ 3501–3503.

3. **Workmen's compensation** 🔑462

Where earnings of both deceased employee and his second wife, whose wages comprised about one third of total amount earned, were used in supporting wife's children by a former marriage, children were not "wholly dependent" as respects right to compensation. St.1937, pp. 268, 269, 285, §§ 3501–3503, 4703.

[Ed. Note.—For other definitions of "Wholly Dependent," see Words & Phrases.]

Proceeding by Richard Lee Tuttle and another, minors, by their guardian ad litem, Edward Scott, against the Industrial Accident Commission of the State of California and others to annul a compensation award of the Industrial Accident Commission.

Award annulled.

Edmund Scott, of Redwood City, for petitioners.

Everett A. Corten, Atty., Industrial Accident Commission, and Eldon B. Spofford, Asst. Atty., Industrial Accident Commission, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioners are the children of Ray W. Tuttle, the deceased employee. Respondents Eugene Keith Trautman and Lorraine O'Neil Trautman are not the children of said deceased but are the children of Rilla May Tuttle. The respondent commission found that all four of said children were wholly dependent upon said deceased and in effect divided the death benefit equally among them under the provisions of section 4703 of the Labor Code, St.1937, p. 285. Petitioners seek to annul said award claiming that there was no evidence to support the finding that the Trautman children were wholly dependent upon the deceased.

Said deceased had married Della C. Tuttle in Kansas in 1928. Petitioners were born of that marriage and were of the ages of eight and five years respectively at the time of the hearing. Said deceased and Della C. Tuttle separated in 1935 and although the wife commenced a divorce action, no decree was ever obtained. In 1936, deceased married Rilla May Tuttle in Nevada. She was formerly married to one Trautman and the Trautman children were the issue of her former marriage. They were of the ages of eighteen and thirteen years respectively at the time of the hearing. The Trautmans had been divorced and the wife (said Rilla May Tuttle) had accepted $1,000 in a property settlement and had agreed to support said Trautman children. She was employed and supporting her children at the time of her marriage to the deceased in 1936 and was practically continuously employed thereafter up to the time of the death of said deceased in July, 1938. Said Rilla May Tuttle, together with her children (the Trautman children) had been living with deceased in Oakland for sometime prior to his death.

[1, 2] No claim is asserted in this proceeding on behalf of either Della C. Tuttle or Rilla May Tuttle. The controversy is solely one involving the respective rights of the Tuttle children, the petitioners, and the Trautman children, the respondents. It is conceded by respondents that the Tuttle children were entitled to the benefit of the conclusive presumption that they were wholly dependent (Labor Code, section 3501, St.1937, p. 268), and that the Trautman children were not entitled to the benefit of said presumption. On the other hand, petitioners do not question the claim that the Trautman children were in good faith members of the household of the deceased within the meaning of section 3503 of the Labor Code, St.1937, p. 269. It therefore appears that the question of whether the Trautman children were wholly dependent or only partially dependent upon the deceased was one to be determined in accordance with the facts as shown by the evidence and without the aid of any presumption. Labor Code, sec. 3502, St.1937, p. 269.

One further observation should be made before discussing the testimony relating to the issue of dependency. It is conceded by respondents that the respondent commission did not purport to make the award under the powers granted to the commission by section 4704 of the Labor Code, St.1937, p. 285, and that the award was based solely upon the finding that the Trautman children were wholly dependent.

[3] There appears to be no real conflict in the evidence relating to the extent of the dependency of the Trautman children. The evidence on this issue is found mainly in the testimony of said Rilla May Tuttle. It appears that both the deceased and said Rilla May Tuttle worked and earned money; that all of the earnings of both were used for the support of said parties and the Trautman children; that the employment of Rilla M. Tuttle was at least as steady as that of deceased; that the deceased "averaged from $30.00 to $45.00 a week; that is the year previous"; that in his last position, held for several months before the accident, he worked by the hour and his wages varied; that he earned the following amounts during said months: March $30, April $124.45, May $131.90 and June $154.48; that said Rilla May Tuttle averaged between $16 and $18 per week as a laundry marker and distributor. The foregoing evidence is entirely in harmony with two other statements of the witness Rilla May Tuttle, one of which was to the effect that deceased supported her and her two children and the other of which was to the effect that she used her own earnings to help support herself and her two children. It was simply a case where two wage-earners were jointly supporting four persons including themselves by contributing all of the earnings of both wage-earners to that purpose. The wages of the deceased averaged about two-thirds of the total amount while the wages of Rilla May Tuttle averaged about one-third of the total amount.

Under the circumstances, we are of the opinion that the finding that the Trautman children were wholly dependent upon the deceased finds no support in the evidence. The uncontradicted evidence showed that their mother steadily contributed substantial sums toward their support and therefore their dependency upon the deceased was not more than partial.

Respondents cite and rely upon the rule stated in Peterson v. Industrial Accident Commission, 188 Cal. 15, 204 P. 390, where the court said at page 18, 204 P. at page 391: "It is but a truism to say that total dependency exists where the applicants subsist entirely on the earnings of the deceased employee, but in applying this rule courts will not deprive applicants of the rights accorded total dependents, when otherwise entitled thereto, merely because of minor considerations or benefits which do not substantially affect or modify the status of the applicants toward the deceased employee." But in that case the earnings were very small and the court pointed out that the employment "was uncertain and irregular, and at best continued only through a few months of a designated period". As pointed out in the concurring opinion, the finding of total dependency could be sustained upon the ground that "the law disregards trifles". The distinction between the facts in that case and those before us is obvious and there is no room here for the application of the rule above quoted.

The award is annulled.

We concur: NOURSE, P. J.; STURTEVANT, J.

In re ALBERTSON'S ESTATE.

INMAN et al. v. PALTENGHI et al.
Civ. 10993.

District Court of Appeal, First District, Division 2, California.

Feb. 24, 1939.

Hearing Denied by Supreme Court April 24, 1939.

1. Wills 🔑55(5)

In will contest, medical testimony indicating that diseases of testatrix would probably affect her brain, and other evidence, *held* to authorize verdict for contestants.

2. Wills 🔑370

In will contest, judgment for contestants would not be reversed for failure to serve citation on all beneficiaries named in the will, where record did not disclose who were served or who were not served.

3. Appeal and error 🔑207, 719(1)
Trial 🔑133(3)

Alleged prejudicial statements and misconduct of counsel were not reversible, where either no objection was made, or objection was sustained, or there was no assignment of error or request for ruling, and court was not asked to admonish jury.

4. Wills 🔑384

In proceeding to contest will on ground of undue influence and lack of capacity, admission of declarations by beneficiary, not made within hearing of testatrix, indicating conspiracy, was not prejudicial error, where contestants had asked permission to plead conspiracy, and trial court ruled that contestants might ask for permission to amend to conform to the proof, struck out such evidence on subsequent motion, and granted judgment notwithstanding verdict on the count pleading undue influence.

5. Appeal and error 🔑105, 109, 870(2)

Orders denying motion for directed verdict and motion for judgment notwithstanding verdict are not appealable but may be reviewed on appeal from the judgment. Code Civ.Proc. §§ 956, 963.

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Appeal from Superior Court, Santa Clara County; A. Caminetti, Jr., Judge.

Proceeding in the matter of the estate of Thomasine H. Albertson, also known as Thomasine Headen Albertson, deceased, wherein Lois Elizabeth Inman and others contested probate of will, opposed by Earl L. Paltenghi, individually and as executor of the last will and testament of Thomasine H. Albertson, deceased, and another. From a judgment on a verdict, denying probate, and from orders denying motions for directed verdict and for judgment notwithstanding verdict, proponents appeal.

Affirmed.

Jackson & McCredie, of San Francisco, for appellants.

Rea, Free & Jacka, of San Jose, for respondents.

STURTEVANT, Justice.

The decedent died March 11, 1934. Later a document purporting to be her will, dated February 27, 1934, was admitted to probate. Thereafter L. E. Inman, B. F. Barnhart, V. Warren, and C. T. Headen, three sisters and a brother, being the children of Mrs. Eva Headen, the surviving widow of George Headen, deceased, who was a half brother of the testatrix, appeared and filed a contest. Two of the legatees named in the purported will appeared and answered. By its verdict the jury found (1) that the decedent was not of sound mind at the time the purported will was executed; (2) that she was not able to understand the nature of the act she was performing, to understand and see the nature and situation of her property, to remember and understand her relations to the persons who had claims on her bounty and who were affected by the provisions of said will; (3) and that the alleged will was executed by decedent while acting under undue influence. Thereafter the proponents made a motion for judgment notwithstanding the verdict. The trial court granted the motion in so far as it was based on the third division of the verdict as returned by the jury. As to the other portions of the verdict the motion was denied. Thereafter the proponents made a motion for a new trial. That motion was denied by operation of law. From said orders and judgment the proponents have appealed.

The first point made by the proponents is that the verdict is not supported by the evidence, however we think said contention may not be sustained. The contestants presented their case in such a manner as to present two different theories. They claimed the insanity of the decedent was of such a broad character as to establish mental incompetency generally. They also claimed it was a form of insanity under which the testatrix was a victim of hallucinations and delusions which had a direct influence upon the making of the will.

Taking up the first theory the record discloses that in the month of October, 1932, the decedent was about seventy years of age and was and had been for some time in ill health. Her home was on a farm adjacent to the city of Santa Clara in Santa Clara county. At that place she consulted local physicians, Dr. Beattie and Dr. Bothe. The latter caused her to be taken to the French Hospital in San Francisco where, on October 13, 1932, she was treated by Dr. Janes. Later she returned to her home but not recovered. In January, 1934, she returned to San Francisco and again consulted Dr. Janes. Acting upon his suggestion she entered the hospital again on March 1, 1934. The will under attack was an holographic will dated February 27, 1934. She died on March 11, 1934. After the death of the testatrix an autopsy was performed by Dr. Janes and Dr. J. B. McNaught. The report of the autopsy was full and complete. On the trial Dr. Janes was called as a witness by the proponents of the will. During an extended examination he made a very complete statement of the conditions he found. The autopsy disclosed the following: 1. Leukemia, myelogenic; 2. Anemia secondary; 3. Splenomegalia; 4. Hemorrhage, gastro intestinal mucosa; 5. Arteriosclerosis, general; 6. Arteriosclerosis, local, renal arteries with scars in kidney; 7. Arteriosclerosis, local aorta; 8. Tuberculosis pulmonary, apical, healed; 9. Accessory spleen; 10. Fibromyoma of uterus (calcified); 11. Atrophy of pelvic organs; 12. Appendicitis, chronic, obliterative; 13. Diverticula, large bowel, multiple. Dr. Janes testified the first seven were causes of death. He also testified as follows: The decedent called at his office on February 13, 1934. He made something of an examination and asked her to return, which she did on February 21. At that time he thought she was in a serious condition and directed her to go to a hospital. He next saw the patient on March 1, 1934, at the French Hospital. She was suffering from acute infection. She had an enlarged spleen. The enlargement was on the left side and the patient complained more or less of her stomach. He then diagnosed the case as enlarged spleen and possibility of cancer of the stomach. Prior to March 11, 1934, he saw the patient once a day and sometimes three times a day. The last two days she was delirious. The immediate cause of death was leukemia and splenomegalia, but neither one affects the mind. Leukemia is an excessive amount of white corpuscles in the blood. An excessive amount of red corpuscles would affect the mind. Splenomegalia is enlargement of the spleen but enlargement of the spleen would have no effect on the mind. The spleen manufactures white blood corpuscles and there is possibility of infection. Enlargement of the spleen is caused by infection. It could be caused by leukemia or by anemia and it is gradual. Anemia is caused by lack of oxygen. When there is a lack of oxygen the blood is affected first, then the nervous system. There are more blood vessels in the brain than in any other part of the body and with a shortgage of oxygen those blood vessels would be affected. There is a great accumulation of blood in the brain. The function of the blood is to transmit food to the different organs of the body. That is the way the body is nourished. Anemia is a decrease of red blood cells, hemoglobin, in the blood. The red blood cells carry the oxygen and when there is a decrease in them there is a decrease in oxygen which causes a general run down condition of the parts affected. The brain would be affected like any other part of the body but the nervous system is the first part of the body to be affected by a lack of oxygen and there would be a general run down condition of all the organs. Hemorrhage, gastro intestinal mucosa was an anatomical cause of death. Hemorrhage is a manifestation of leukemia at the end of it. Patients afflicted with leukemia generally have hemorrhage of the stomach before death. A hemorrhage in 1931 would indicate the patient was run down. It might be a manifestation of anemia. Gastro intestinal mucosa means the mucous membrane of the intestines or stomach. One cause of death was hemorrhage of the lining of the stomach. The first time the witness discovered the patient had hemorrhage of the stomach was when the deceased went to his office February 21, 1934. He considered the fact very serious. Arteriosclerosis general was another cause of death. That affliction is a hardening of the coat of the arteries about the body. It is the arteries losing their contractual power on account of hardening. The organs of the body get the necessary blood but it takes longer for it to get to them. It diminishes the supply of blood to the organs and causes a run down condition of those organs because they are deprived of the necessary food. Among the organs so affected would be the brain. General arteriosclerosis affects the organs of the body in the way of circulation. That means a lack of blood getting to the organs. Arteriosclerosis or anything that prevents the blood from getting to the brain would be a cause or help to be a factor of forgetfulness in old people. It would be a factor in becoming childish —more so with a person seventy years of age than a person thirty. Arteriosclerosis, local, renal arteries with scars in kidney was another cause of death. It is a general arteriosclerosis involving the kidneys. The kidneys of the deceased were affected with arteriosclerosis. Arteriosclerosis, local, aorta was another cause of death. It means the aorta artery was sclerotic. It is the principal artery of the heart. The condition is serious. It takes some few years to develop. If the aorta is affected it means the supply of blood is cut down from the organs of the body. It would cause a run down condition of the body, difficulty in breathing, making the patient feel tired and having a feeling of exhaustion. It would also cause an enlargement of the heart. Tuberculosis, pulmonary, apical, healed, was another cause of death. It means tuberculosis of the lungs, on the apex, healed. It may be an old cavity that was healed up. It might have been many years back. Tuberculosis would have a weakening condition on the body, causing a loss of weight, shortness of breath, and a general run down condition. Appendicitis, chronic, obliterated, means the patient had had chronic appendicitis but the appendix had been obliterated. There was none. Before it was obliterated the appendix would be a source of focal infection. Of the thirteen causes of death the opinion of the witness was that the primary cause was leukemia and that hemorrhage gastro intestinal and general arteriosclerosis were the secondary causes. Leukemia was the most serious. The decedent practically bled to death from the stomach. Leukemia is progressive and in the end it is a final breakdown of the mental and nervous system. That is the case when death draws near.

In support of their other theory the contestants introduced evidence of specific facts relating to the health, acts, and statements of the deceased. They introduced evidence that in 1925 she suffered a breakdown, was taken to the Livermore Sanitarium for rest and treatment, and at that time she spoke incoherently and did not recognize a friend who had known her for many years. In August, 1928, she wrote a lengthy letter regarding the acts and conduct of the members of her family. Nearly all of the statements contained in the letter were not true, but all of the statements tended to show the deceased believed the relatives mentioned were most unfriendly toward her. In 1930 her health was such that she consulted Dr. Beattie and he testified at that time she was suffering from a nose bleed which did not respond to treatment and which indicated a secondary anemia. She was feeling very badly, lost weight, and remained in the hospital about one month. In the same year she did many acts showing she was very suspicious not only of the persons about her but of outsiders, and complained that people were talking about her. She cried frequently without cause and asserted her deceased husband was hovering about her and influencing her conduct. During the same time she caused locks to be placed on her gates that people might not enter her farm. During these periods she failed to recognize her immediate neighbors and persons whom she had known for many years. In March, 1931, she was again afflicted with secondary anemia and other ailments that caused her to remain in the hospital for over two months. During that time she was somewhat irrational and in a very nervous state. While in the hospital, contrary to the instructions of the attendants, she would get out of bed and wander around in the hospital. She was ill again within a month after she left the hospital and her condition did not seem to improve. In 1928, 1931, 1933, and in the early part of 1934, she made statements to the effect that she was alone in the world and had no relatives, whereas the truth was she had several blood relatives and relatives by marriage. In 1932 she was again in the hospital complaining of the effects of a fall, but she also complained of being tired and of suffering pain in her stomach, and shortness of breath. There was also evidence that from 1925 down to the date of her death she was very penurious although she had an estate worth about $50,000. The fact further appeared that in the will under attack she left the greater part of her estate to Earl L. Paltenghi, one of the proponents. He was in no manner related to her, was only slightly known to her, but was the son-in-law of Dr. Bothe who at one time was her physician.

[1] The contestants called Dr. Will Rebec as an expert. To him they propounded a long hypothetical question. That question recited among others the foregoing facts, including the report of the autopsy. In reply the doctor testified that the decedent at the time she made the purported will was of unsound mind —she was suffering from senile dementia, that is, she was insane. Taking up each one of the afflictions set forth in the report of the autopsy the witness described its effects on the body and the effect of the diseased organs of the body on the nervous system. He described in detail the nature of arteriosclerosis; that it results in a deposit of calcium in the tissues of the arteries; that the deposit is permanent; that, in the case of the decedent, the condition was chronic, and that it was progressive. He stated such facts as would show the mentality of the patient would be lessened in proportion to the progress of the affliction and that the progress thereof depended upon all of the facts which were presented for the determination of the jury. After the cause had been submitted the jury found the facts against the proponents. Giving effect to the facts above recited, we think it is clear it may not be said the verdict was not supported by the evidence, nor that the verdict does not support the judgment.

[2] The next point made by the proponents is that the contestants failed to serve the citation on all of the beneficiaries named in the purported will. In reply to that point it is sufficient to state the record does not disclose who were served or who were not served.

[3] It is next contended that counsel for contestants were guilty of prejudicial statements and misconduct. In support of this assertion proponents quote questions asked by, or statements made by counsel for contestants. The record shows that in some instances no objection was made in the trial court. In other instances proponents made an objection and it was sustained. In other instances there was no assignment of error and the court was not asked to rule thereon. The court was not asked to admonish the jury to disregard the erroneous conduct, if any. There was no failure on the part of the court to grant a request to admonish counsel nor to rule on objections duly made. On the record as made the point may not be sustained Proponents cite and rely on People v. Edgar, 34 Cal.App. 459, 167 P. 891. But the rule in that case is not applicable to the record presented in the instant case.

[4] It is next asserted that the trial court erroneously received evidence of statements made by Dr. A. C. Bothe. That assertion arises out of the following facts. The contestants had alleged that the purported will was executed under undue influence. At an early date they announced they expected to prove that Dr. A. C. Bothe and his wife, and Earl L. Paltenghi, their son-in-law, entered into a conspiracy to obtain title to the property of the deceased and that the will was the outgrowth of said conspiracy. In presenting that theory the contestants introduced in evidence many declarations of Dr. A. C. Bothe not made within the hearing of the deceased. It is those declarations of which they now complain. There is no merit in the contention. The proponents claim the contestants had not pleaded a conspiracy and therefore said declarations were hearsay. Assuming, but not deciding, that the contestants had not pleaded a conspiracy, nevertheless, as we understand the record, they had asked permission to do so and the trial court had ruled that later they might ask for permission to amend to conform to the proof. At a later date, on motion duly made, all of the evidence complained of was stricken out. Furthermore, when a motion for judgment notwithstanding the verdict was made, the motion was granted as to the count pleading undue influence. As to the other counts the admission of the evidence complained of was wholly immaterial and nothing appears in the record showing it was prejudicial to the rights of the proponents.

Under the heading "Other Prejudicial Statements and Rulings" the proponents list "Miscellaneous Errors". We have examined the record. We find nothing therein presenting anything purporting to be prejudicial error. Furthermore, the alleged irregularities were not called to the attention of the trial court and it was not asked to rule thereon.

[5] Finally the proponents contend the trial court erred in denying the proponents' motion for a directed verdict and later denying their motion for judgment notwithstanding the verdict on the issue of unsoundness of mind. We think they are mistaken. Our reasons are clearly set forth hereinabove where we discussed the first point made by the proponents. In their notice of appeal the proponents attempted to appeal from each of the orders herein last mentioned. They are not appealable orders. Code Civ.Proc. § 963. But they may be reviewed on an appeal from the judgment. Code Civ.Proc. § 956. We have so reviewed them. Therefore the appeal from said orders should be and it is dismissed.

The appeal from the judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

WEST COAST ADVERTISING CO. v. CITY AND COUNTY OF SAN FRANCISCO.*

Civ. 11009.

District Court of Appeal, First District, Division 2, California.

March 1, 1939.

Hearing Granted by Supreme Court April 27, 1939.

1. Municipal corporations 🔑57, 64

A municipality governed by freeholders' charter has the powers expressly enumerated therein on municipal affairs and other powers on municipal affairs enumerated in ordinances duly adopted, and in other matters is subject to and controlled by general laws. Const. art. 11, § 6.

2. Municipal corporations 🔑73

The repayment or refusal to repay taxes illegally collected by municipality governed by freeholders' charter, and a suit to compel repayment, are "municipal affairs" within constitutional provision that municipality is subject to and controlled by general laws in respect to all municipal affairs not expressly enumerated in charter or ordinances. Const. art. 11, § 6.

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

3. Municipal corporations 🔑64

A statute prohibiting suit on claim against municipality not presented to and wholly or partly rejected by board of supervisors was a "general law" within constitutional provision that a municipality is subject to and controlled by general laws in respect to all municipal affairs not expressly enumerated in charter or ordinances. Pol. Code, § 4075; Const. art. 11, § 6.

[Ed. Note.—For other definitions of "General Law," see Words & Phrases.]

4. Municipal corporations 🔑977

The presentation of claim against municipality governed by freeholders' charter was a condition precedent to commencement of action for recovery of taxes illegally collected by municipality, and a complaint not alleging presentment of claim was insufficient to state cause of action for recovery of taxes so collected. Pol.Code, § 4075; Const. art. 11, § 6.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by the West Coast Advertising Company against the City and County of San Francisco, a municipal corporation, to recover taxes illegally collected. From a judgment for the plaintiff, the defendant appeals.

Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellant.

Glensor & Schofield, of San Francisco, for respondent.

Henry C. Clausen, Hartley F. Peart, Howard Hassard, Harry G. Henderson, Rufus H. Kimball, and Simeon E. Sheffey, all of San Francisco, amici in support of respondent.

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*For subsequent opinion see 95 P.2d 138.

STURTEVANT, Justice.

In an action brought to recover taxes illegally collected, the trial court made findings in favor of the plaintiff and from the judgment entered thereon the defendant has appealed.

The taxes were collected under the provisions of certain ordinances. Ordinance No. 4059 N.S. purported to regulate the business of outdoor advertising and in particular the occupation of maintaining billboards. Among other things it required the proprietor to keep books of account and it fixed a license tax in proportion to receipts. The amount of the license tax so imposed on the plaintiff was $90 per quarter. That tax it is conceded was a tax for revenue as distinguished from a tax for regulation. No contention is made that the defendant does not possess the power to tax for regulation. But the defendant admits the tax was for revenue and claims it was nevertheless legally imposed. In view of the conclusion which we have reached it is unnecessary and improper to discuss those claims.

[1-4] After the transcript was filed, and after all of the briefs had been filed, the defendant informally raised the point, and thereafter argued, that the complaint in the instant case does not state a cause of action because there is no allegation contained therein that prior to the commencement of said action the plaintiff presented a claim against the defendant as provided in section 4075 of the Political Code. Rhoda v. Alameda Co., 52 Cal. 350. The point was not made in the trial court and was first made in this court at the time and in the manner just stated. The defendant is governed by a freeholders' charter. As such it has (1) the powers expressly enumerated therein on municipal affairs; (2) other powers on municipal affairs enumerated in ordinances duly adopted; and (3) in other matters it is subject to and controlled by general laws. Const. art. 11, sec. 6. It will not be controverted that the matter of repayment or refusal to repay taxes illegally collected is a municipal affair. Fragley v. Phelan, 126 Cal. 383, 388, 58 P. 923. By the same token a suit to compel such repayment is a municipal affair. It is not claimed that any section of the charter of 1932 contains any provision expressly requiring as a condition precedent the presentation of a claim to be repaid taxes illegally collected. No ordinance to that effect is called to our attention. However there are other matters that must be considered. As just noted above, in section 6 of article 11 of the Constitution the defendant city was authorized in a charter adopted thereunder "* * * to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they *shall be subject to and controlled by general laws.* * * *" (Italics ours.) Section 4075 of the Political Code is a "general law". It was adopted in 1931. In its provisions it is very broad and comprehensive. It is long and need not be quoted. It is sufficient to state it distinctly provides that no suit on any claim shall be brought against the municipality until the claim is presented to the board of supervisors and has been rejected in whole or in part. It was held, under a similar statute, that the presentation of a claim was a condition precedent and should be alleged or a complaint based on the claim would fail to state facts sufficient. Farmers etc. Bank v. City of Los Angeles, 151 Cal. 655, 657, 658, 91 P. 795, and cases there cited. The reasoning of that case was followed by this court in a recent case, Weber v. County of Santa Barbara, 86 P.2d 1069.

Furthermore, section 3 of the charter, although it is expressed in very general terms, is in accord with what we have said. That section provides as follows: "Where a procedure for the exercising of any rights or powers belonging to a city, or a county, or a city and county is provided by statute of the state of California, said procedure shall control and be followed unless a different procedure is provided in, or by ordinance enacted under authority of, this charter".

Keyes v. San Francisco, 177 Cal. 313, 173 P. 475, is not in conflict with anything we have said. It was decided in 1918 several years before the present charter was adopted. In it the court passed on the meaning of several sections contained in the old charter but which are not contained in the present charter. It also passed on the meaning of section 4390 of the Political Code as said code was then printed. But, on page 325, of 177 Cal. 173 P. 475, it held that said section was not applicable to the city and county of San Francisco.

It is asserted that the following cases are authority to the effect that the plaintiff was not bound to comply with the provisions of section 4075 of the Political Code. Young v. Hoagland, 212 Cal. 426, 298 P. 996, 75 A.L.R. 654; Vitale v. City of Los Angeles, 13 Cal.App.2d 704, 57 P.2d 993; Home Telephone etc. Co. v. City of Los Angeles, 40 Cal.App. 492, 181 P. 100; Hartford Fire Ins. Co. v. Jordan, 168 Cal. 270, 142 P. 839; Whyte v. State of California, 110 Cal.App. 314, 294 P. 417; 3 Cooley on Taxation, 4th ed., pp. 2556–2557. No one of them deals with the point to which they are cited. In each the question discussed is as to what is an involuntary payment within the rule which authorizes the payor to recover. But no one of them otherwise discusses the conditions precedent to the commencement of an action.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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31 Cal.App.2d 338

BLEY v. DESSIN et al.

DESSIN et al. v. BLEY et al.

Civ. 10983, 10948.

District Court of Appeal, First District, Division 2, California.

March 6, 1939.

1. Partnership 🔑204

In action against partnership and members thereof, return of service of summons reciting that affiant served the summons on named persons "individually and as a partner * * * by delivering [a copy] to each of said defendants personally" showed substantial compliance with statute and was sufficient in absence of application for amendment thereof. Code Civ.Proc. § 388; § 411, subd. 7.

2. Judgment 🔑102

Where trial court had jurisdiction of subject matter and parties, default judgment against partnership rendered after amendment of pleadings was not void, since trial court had jurisdiction to determine that amendments were not so substantial as to waive default. Code Civ.Proc. § 585, subd. 2.

3. Judgment 🔑102

Before entering default judgment after amendment of pleadings, trial court should examine the pleadings and ascertain if amendments were so substantial as to constitute waiver of default. Code Civ.Proc. § 585, subd. 2.

4. Appeal and error 🔑934(3)

The reviewing court would assume, in support of default judgment granted by trial court after amendment of pleadings, that trial court examined pleadings and ascertained that amendments were not so substantial as to waive default. Code Civ.Proc. § 585, subd. 2.

5. Appeal and error 🔑113(3)

An order denying motion to quash service of summons and to vacate proceedings, including entry of default judgment thereon, was not appealable in absence of showing that the default judgment was void.

6. Judgment 🔑113

In action against partnership and members thereof, wherein no appearance was made for the partnership, attorney for plaintiff was not bound to advise attorney for individual partners, in arranging for continuance, that he intended to obtain entry of default against the partnership.

7. Judgment 🔑426

In action against partnership and members thereof, alleged error affecting default judgment against partnership, in not indorsing default on the complaint and in return of summons showing service on members as individuals, was "intrinsic," not "extrinsic," and did not authorize equitable relief against the judgment.

[Ed. Note.—For other definitions of "Intrinsic," see Words & Phrases.]

8. Appeal and error 🔑786

In action for equitable relief against judgment, appeal from judgment for defendants would be dismissed on ground that mere inspection of the transcript showed that question was unsubstantial, where claim did not show extrinsic error authorizing equitable relief. Rules of the Supreme Court and District Courts of Appeal, V, § 3.

Appeals from Superior Court, San Mateo County; A. R. Cotton and Maxwell McNutt, Judges.

Action by Ross C. Bley against H. W. Dessin and others for breach of contracts. From an order denying motion to quash service of summons and to vacate proceedings including entry of default and judgment against Dessin Bros., a copartnership, defendants appeal. Appeal consolidated with appeal by Harry W. Dessin and others, as plaintiffs in an action against Ross C. Bley and others, to restrain enforcement of the judgment, from a judgment for defendants in that action. On motions to dismiss the appeal.

Motions to dismiss granted.

E. C. Mahoney and Carl W. Anderson, both of Burlingame, for appellants.

F. E. Hoffmann, of San Mateo, and Francis Gill, of San Francisco, for respondents.

STURTEVANT, Justice.

These are motions to dismiss appeals. After the transcripts had been filed in the above-entitled actions counsel entered into a stipulation that the two appeals could be consolidated and heard and determined as one appeal.

The motion in the first case involves the following facts: On December 4, 1934, the plaintiff filed a complaint asking a judgment for moneys claimed to be due by reason of the breach of certain contracts. The summons was served on H. W. Dessin and on W. J. Dessin. Later they appeared and filed demurrers to plaintiff's complaint. The demurrers were sustained and the plaintiff filed an amended complaint. The same defendants filed demurrers to the amended complaint, which were sustained, and the plaintiff filed a second amended complaint. After that pleading had been filed the plaintiff filed with the clerk a request for a default, but the record does not show whether the clerk made the entry. Counsels' briefs assume that the entry was not made. Following the claims of counsel we will assume that such was the fact. Thereafter the attorney for the plaintiff applied to the court to enter the default of Dessin Brothers, a copartnership, and as such named as one of the defendants by the plaintiff. That application was made in open court on October 24, 1935. On the same day the trial court made an order allowing the plaintiff to make an amendment on the face of his complaint and then ordered judgment in favor of the plaintiff. Thereafter, on March 3, 1936, the plaintiff filed a formal judgment which recites the application of the plaintiff made in open court, that evidence both oral and documentary was taken, and then follows a formal judgment in favor of the plaintiff against Dessin Brothers, a copartnership, for $816.73. The summons was filed on January 21, 1935. Attached to it was a return in the form of an affidavit by M. F. Boland. That affidavit contains an allegation "that he personally served the within summons on the 4th day of December, 1934, on W. J. Dessin individually and as a partner of Dessin Brothers, a copartnership, and upon H. W. Dessin on the 5th day of December, 1934, individually and as a partner of Dessin Brothers, a copartnership, defendants herein named, by delivering to each of said defendants personally in the county of San Mateo a copy of said summons attached to a copy of the complaint in the action therein named". On the 11th day of June, 1938, Dessin Brothers served a notice that they would move "the said court to quash the service of summons, or purported service of summons heretofore made on Dessin Brothers designated in the above-entitled cause as Dessin Brothers, a copartnership, and upon H. W. Dessin and W. J. Dessin, doing business under the firm name and style of Dessin Brothers, designated in the above-entitled cause as Dessin Brothers, and to set aside and to vacate all proceedings herein based upon said purported service of summons, including the entry of default of Dessin Brothers, designated herein as Dessin Brothers, a copartnership, and judgment thereon, and said defendants will further move the court to recall and quash the writ of execution that has been issued on said judgment". That motion was denied on June 29, 1938, and a minute entry was made on that date. On July 1, 1938, a formal order to the same effect was signed by the trial judge and filed with the clerk. From that order Dessin Brothers, a copartnership, filed a notice of appeal on July 11, 1938. It is that appeal which the plaintiff has moved to dismiss as hereinabove stated.

The plaintiff contends that the appeal was taken too late. Code Civ.Proc. § 939. The defendants reply it is their contention that the judgment against the defendant Dessin Brothers, a copartnership, was void and therefore they were entitled to make their motion at any time. As we understand them they do not contend that if the judgment was not void they have any legal defense to the motion now made by the plaintiff.

[1] In contending that the judgment against Dessin Brothers was void the defendants make two separate claims. They point to the fact that the default of Dessin Brothers was not entered and that plaintiff's amended pleadings were not served on Dessin Brothers. In the second place they contend that Dessin Brothers, a copartnership, was never served with summons. We will take up the second contention first. The proof of service of the summons as recited above was an attempt, at least, to make an affidavit to the effect that such service was made. The statute authorizes the summons in such a case to be served on one or more of the partners. Code Civ.Proc. § 388. The statute defining how a summons may be served contains no specific method for serving a summons on a copartnership. But, having specified how a summons may be served on certain persons, natural or artificial, the last recital is that the summons may be served by delivering a copy thereof "in all other cases to the defendant personally." Code Civ. Proc. § 411, subd. 7. We think the affidavit of Mr. Boland shows he acted in substantial compliance with the statute. If the language used by him in his affidavit, was objectionable the return could, on a proper application, have been amended. Morrissey v. Gray, 160 Cal. 390, 397, 117 P. 438. A contention similar to that made by these defendants was before the court in the case of Colquhoun v. Pack, 28 Cal.App. 319, 152 P. 319. The court dismissed the contention with the short statement that it was and is without merit.

[2-4] Turning to the first contention made by the defendants the record disclosed that the trial court had jurisdiction of the subject-matter and as we have just shown it had jurisdiction of Dessin Brothers, a copartnership. Therefore it may not be said plaintiff's judgment was void. Gray v. Hall, 203 Cal. 306, 313, 265 P. 246. Through an abundance of precaution the plaintiff did not apply to the clerk to enter a default judgment against Dessin Brothers; but he applied to the court. Code Civ.Proc. § 585, subd. 2. All of the records and files in the action were before the trial court. Before entering a default judgment against Dessin Brothers it was the duty of the trial court to examine the pleadings and ascertain if any of the amendments made by the plaintiff were amendments of substance which constituted a waiver of the default. In support of the judgment we must assume that it did so. The conclusion which it reached under these circumstances was within its jurisdiction and its judgment may not be said to be void. In Zierath v. Superior Court, 35 Cal.App. 788, 171 P. 112, the court was considering a similar question. In that case the trial court granted the motion, whereas in this case the motion was denied. In the Zierath case the plaintiff, being dissatisfied with the order made by the trial court vacating the default judgment, applied for a writ of review. In passing on the petition in the review proceedings the District Court of Appeal of the Second District held that the trial court exceeded its jurisdiction and the order vacating the default judgment was annulled.

[5] The defendants do not call to our attention any other reason as supporting their contention that the default judgment was void. It is clear therefore that the order appealed from was not an appealable order. It follows that the motion to dismiss should be and it is hereby granted.

Dessin et al. v. Bley et al.

For an understanding of the motion presented by this appeal the following facts are pertinent. Some time prior to April 4, 1938, the exact date not appearing in the record, the plaintiffs commenced an action asking for an injunction to restrain the defendant Bley from enforcing a judgment, from selling any of the property levied on by his writ of execution based on said judgment, and that said judgment be vacated and annulled. The judgment so attacked is specifically set forth in the decision in Bley v. Dessin et al., Civil No. 10983. The record does not set forth the original complaint, the amended complaint, the demurrers interposed or the orders made thereon. It does set forth the second amended complaint, the demurrer interposed thereto, and an order sustaining said demurrer without leave to amend. It also sets forth the judgment entered pursuant to said order. From that judgment the plaintiffs have appealed.

[6] In their second amended complaint the plaintiffs recited consecutively the various pleadings filed, the motions and orders

made, and the several steps taken in the said action Bley v. Dessin et al. Except as we will presently note, there is no single allegation in the pleading alleging any ground for equitable relief. After the answers of H. W. Dessin and W. J. Dessin had been filed said action was set for trial. From time to time the trial was reset. Having recited these facts the plaintiff alleged, "that on the 17th day of October, 1935, a minute order setting said cause for trial was made by the above-entitled court, setting said cause for trial on October 24; that said Mahoney, attorney for defendants Dessin therein and the plaintiffs herein, was engaged in trials in the city and county of San Francisco, and would not be released to try said action on the 24th day of October, 1935; that said Mahoney communicated said information to said Hoffmann, attorney for plaintiff Bley and defendant herein, and requested continuance of the trial of said cause to another date". There is no allegation that prior to October 24, 1935, any appearance had been made for Dessin Brothers, a copartnership. Mr. Mahoney had appeared for them as individuals and had filed answers. When, as alleged, Mr. Mahoney asked Mr. Hoffmann for a continuance of the trial, nothing to the contrary appearing, we must assume Mr. Mahoney was speaking for his clients as the record then stood, and that Mr. Hoffmann was speaking for his client as the record then stood. There is nothing purporting to be an allegation that Mr. Hoffmann made a promise to Mr. Mahoney which caused the latter to remain away from court and that he did so remain away from court. As Dessin Brothers, a copartnership, were in default, no duty devolved upon Mr. Hoffmann to advise Mr. Mahoney that he intended to apply to the court to enter the default of Dessin Brothers, a copartnership.

[7] Conceding, without deciding, that plaintiff's second amended complaint alleged certain irregularities in the proceedings done, had, and taken in the first action, there is no allegation of any fact purporting to state any claim for equitable relief. In 15 Cal.Jur. at page 10, the author states: "Equity does not afford relief against a judgment except upon some established ground for equitable relief and under circumstances otherwise justifying its interposition; and this is true even though the case was one over which equity had concurrent jurisdiction in the first instance. The plaintiff must make an affirmative showing of some equitable consideration or of some good reason sounding in public policy sufficient to justify the interference of equity." The subject was very fully considered in Hogan v. Horsfall, 91 Cal. App. 37, 41-43, 266 P. 1002. It would be difficult to state the doctrine applicable in language that is clearer than the learned discussion written for the court by Mr. Presiding Justice Tyler in the cited case.

The plaintiffs make their motion to dismiss on the ground that a mere inspection of the transcript shows the question upon which the decision of the case depends is so unsubstantial as not to need further argument. (Rules of the Supreme Court and District Courts of Appeal, V, sec. 3.)

The defendants contend that in the action entitled Bley v. Dessin et al., the clerk did not endorse on the complaint that the default of the defendants for not answering had been entered and therefore the judgment in said action was void. They next contend that the return of the summons in said action showed service thereof on the individuals and described them as partners of the copartnership against whom the default judgment was entered and that such return was insufficient to give the court jurisdiction over the copartnership. They then stress the fact that they alleged the judgment dated March 3, 1936, was void and therefore they were entitled to plead the fact and ask for relief in equity, and finally they contend that under the circumstances the demurrer should not have been sustained without leave to amend. If it be assumed that any one of these contentions had any merit the extent thereof was to constitute error, but such error was intrinsic and not extrinsic to the action entitled Bley v. Dessin et al., and did not constitute grounds to support an action in equity to set aside the judgment therein. Hogan v. Horsfall, supra.

[8] The motion to dismiss the appeal is granted.

We concur: NOURSE, P. J.; SPENCE, J.

31 Cal.App.2d 321

MACE v. WATANABE et al.

Civ. 10867.

District Court of Appeal, First District, Division 2, California.

March 3, 1939.

1. Automobiles ⚷243(4)

Where country road joined highway at two distinct places, thereby forming a "Y," and automobile collision occurred on one leg of the "Y," permitting traffic officer who was familiar with intersection to testify that it was general custom and habit of motorists to travel the roadway along each leg of "Y" rather than to use soft gravel covering portion between the two legs for purpose of showing that there were two intersections was not error.

2. Appeal and error ⚷1064(2)

Where country road joined highway at two distinct places, thereby forming a "Y," and automobile collision occurred on one leg of the "Y," submitting question whether there was one or two intersections rather than determining question as a matter of law was not prejudicial error.

3. Evidence ⚷471(3)

In automobile collision case, permitting witness to testify that one mark on highway appeared to have been made by "free running wheel" of defendant's automobile was not objectionable on ground that witness who had not been qualified as expert was permitted to give expert testimony.

4. Trial ⚷260(8)

Refusal of proposed instruction regarding duty of driver making left-hand turn in an intersection was not improper where matter was fully covered by other instructions given.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Pauline Mace, as administratrix of the will annexed of the Estate of Fred E. Mace, deceased, against K. Watanabe and another for damages for death of Fred E. Mace. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. A. Bardin and J. T. Harrington, both of Salinas, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for damages arising out of the death of her husband in a collision with a motor vehicle operated by defendants. The cause was tried with a jury, and the defendants had a verdict.

The collision occurred on a portion of Romie Lane road, near its intersection with U. S. Highway 101, south of the city of Salinas. At this point the main highway makes a wide curve and is joined by the county road in two distinct roadways at points about four hundred feet apart. This "Y" was constructed by the county and the two lanes of traffic along each leg of the "Y" were commonly used by vehicles coming from and going to the main highway. The "V" shaped portion between the two legs of the "Y" and the highway proper was covered with gravel and loose dirt and was not generally used in such traffic. The defendants were traveling north on the main highway and made a left-hand turn into Romie Lane road at the southerly intersection of the "Y". The deceased was traveling east on Romie Lane road and took a right-hand turn along the same leg of the "Y". At the time of the impact defendants had traveled more than three hundred feet from the point where they left the main highway, and were approximately one hundred and twenty feet from the easterly edge of the main highway. They were on their right-hand side of the traveled road, and were traveling in second gear at a low rate of speed. The deceased was traveling between fifty and sixty miles an hour and was unable to make the turn into this leg of the "Y". His car struck a second trailer which was at the time drawn by defendants' truck, and an examination of the roadway immediately after the collision disclosed that decedent's car had skidded about seventy feet before the impact and about twenty-five feet thereafter. The defendants had pleaded both want of negligence on their part and contributory negligence on the part of the decedent. The evidence unmistakably proves both defenses, and the jury must have so found. The attack on the judgment is thus limited to the questions of the admissibility of certain evidence and the propriety of certain instructions.

[1] The trial court, over objection, permitted a witness to testify that it was the

general custom and habit of motorists to travel the roadway along each leg of the "Y", rather than to use the soft gravel forming the "V". The witness was a traffic officer who was familiar with the intersection and who frequently took his station within the "V" to observe traffic on both highways. It was offered in part to show that there was a well-known and well-defined roadway over each leg of the "Y" and none through the "V". It was also offered as preliminary to the showing that the deceased was thoroughly familiar with this custom and practice. There was no error in the admission. This evidence was not like that offered in Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922, to show the habit of pedestrians to violate traffic signals maintained for their protection. The parties were at odds whether the "intersection" was at the point where the prolongation of the lateral curb lines of Romie Lane road met the state highway, or whether there were two intersections —where each roadway in fact met the highway. The evidence showed that the county had constructed and maintained these two separate approaches, and the further evidence that they were commonly used as such by all motor traffic was material to respondents' case.

[2] Appellant complains that the trial court should not have left to the jury in its instructions the question whether there was one or two intersections; that this should have been determined as a question of law by the court. We can see no merit in the criticism because, if the trial court had decided the question, it must have found that there were two intersections—where each separate roadway in fact met the main highway.

[3] A witness who examined the roadway soon after the collision testified to the marks made by decedent's car. He was permitted to testify over objection that one mark appeared to have been made by a "free running wheel". Appellant complains that this was error because the witness had not been qualified as an expert. He did not give expert testimony. He merely testified to the physical facts—to what he observed on the roadway. The difference between the mark of a free running wheel and of a locked wheel is a matter of common knowledge and observation and, though the answer here seems to have been put in the way of an opinion, it was nothing more than a statement of what the witness had seen.

[4] Criticism of the refusal of appellant's proposed instruction on the duty of the driver in making a left-hand turn in an intersection is not warranted as the matter was fully and properly covered by other instructions given.

The judgment is affirmed.

We concur: STURTEVANT, J., SPENCE, J.

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31 Cal.App.2d 290

Ex parte MEANS.

Cr. 1652.

District Court of Appeal, Third District, California.

March 1, 1939.

1. Municipal corporations 🔑592(1)

Sacramento ordinance, authorized by charter and the Constitution, requiring plumbers to obtain registration certificates from city health officer, *held* not unconstitutional as applied to a civil service state employee who was engaged as a plumber by the state on the state fair grounds at Sacramento, on the ground that it conflicted with general Civil Service Act or rules of the state personnel board, since rules if conflicting would be abrogated. Const. art. 24; St. 1937, p. 2085; Const. art. 11, § 11.

2. Municipal corporations 🔑592(1)

A state civil service personnel board's system of plumbers' qualifying examinations would not abrogate a city ordinance respecting same matter. St.1937, p. 2085; Const. art. 24.

3. Municipal corporations 🔑592(1)

Nothing less than positive and general law on same subject as city ordinance creates conflict within section of Constitution authorizing city to make local, police, sanitary or other regulations not in conflict with general laws. Const. art. 11, § 11.

4. Municipal corporations 🔑592(1)

The supplying of water and removal of water borne waste are municipal affairs.

Proceeding by E. H. Means for a writ of habeas corpus to procure his release from imprisonment under judgment on conviction of engaging in the work of a plumber without having registration certificate as required by city ordinance.

Writ discharged and petitioner remanded.

Prior opinion, 85 P.2d 459.

John J. Hamlyn, of Sacramento, Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for petitioner.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery and Robt. E. Reed, all of Sacramento, amici curiae.

Hugh B. Bradford, City Atty., and B. F. Van Dyke, both of Sacramento, for respondent.

PER CURIAM.

A rehearing was granted in this matter in order to give further consideration to the questions presented, and particularly to permit the department of public works an opportunity to be heard.

After reargument and the study of additional briefs we still adhere to our original conclusions, keeping in mind that we are considering primarily the right given to a municipality, to make and enforce within its limits all necessary police and sanitary regulations not in conflict with general law.

As we heretofore stated petitioner was charged with a violation of ordinance No. 496, 4th series, section 3, and was convicted and imprisoned therefor.

This ordinance is entitled "An ordinance regulating plumbing in the City of Sacramento; providing for the examination of and issuance of certificates of registration to qualified plumbers; * * *"

It defines "plumbing work" as including "all water and sewer pipes, drainage and water pipes and vent pipes in or pertaining to any building or lot upon which same is situated, * * *; also all material and work used in new construction or reconstruction * * *; also all pipes in connection with the vapor or waste of any kind which may be discharged into the sewers or drains or vent pipes". It makes it unlawful for any person to engage in the plumbing business without first procuring from the health officer a certificate of registration authorizing such acts; and then declares it unlawful for any person to perform such labor without first obtaining such certificate and prescribing a penalty therefor.

In the instant case petitioner was a civil service state employee, assigned to and engaged in the work of a plumber by the state of California at the state fair grounds in Sacramento. The fair grounds lie within the corporate limits of the city of Sacramento. He earned his status by virtue of having passed the necessary examinations required by the provisions of article 24 of the state Constitution, the Civil Service Act, Stats.1937, chap. 753, p. 2085, and the rules and regulations of the state personnel board. He did not have a registration certificate as required by the foregoing ordinances of Sacramento, hence his arrest and imprisonment.

Sacramento is a charter city, and is given the power therein "to regulate the construction of and the materials used in all buildings * * *; to regulate the manner of construction and location of drains and sewers * * *; the materials and methods used for piping buildings for water; * * * to regulate and prescribe all methods and materials used for the plumbing of all buildings, * * * and to provide for the examination and licensing of all persons * * * who shall engage in or work at the business of plumbing * * *." Sacramento Charter, section 9.

In addition to this express charter provision, Sacramento is given the power by section 11 of article 11 of the state Constitution, to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws". Acting, therefore, under its general police power and under its specifically given charter powers Sacramento adopted the ordinance in question. Having in mind the nature of the work and its possible effect upon the health and well being of its citizens, it would appear that such requirements, both as to material and workmanship, were a necessity and the failure to so protect its citizens would be a dereliction of duty upon the part of any city.

[1] It is the contention of petitioner that the ordinance in question is in conflict with the general Civil Service Act, and to that extent is unconstitutional. We are unable to find such conflict. Ordinance No. 496 deals exclusively with the regulation of plumbing within the city of Sacramento, how it shall be done, and those who

may do it. Neither in the Constitution nor in the Civil Service Act is this question mentioned, and obviously those provisions were not intended to occupy that field. Nor do we find in the rules and regulations of the personnel board any provisions pertaining to the regulation of plumbing, but even if such conflict did exist, the provisions of the charter, being a legislative act, must be held to prevail over a rule or regulation of an appointive board, which is no more than a state agency created to perform certain governmental functions for the state in a very restricted field.

[2, 3] In Pasadena School District v. City of Pasadena, 166 Cal. 7, 134 P. 985, 47 L.R.A.,N.S., 892, Ann.Cas.1915B, 1039, the school district, embracing all of the territory within the limits of the city, was proceeding to erect a school building without having first complied with an ordinance of the city providing for the issuance of a building permit and the payment of certain fees, and the submission of the proposed plans to the city. The city threatened to arrest the school trustees and the contractor, and the controversy was submitted to the court under section 1138 of the Code of Civil Procedure. The question, as found by the court, was, "Has the city * * * the power to subject the school district * * * to its regulating building ordinances and building code in the exercise of its police power?" In brief, the court held that unless there was some positive and general law upon the same subject which could be said to create a conflict, the charter provisions must govern, and that while the state had the power to provide for a complete and exclusive system of regulation in respect to the erection of school buildings, if it had not exercised that power the city was within its right in exacting conformity with its building laws. So, here, while the state could, if it desired, provide regulations for the installation of plumbing, it has not done so. The fact the Constitution provides for civil service and gave authority to a board to set up a system of rules and regulations in furtherance of that purpose, does not constitute a general law regulating plumbing. Even if the board did set up a system of qualifying examinations for plumbers, it would not abrogate the city's ordinance in respect to the same matter. As said in Ex parte Campbell, 74 Cal. 20, 15 P. 318, 321, 5 Am.St.Rep. 418, "nothing less than a positive and general law upon the same subject can be said to create a conflict within the meaning of that section".

Whether or not a general law would in the present situation affect the outcome of this case we are not here called upon to decide. The charter grants the city the right and power to make and enforce laws and regulations in respect to municipal affairs.

In Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351, and quoted with approval in Bank v. Bell, 62 Cal. App. 320, 217 P. 538, 542, it is said: "* * * The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force [with respect to Los Angeles]. If its charter gives it powers concerning them, it has those powers. If its charter is silent as to any such power, no general law can confer it. * * *"

In the Matter of Nowak, 184 Cal. 701, 195 P. 402, 403, the court said: "The net result of this situation is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself."

[4] That the supplying of water and the removal of water borne waste is a municipal affair is clearly established in Metropolitan Water District v. Superior Court, 2 Cal.2d 4, 37 P.2d 1041; Smith v. City of Glendale, 1 Cal.App.2d 463, 36 P.2d 1083; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; Wehrle v. Board of Water & Power Commissioners, 211 Cal. 70, 293 P. 67.

In City of Pasadena v. Charleville, supra, the court held that the city was not bound by state law or regulation in respect to municipal affairs. In that case a contract had been let by the city for the erection of a wire fence around its municipal reservoir. A general state law required that any contract for the doing of any public work should contain certain provisions as to the payment of the prevailing per diem wage. The city manager refused to sign a contract for the erection of the fence which did not contain such provisions; the city taking the position that the maintenance and operation of a water distribution system was a municipal affair and not bound by general state law opposed the position taken by its manager, which contention the court upheld, declaring that the city was not controlled by any legislative enactment regarding its municipal affairs, and that the construction of the fence around the reservoir, which was a part of the city's municipal water system, was a municipal affair.

Regardless, however, of that point we believe that neither the constitutional provision providing for civil service nor the Civil Service Act applied to the situation here presented, and that the city was acting within its authority in making it a misdemeanor for any one to do plumbing work within its limits without obtaining a license so to do. That being true, the writ sought should be discharged, and the petitioner remanded. It is so ordered.

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31 Cal.App.2d 329

MARTIN v. POSTAL UNION LIFE INS. CO.

Civ. 6082.

District Court of Appeal, Third District, California.

March 3, 1939.

1. Insurance ⚷524

Under accident policy defining total disability as disability preventing insured from performing duties pertaining to his occupation and from attending to any business or occupation, insured is not entitled to disability benefits for period during which he attended to any business or occupation.

2. Insurance ⚷524

Under accident policy defining total disability as disability preventing insured from attending to any business or occupation, insured, previously employed as a carman, was not entitled to disability benefits for period after accident during which he solicited insurance, but only for period in which he solicited no insurance.

3. Insurance ⚷524

That remuneration received by insured for soliciting insurance may have been small did not entitle insured to total disability benefits for period of solicitation under accident policy defining total disability as disability preventing insured from attending to any business or occupation, since insured had actually performed the duties of an occupation or business.

4. Appeal and error ⚷1152

The trial court's error in its finding as to duration of insured's total disability did not require reversal, but the Court of Appeal was authorized to modify findings and to amend judgment to conform thereto. Code Civ.Proc. § 956a.

5. Insurance ⚷562

The insurer's tender to insured of money as balance due for total disability under accident policy estopped insurer from avoiding liability because of insured's failure to furnish notice and proof of loss 90 days after termination of total disability.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Cabble C. Martin against the Postal Union Life Insurance Company to recover total disability benefits under an accident policy. Judgment for plaintiff, and the defendant appeals.

Judgment modified and, as so modified, affirmed.

Daniel Rygel, of Oakland, for appellant.

L. Dewitt Spark, of Roseville, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to recover on a policy of insurance against loss of time, due to a personal accident to the assured. The case was tried before the court sitting without a jury, and judgment was rendered against the defendant insurance company in the sum of $600. The appeal is prosecuted from the judgment.

This is a second action against defendant by the plaintiff; the judgment in the first action was appealed from to the District Court of Appeal, Third District, and numbered "3 Civil No. 5416", which said judgment was modified by the said Appellate Court, by a remission and reduction of the amount of the judgment rendered, from the sum of $839.84 to $473, 16 Cal.App.2d 570, 61 P.2d 333; this present action is for a claim of continuing total disability from the 10th day of March, 1934, to and including the 10th day of March, 1935, on the same policy of insurance sued on in the above referred to action.

The complaint sets forth the execution of the policy, a copy of which is annexed thereto. It alleges that plaintiff suffered an accident on the 16th day of September, 1933, while operating an automobile, and received a severe blow upon his body and a displacement of a vertebra in his spine; that as a result of his injuries plaintiff was totally disabled from March 10, 1934, to March 10, 1935; that under the provisions of said policy there is due plaintiff the sum of $1,200, being payments for total disability at the rate of $100 per month. The trial court found that all of the allegations of the complaint were true, except as to the period of disability, and with respect to such period the court found that plaintiff was disabled, under the terms of said policy, from the 10th day of March, 1934, to the 10th day of September, 1934, and that plaintiff was entitled to recover the sum of $600, which is indemnity at the rate of $100 per month, as provided in said policy.

The chief contention made by appellant is that the evidence was insufficient to support the finding of the trial court to the effect that plaintiff was totally disabled for a period of six months. The only portion of the insurance policy which is pertinent on this point is the paragraph which defines "total disability". This paragraph is as follows: "Total and Partial Disability Defined. Disability, under the terms of this policy, shall not be considered total unless the insured is so disabled by 'such injury' or 'such illness' that he is wholly prevented from performing each and every duty pertaining to his occupation and from attending to any business or any occupation whatsoever. Partial disability shall be such disability as causes partial loss of time and continuously prevents the insured from performing one or more important duties of his occupation."

It appears from the evidence that for sometime prior to the accident plaintiff was engaged in the occupation of carman for Pacific Fruit Express Company. There is, however, nothing in the record to indicate the nature of the duties of a carman, and whether or not such duties require any physical exertion upon the part of the party who performs them. Plaintiff testified that the last work performed in the capacity mentioned was in the latter part of 1932, or the early part of 1933; that the last occupation in which he was engaged was that of insurance agent for Farmers Automobile and Insurance Exchange; that from March 10, 1934, to March 10, 1935, he engaged in the latter occupation and solicited business for said insurance exchange; and that he commenced solicitation of said business for said company in the month of June, 1934. Following is a tabulation of the number of policies written each month thereafter during the period for which total disability is claimed: August, five policies; September, twelve policies; October, six policies; November, fifteen policies; December, ten policies; January, 1935, fourteen policies; February, sixteen policies; March, seven policies. The total remuneration received by plaintiff as commissions on said policies started with $24 for the month of June, 1934, and during the remainder of said period was in varying amounts, with an average of about $70 for each of the months from June, 1934, up to and including March, 1935.

[1, 2] It will be noted that the terms of the insurance policy quoted are exceedingly stringent in effect, in that they provide, in order that one may be considered totally disabled, that he be not only wholly prevented from performing each and every duty pertaining to his occupation, but also "from attending to any business or any occupation whatsoever." "The court regards the policy as one designed to provide a substitute for earnings when the insured is deprived of capacity to earn by bodily injury or disease. He must be prevented from performing work and conducting business for compensation or profit." Maresh v. Peoria L. Ins. Co., 133 Kan. 191, 299 P. 934, 936. If, therefore, the evidence shows beyond controversy and dispute that during said twelve months' period, or any portion thereof, the plaintiff attended to any business or occupation whatsoever, he is not entitled to recover during that period. We are of the opinion that the record shows that plaintiff was only entitled to recover for a period of three months, and that there is sufficient evidence in the record to justify a finding to the effect that during the three month period ending June 10, 1934, plaintiff was totally disabled under the definition of "totally disabled" set forth in said policy. He testified that he did no soliciting of

insurance whatever during that period of time. It is true that there is some evidence to the effect that he received a small commission of $2.93 on a policy of fire insurance written for another company, but there is nothing in the record to indicate that he performed or did any of the work connected with the solicitation of the business from which said commission accrued.

[3] The contention of the respondent is to the effect that the amount of work performed by plaintiff during said twelve months' period and the remuneration received by him "is in such small amount as to be so nominal and trivial as to not rebut respondent's contention that he was totally and continuously disabled". We are unable to view the matter in that light. Not only did plaintiff receive substantial remuneration for most of the twelve months' period referred to, but he also acted as district manager for said Farmers Inter-Insurance Exchange, commencing with the month of June, 1934, and during that month, and to and including March 10, 1935, he testified that he had charge of not less than six agents who were working under his direction and control. The fact that the assured received little or no remuneration for the work done is not the controlling factor. The question is: Did he actually, and in a substantial manner, perform the duties of any occupation or business? The answer must obviously be in the affirmative.

[4] While it thus clearly appears that during nine of the twelve months for which total disability is claimed, plaintiff was not totally disabled, and that the evidence would only support a finding of disability for the first three months of said period, this does not necessitate a reversal of the case. This court has the power, under the provisions of section 956a of the Code of Civil Procedure, to modify the findings with respect to those facts discussed above.

[5] It is next contended that plaintiff cannot prevail, for the reason that he did not furnish claim or notice of proof of loss ninety days after the termination of total disability, as provided in the policy. With respect to this issue the trial court found "that the notice of loss and proof of loss specified by the provisions of said policy were waived by defendant". We are of the opinion that there is sufficient evidence in the record to support this finding. It is alleged in the answer, "that defendant has been informed since the above cause of action has been filed that the only sum that plaintiff is entitled to under the terms of the said policy is the sum of $100.00 for one month, beginning from March 10, 1934, to and including April 10, 1934, * * * and this defendant herewith continues to offer to the said plaintiff the sum of $100.00 as and for payment to the said plaintiff of the balance due him for total disability under the terms of the said policy of insurance". The position taken by defendant at the trial was in accordance with the above allegations set forth in its answer.

In 1 C.J. page 478, the rule in respect to waiver of notice of proof of loss is thus stated: "Very slight circumstances are sufficient to establish a waiver of the condition." So there is a waiver, where the "insurer * * * tenders a sum claimed to be all that is due under the policy". The chief purpose of the requirement that a proof of loss be furnished is to enable the insurer to make a proper and adequate investigation of the facts upon which the claim for indemnity is based. Here, however, the insured, without having received such notice of loss and proof of loss, proceeded to offer to pay the sum of $100 to cover a period of total disability for one month under the terms of the policy. It is not reasonable to suppose that this offer would have been made if the insurer had not, prior to that time, made such an investigation as would seem proper to do under the circumstances. For this reason we are of the opinion that defendant would be estopped from questioning the failure of the insured to furnish such notice.

It is therefore ordered that the findings of fact and conclusions of law be amended as follows:

At the end of paragraph II of such findings strike out the words "10th day of September, 1934", and substitute in place thereof the words "10th day of June, 1934".

In the last paragraph thereof, under the heading "Conclusions of Law", strike out the words "September 10, 1934", and insert in lieu thereof the words "June 10th, 1934".

Strike out the words "Six Hundred and No/100 Dollars, ($600.00)", and insert in lieu thereof the words "Three Hundred and No/100 Dollars, ($300.00)".

It is further ordered that the judgment in said action be amended to conform to said amended findings by striking out the words "Six Hundred and No/100 Dollars ($600.00)", and inserting in lieu thereof the words "Three Hundred and No/100 Dollars ($300.00)".

As so modified it is ordered that the judgment be affirmed, and that respondent recover his costs.

We concur: PULLEN, P. J.; THOMPSON, J.

31 Cal.App.2d 251

In re JOHNSON'S ESTATE.

GARRETT v. RYGEL et al.

Civ. 10845.

District Court of Appeal, First District, Division 2, California.

Feb. 28, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Wills 🔑166(8)

In will contest, evidence showed attorneys to have exercised undue influence over aged testatrix who was in a weakened mental and physical condition, invalidating will.

2. Wills 🔑166(2)

In will contest, where two attorneys had together represented themselves as testatrix' attorneys, and one had been her attorney for years, evidence established confidential relationship existing between both attorneys and testatrix, as respects question of undue influence.

3. Wills 🔑163(2, 4)

One who unduly profits by a will and sustains a confidential relationship to testator and actively participates in procuring execution of will has burden of showing that will was not induced by his undue influence, since undue influence in such case is presumed.

4. Wills 🔑719

A husband who, in property settlement in divorce action, waived his rights of inheritance in wife's estate, did not waive right to take as legatee under wife's will.

5. Wills 🔑263

Where wife willed property to husband, and in wife's subsequent divorce action, husband, in property settlement, waived rights of inheritance in wife's estate, husband's daughter by former marriage, as natural heir of husband, was proper party to contest subsequent will of wife.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Proceeding in the matter of the estate of Mary Johnson, deceased, wherein Isabel Garrett, formerly Isabel Kernan, as guardian of the person and estate of Ira H. Spangler, an incompetent person, contested the probate of an alleged will of deceased, which was offered for probate by Daniel Rygel, as special administrator of the estate of Mary Johnson, deceased, and others. From a judgment in favor of proponents, contestant appeals.

Reversed.

Hearing denied by Supreme Court; SEAWELL and EDMONDS, JJ., dissenting.

Anthony, Harwood & Rogers, Leo C. Dunnell, and Albert C. Wollenberg, all of San Francisco, Carlson & Collins, of Richmond, and H. V. Greenwood, of Vallejo, for appellant.

T. H. DeLap and Tinning & DeLap, all of Richmond, for respondents.

NOURSE, Presiding Justice.

The appellant, as administratrix of the Estate of Ira H. Spangler, deceased, contested the probate of the will of Mary Johnson, who was the former wife of Ira H. Spangler. The cause was tried before the court without a jury, and judgment was rendered in favor of proponents. Mental incapacity and undue influence were the basis of the contest. On the appeal it is argued, among the grounds for reversal of the judgment, that the charges of undue influence were proved by uncontroverted evidence, and that the trial court erred in its rulings and findings on the issue of confidential relationship of the beneficiaries. As the judgment must be reversed upon these grounds it is unnecessary to burden the opinion with discussion of other grounds raised.

In October, 1930, Mary Johnson and Ira Spangler intermarried. They lived in Napa for a while and moved to San Francisco in November, 1931, where they lived until January, 1936. Mary Johnson obtained an estate of approximately $130,000 from her first husband. She was more than seventy years of age when she died in October, 1936. Her last husband was about fifty-eight years of age at the time of his death in January, 1937. In April, 1931, Mary Spangler voluntarily executed a will which her own attorney prepared for her and which left all her property to her husband. No evidence of estrangement between the parties appears in the record until the respondents herein came into the picture as hereinafter related. In October, 1935, the husband became very ill and was taken to a hospital in San Francisco. He did not survive the illness, but was continually confined because of it until his death in January, 1937.

A considerable part of the property of Mrs. Spangler had been placed in trust with a local bank and the income made payable on the check of Ira. From the time of his hospitalization the latter was in such weak physical and mental condition that he was unable to care for himself or his wife. Checks were written by a clerk of the bank and by him taken to the patient who signed by cross only. Mrs. Spangler had become ill at about the same time and a nurse or housekeeper was employed to care for her. Expenses for the upkeep of the house and of the care of both husband and wife were paid by the bank in the manner stated upon the request of the nurses or others in charge of the patients. The condition of both became so critical that an officer of the bank suggested to Mrs. Garrett that she apply for letters of guardianship. Such an application was filed in the superior court in San Francisco by Mrs. Garrett, who was the only child of the Spanglers, being a daughter of Ira by a former marriage. This started the activities of the respondents.

These petitions were filed on January 10, 1936, when both patients were admittedly incompetent and unable to take care of their property. When notice of the filing was published in "The Recorder" the respondent Daniel Rygel, an attorney at law, rushed to the hospital where the husband was confined, and there found the appellant, to whom he offered to see that she would inherit a large part of the estate if she would dismiss the attorneys who had filed the petitions and substitute him in their stead. Unsuccessful, he went to the apartment where Mrs. Spangler was confined and, by misrepresentations of the treatment of her by her husband and of his weakened mental and physical condition, persuaded her to employ J. F. Riley and himself to represent her. In this scheme a written contract of employment on a percentage fee was executed on January 13, 1936, between Mrs. Spangler and Riley and Rygel as her attorneys. They collected and retained for themselves over $10,000 through this contract. Four days later—January 16th—they had her verify a complaint in divorce which reads like the voice of Rygel and Riley. This complaint was filed on January 17th, and on the same day these attorneys filed their petition to have their client declared incompetent and named a guardian of their own selection, who was thereafter always subject to their will. Both petitions were filed in the county of Napa, which the attorneys well knew was not the residence of their client. The divorce action was transferred to San Francisco for that reason, and a property settlement was made by the guardians of these two old incompetents and a decree of divorce entered on application of the attorneys for Mrs. Spangler. This decree had not become final when the death of the parties occurred.

Having removed their client to Napa where they hid her from her husband and stepdaughter, Riley and Rygel had a will executed in May, 1936, wherein all the property, except a special bequest of $5,000 to the guardian selected by her attorneys, was left to Mrs. Rygel, who prior to the events here recorded since January 11, 1936, was unknown to the testatrix. This will named "my attorney Daniel Rygel" as executor to serve without bonds. This express designation of Rygel as attorney appeared dangerous in case of a contest, and a new will was prepared by Riley and executed on September 16, 1936. This was in the precise terms of the former will except that the words "my attorney" were omitted. This is the will that is under contest. The will of May, 1936, has not been offered for probate because the evidence of the mental incapacity of the testatrix at that time was too strong to meet a contest. The will of September, 1936, was in the handwriting of Riley, and was written by him in a bedroom of the Rygel home at a time when the testatrix was paralyzed on the left side, had difficulty in her speech, and was in such a serious condition from cerebral hemorrhages that she had been given neohemoplastin and amytal. The doctor in attendance would not allow her to sit up to sign the will, but guided her hand while she made her mark, her name being written in by Riley. She died soon thereafter, and the doctor who had been in attendance upon her at the time the will was written certified as the cause of death "cerebral hemorrhage".

It is in the evidence and uncontroverted that from January 11, 1936, to the date of the death of the testatrix these attorneys carried on a premeditated course of conduct to obtain control of the property. They admittedly misrepresented the facts to her regarding the condition of her husband, poisoned her mind against him and his daughter, and pretented to her that they were her only friends. They collected enormous fees for inconsequential service, traveled about the country at her expense, purchased an automobile from the funds in the hands of her guardian at a time when she was unable to leave her bed. They hid her from her friends in Napa, and then moved her to Rygel's house in Berkeley, where she was likewise concealed, and where Mrs. Rygel was paid two hundred dollars a month for her care, which was in addition to the regular fees paid to a nurse. During this time Rygel boasted among his friends that "We are sitting on top of the world; we have a new car, Augusta has a maid, and the money is rolling in." Riley died during the course of the trial, and it was thereafter discovered that more than $10,000 in cash and bonds belonging to Mary Spangler had gone into his estate received by Rygel as attorney for Mary Spangler, but not by him turned over to her guardian. The respondents have throughout the trial and on this appeal given as their justification for their conduct that, if they had not taken these proceedings, the appellant would have accomplished what they have done. But we have the positive evidence of how some of these respondents looted the estate, while on the other hand we merely have their suspicions and charges that the appellant might have done the same if they had not prevented her. There is no principle of law which justifies one wrong because of another, or of one that might be threatened or anticipated.

[1] Upon this evidence, the material parts of which are not disputed in any way, it would seem to follow as a matter of course that any court or jury would be compelled to find undue influence in the execution of the will. The finding here adverse to the contestant can be accounted for in only one way—the error of the trial court in finding that there was no confidential relation between the beneficiaries and the testatrix. Here the undisputed evidence is that for many years before the events narrated, Riley had been the regular attorney and counsel for the testatrix. From January 11, 1936, he and Rygel appeared together as such. They executed a joint contract of employment with her, they prepared and filed petitions and complaints in court proceedings, they appeared and represented themselves in open court as her attorneys, and they were the sole attorneys for her guardian whom they selected and had appointed. Riley prepared the will of April, 1931, and Rygel was a witness to it. The two maintained a joint law office in San Francisco, and frequently appeared together in litigation. This relation continued up to the time of her death. Though the facts here stated have not been disputed, Rygel, as a witness in the trial, repeatedly asserted that he was not *joined* as counsel with Riley as stated, but was merely *associated* with him, and that he was not otherwise the attorney and advisor of the deceased.

[2, 3] Having erroneously drawn the conclusion of law on these admitted facts, that there was no confidential relation, the trial court fell into the further error in ruling on the issue of the burden of proof. It can be taken as a settled rule of law in this state that "where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence". Estate of Lances, 216 Cal. 397, 403, 14 P.2d 768, 770; Estate of Witt, 198 Cal. 407, 419, 245 P. 197; Estate of Yale, 214 Cal. 115, 122, 123, 4 P.2d 153; Herbert v. Lankershim, 9 Cal.2d 409, 481, 71 P.2d 220; Estate of Lepori, 4 Cal.App.2d 761, 764, 41 P.2d 970. The presumption of undue influence which arises from these relations shifts the burden of proof to the proponents to overcome it. We may go one step further in applying the rule to the case at hand—when the presumption is present *and no evidence is offered to overcome it* the court or jury is bound to find in accordance with the presumption. Whether we call this a finding of fact or a conclusion of law is not material. It has some of the elements of both. But it is a

rule of law and a rule of property which cannot be lightly cast aside. If the undue influence is thus *proved* to exist the contestants are entitled to a judgment.

In the argument here respondents contend that since Riley drew the will and Mrs. Rygel was the legatee, the element of "activity" of the beneficiaries is not present. The argument is specious, but illusory. At the very moment when the will was signed Mr. and Mrs. Rygel were in their own bedroom where they could not see or hear what was transpiring in the room of their patient, but throughout the entire day while the patient was suffering from a paralytic stroke and cerebral hemorrhage Mrs. Rygel alone was with her, and for a period of ten months these two with the aid of Riley were continually working upon their patient to that end. Throughout the period when these parties had the decedent in their control, Rygel frequently urged her to make a will and to remember Riley. They took her on long rides, and when she returned she told her nurse that she was exhausted because they had tried to force her to make a will and that she did not want to make one. This evidence is not disputed in any manner. It is confirmed by the testimony of Rygel that he could not get her to make a will; that she could not remember what property she owned. During this period she could not remember that she had a husband except on those occasions when these parties represented to her that he was endeavoring to get all her property. They did not tell her that he was hopelessly insane, confined to a hospital because of a fatal illness, or that they had taken all the funds into the hands of their chosen guardian and left the husband without anything for his care until his guardian was compelled to make a settlement with them.

[4, 5] One other point requires consideration. The trial court found that the contestant had no capacity to sue because of the property settlement in the divorce action. This finding was based upon these facts. When the guardian of the decedent had taken all the funds into his hands, the guardian of the husband made a property settlement in the divorce action wherein she agreed to waive all "rights of inheritance" in the estate of decedent on behalf of her ward. It is appellant's contention that, in waiving the rights of inheritance, the husband did not waive his right to take as a legatee under the will. This contention must be sustained. Estate of Crane, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101. The interlocutory decree of divorce had not become final before the death of the parties. The will of April, 1931, leaving all the property to Ira Spangler had never been revoked. The appellant was the natural heir of Ira Spangler and as such was a proper party to contest this will of September 16, 1936. Estate of Langley, 140 Cal. 126, 130, 73 P. 824; Estate of Visaxis, 95 Cal.App. 617, 620, 273 P. 165.

The judgment is reversed, appellant to have her costs against the respondents.

I concur: STURTEVANT, J.

I concur in the judgment: SPENCE, J.

31 Cal.App.2d 240

In re MADSEN'S ESTATE.

CROW v. MADSEN.

Civ. 2248.

District Court of Appeal, Fourth District, California.

Feb. 27, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Executors and administrators ⇨315(6)

A decree of distribution which has become final is conclusive as to the rights of those interested in the estate.

2. Trusts ⇨95

Where, through extrinsic fraud practiced in probate proceedings, distributees have improperly obtained property, equity will declare that distributees hold property in trust for rightful owners.

3. Executors and administrators ⇨504(6)

Probate court was without jurisdiction to pass upon objections to final account of an executor based upon alleged failure to account for property claimed to have rightfully belonged to testatrix but distributed to executor while he was acting as administrator of a previous estate, where decree of distribution in former estate proceedings had become final; complainant's proper proceeding being in equity.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of the estate of Hanne Madsen, also known as Johanna Madsen, deceased, wherein Helen Crow filed objections to the final account of Martin C. Madsen, as executor of the last will of Hanne Madsen, deceased. From an order approving and settling the final account of the executor, Helen Crow appeals.

Order affirmed.

Chester R. Andrews and John J. Gallagher, both of Fresno, for appellant.

H. E. Barbour and W. B. Backlund, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order approving and settling the final account of an executor.

Hans Madsen died intestate on March 22, 1936, leaving surviving his widow, Hanne Madsen, and one son, Martin C. Madsen, who was appointed administrator of the estate. On March 26, 1936, the widow signed an instrument purporting to assign her interest in the estate to Martin C. Madsen and directing the court to distribute the same to him. All of the property of said estate was later distributed to Martin C. Madsen by a decree of distribution filed on October 10, 1936, which decree has become final.

On November 10, 1936, Hanne Madsen, the widow, died leaving a will dated April 27, 1936, whereby she bequeathed to Helen Crow, the appellant herein, the sum of $3,100. She gave, devised and bequeathed all of the rest of her property to her son Martin C. Madsen, the respondent herein, nominating him as the executor of said will to serve without bonds. He was appointed executor of her estate and in due course filed an inventory and appraisement and, later, a final account, in both of which he set forth that no money or property of any kind had come into his hands as such executor.

The appellant filed objections to said final account, alleging, among other things, that Martin C. Madsen had obtained from Hanne Madsen the purported assignment of her interest in the estate of Hans Madsen by fraudulent representation; that this assignment was void; that the said Martin C. Madsen had wrongfully failed to account in the estate of Hanne Madsen for that part of the property belonging to the estate of Hans Madsen which should have been distributed to Hanne Madsen; and that he had converted this property to his own use. Martin C. Madsen filed a demurrer to said objections upon the ground that the probate court had no jurisdiction to pass upon the question thus raised. This demurrer was sustained and thereafter an order was entered approving and settling the final account of Martin C. Madsen as executor of the last will of Hanne Madsen, from which order this appeal was taken.

The appellant particularly relies upon Bauer v. Bauer, 201 Cal. 267, 256 P. 820 and Estate of Roach, 208 Cal. 394, 281 P. 607. These cases, following earlier decisions, lay down the rule that a superior court, sitting in probate, has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands for the purpose of charging him therewith and, in determining that question, to determine all issues necessarily incidental thereto. It is argued that these cases are controlling here since the instant case involves a claim of ownership of property made by the executor as against the estate.

This rule has been applied in cases where it was contended that deeds or assignments, under which an executor or administrator claimed the property, had been fraudulently obtained. The jurisdiction of a probate court in such a case has been sustained upon the grounds that such a court has power to apply equitable principles in aid of and in carrying out its probate functions, and that it must necessarily have jurisdiction to determine what property has come into the hands of the executor, as such.

A somewhat different situation exists where it has already been judicially determined that certain property in the possession of the executor belongs to him personally. There is then no necessity for action, in so far as the probate court is concerned, at least until something else is done, something which calls for the exercise of a general equity jurisdiction. This was recognized in Bauer v. Bauer, supra, where the court called attention to the fact that "'It is self-evident that this is not a case where extrinsic fraud practiced upon the probate court has conferred jurisdiction upon the superior court as a court of equity to interpose and furnish relief from a final order of the court in probate' ". [201 Cal. 267, 256 P. 822.]

[1] It is well settled that a decree of distribution which has become final is conclusive as to the rights of those interested in the estate. Manning v. Bank of California, 216 Cal. 629, 15 P.2d 746; Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145; Crew v. Pratt, 119 Cal. 139, 51 P. 38, 42. In the last-named case, it is said: " 'The distribution of the estate of a deceased person is a proceeding in rem, * * * and the action of the court in making the distribution binds the whole world, and is equally conclusive upon every claimant, whether his claim is presented, or whether he fails to appear, subject only to be reversed, set aside, or modified upon appeal; and its decree cannot be collaterally attacked for any error committed therein.' "

[2] It is, of course, equally well settled that where, through extrinsic fraud practiced in probate proceedings, distributees have obtained property to which they are not entitled, equity will do justice not by overthrowing the decree of distribution but by declaring that the distributees hold the property in trust for the rightful owners. Simonton v. Los Angeles Trust & Sav. Bk., 192 Cal. 651, 221 P. 368; Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Wingerter v. Wingerter, 71 Cal. 105, 11 P. 853. In Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184, 187, the court said: "This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists."

In Security-First Nat. Bk. v. Superior Court, 1 Cal.2d 749, 37 P.2d 69, 73, the trial court, sitting in probate, had entered an order vacating its previous orders settling and approving certain accounts. In annulling the order vacating the previous orders the Supreme Court said: "Finally, the respondents contend that the motion to vacate the orders may be considered as addressed to the equity powers of the probate court, and that the respondent court had jurisdiction to set aside said orders on the ground that extrinsic fraud had been practiced in said proceedings. The probate court has no general equity jurisdiction. Its general jurisdiction is confined to the settlement of the estates of deceased persons. Burris v. Kennedy, 108 Cal. 331, 41 P. 458; Estate of Hubbell, 121 Cal.App. 38, 8 P.2d 530; Parkman v. Superior Court, 77 Cal.App. 321, 246 P. 334. It has the power, however, to apply equitable and legal principles in aid of its functions as a probate court. 11a Cal.Jur. 92, 93, and cases cited. See Estate of Eilert, 131 Cal.App. 409, 21 P.2d 630. Consequently on a collateral attack the probate court is not vested with power to avoid its own orders or decrees which have become final on the ground that extrinsic fraud has been practiced in obtaining the order or decree. Such power is appropriately vested in a court having general equity jurisdiction." (citing cases.)

[3] An exactly similar situation is involved in the case now before us, with the single exception that an attempt to collaterally attack a decree of distribution which has become final is here made in a subsequent probate proceeding. This makes no difference in so far as the principle involved and the jurisdiction of the court are concerned, and we conclude that any relief to which the appellant was entitled was to be obtained through a proceeding in equity, and that the demurrer was properly sustained.

The order appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

31 Cal.App.2d 324

KADOW et al. v. CITY OF LOS ANGELES et al.

Civ. 11707.

District Court of Appeal, Second District, Division 1, California.

March 3, 1939.

1. Automobiles 🔑193(10)

A city policeman who at time of automobile collision was driving city's automobile, and was transporting a superior officer, to police station, as a courtesy to the superior officer, was not acting within "course and scope of his employment," and hence city was not liable for injuries to occupants of automobile with which policeman's automobile collided.

[Ed. Note.—For other definitions of "Course of Employment" and "Scope of Employment," see Words & Phrases.]

2. Automobiles 🔑230

A policeman who was not acting in scope of his employment at time of automobile collision allegedly resulting from policeman's negligence was not entitled to notice of intention of occupants of automobile with which policeman's automobile collided, to bring action for injuries sustained, even if the statute relating to notice of claims based on negligence of public officers was otherwise applicable. St.1931, p. 2476, § 1.

3. Estoppel 🔑111

Generally, a party who relies upon waiver must specially plead it.

4. Estoppel 🔑53

A waiver will not be presumed or implied contrary to intention of party whose rights would be injuriously affected thereby, unless opposite party has been misled to his prejudice into honest belief that waiver was consented to or intended.

5. Estoppel 🔑52

A "waiver" is the intentional relinquishment of a known right with knowledge of facts.

[Ed. Note.—For other definitions of "Waiver," see Words & Phrases.]

6. Automobiles 🔑230

Failure of occupants of automobile with which policeman's automobile collided, to file with policeman within 90 days after collision, a written claim, pursuant to statute relating to claims based on negligence of public officers, did not constitute "waiver" of occupants' right to recover from policeman who, at time of collision, was not acting in scope of his employment for city. St.1931, p. 2476, § 1.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Florence Kadow and another against the City of Los Angeles and another, for injuries sustained in an automobile collision. From an adverse judgment, the defendants appeal.

Reversed as to defendant City of Los Angeles and affirmed as to defendant Roy E. Smith.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Albert E. Wheatcroft and Louis A. Babior, Deputy City Attys., all of Los Angeles, for appellants.

Joseph L. Fainer, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by defendants City of Los Angeles and Roy E. Smith from a judgment in favor of plaintiffs, for damages for personal injuries sustained in an automobile accident.

Defendant Smith, a police officer of the City of Los Angeles, during the period in which the accident occurred, was assigned to the vice squad on the so-called "Valley Division" at Van Nuys, working out of Captain Thornberg's office at the Central Station in Los Angeles. For use in connection with Smith's duties a Ford automobile, owned by the City of Los Angeles, was permanently assigned to him; the car was kept at his home in North Hollywood when not in use. Smith's duties, for the most part, consisted of "touring" in the Valley Division from Mulholland drive to Sunland, Tujunga and Chatsworth. Approximately five per cent of his investigating work arose from reports or specific complaints; the balance of his work consisted in going from location to location, making investigations in various neighborhoods to determine the character of new residents, visiting schools and clubs, and making the acquaintance of those people who might give information as to undesirable conditions. The tours usually lasted from the time Smith checked in at the Central Station, by telephone, in the morning, until he checked out, also by telephone, at night. In answer to the question: "What are your hours on duty?" Smith replied, "We make our own hours. * * * We work whatever hours that we can to accomplish the duties we have."

The collision involved herein occurred in Los Angeles on Sunday, August 9, 1936, at about 6:15 o'clock p. m., in the vicinity of Sunset and Griffith Park boulevards, between the city-owned automobile driven by defendant Smith and an automobile owned and driven by plaintiff Clarence Kadow, in which his wife, Florence Kadow, was riding.

The evidence reveals that on the day of the accident Smith reported in to the Central Station at 9 o'clock in the morning; that, accompanied by one Sergeant McMullen of his detail, he performed the required duties in the valley until 2:45 o'clock in the afternoon; that Smith then drove McMullen to his home in Los Angeles; and that he thereafter visited the pistol range at Elysian Park in Los Angeles, where a barbecue was being given by the Police Post of the American Legion for visiting Legionnaires of the police department and police officers from outside towns in California. Earlier in the day one James E. Clementine, a lieutenant of the Los Angeles Police Department, who was second in command at the Van Nuys Station but not directly connected with the vice squad, visited Smith at the latter's home. During the course of their conversation defendant Smith informed Clementine that he expected to take McMullen home at 3 o'clock in the afternoon, whereupon Clementine asked Smith if the latter would pick him up at Elysian Park at around 4 o'clock on his way back to the valley, as he (Clementine) was to report for duty at the Van Nuys Station at that time. At the designated hour Smith arrived at Elysian Park and met Clementine, but he did not leave immediately as Clementine, expecting to be late, had telephoned to a Sergeant Dowling, and had asked him to remain at the station until Clementine's arrival. At around 6 o'clock that evening Smith, accompanied by Clementine and a Mr. Elwyn D. Wulsten, who lived in North Hollywood and who was a friend of Clementine's, and two other gentlemen whom they picked up at Echo Park avenue, proceeded to the Van Nuys Station by way of North Hollywood. While en route, the accident involved herein occurred.

Defendant Smith testified, in effect, that Lieutenant Clementine was a superior officer although not assigned to Smith's division; that his act in taking the lieutenant back to Van Nuys was not one of his prescribed duties but was "more or less a return of courtesies"; that, with the exception of Sergeant McMullen, no one at the Central Station knew where he was going that afternoon; and that he did not "sign" off duty on this particular night because, at the time he called the Central Station, which was at about 7 o'clock in the evening, his office was closed.

The trial court found, in part, as follows: "* * * that at all times herein mentioned the defendant Roy E. Smith was employed and hired by the defendant City of Los Angeles, a Municipal Corporation, and was acting within the course and scope of his employment as an agent, servant and employee of the defendant City of Los Angeles, a Municipal Corporation. * * * That * * * on or about August 9, 1936, while the defendant Roy E. Smith was acting within the course and scope of his employment for the defendant City of Los Angeles, a Municipal Corporation, he was in possession and control of a certain automobile owned by the defendant City of Los Angeles, which automobile Roy E. Smith was then and there driving and operating with the knowledge and consent of the owners, going in a general westerly direction on Sunset Boulevard * * *."

The sole point raised on appeal by the city is "whether, at the time of the accident, Smith, when transporting his friends to their destinations, was acting within the course and scope of his employment, and whether the city automobile at that time, was then being used for a municipal purpose".

The only point raised on appeal by defendant Smith is "whether the respondents waived their right to recover against him by failing to present to and file with him a written and verified claim, pursuant to Statutes of 1931, page 2476, as amended by Statutes of 1933, pages 2147, 2148", which statute reads, in part, as follows: "Section 1. *Claims based on negligence of public officer.* Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, and/or *the negligence or carelessness of any public officer,* a verified claim for damages shall be presented in writing and filed with such officer and the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Act 5150, Deering's Gen.Laws, 1931. (Italics added.)

[1] It is evident from the foregoing somewhat detailed resume of the facts that defendant Smith was not engaged in the performance of an official act when the accident occurred. The performance by a subordinate at the request of a superior officer, of an unofficial act, does not necessarily give to such act official character or even official color. There is no evidence in the record to support the finding that defendant Smith was, at the time of the accident, acting within the course and scope of his employment, as agent, servant and employee of the City of Los Angeles. See Brindamour v. Murray, 7 Cal. 2d 73, 59 P.2d 1009.

[2] With regard to appellant Smith's contention that the failure of plaintiffs to file with him a written and verified claim pursuant to Act 5150, above referred to, foreclosed plaintiffs' right to recover, it should be noted that the requirement pertains to the "negligence or carelessness of any public officer". Assuming, but only for the sake of argument, that the above act is applicable, manifestly the provisions are not intended to extend to, and to include, civilians. A peace officer, so far as the legal effect of the above provisions is concerned, unless on official duty or engaged in some official act within the course and scope of his employment, is a civilian within the meaning of the act. The foregoing disposition of appellant Smith's contention is not to be understood as deciding that the point is well taken or that the act relied upon is applicable.

[3-6] Appellant Smith's contention, which appears for the first time on appeal, in substance to the effect that the failure to file a written claim with him, the officer, within ninety days after the accident constituted a waiver, is without merit. It is the general rule that a party to an action who relies upon a waiver must specially plead such waiver. 25 Cal.Jur., p. 931. Moreover, "In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to;" also, "A waiver is the intentional relinquishment of a known right with knowledge of the facts." Cal.Jur., supra, pp. 926, 928. There is no justification for the application of the doctrine in the case at bar.

For the foregoing reasons the judgment is reversed as to defendant City of Los Angeles, and is affirmed as to defendant Smith.

We concur: YORK, P. J.; WHITE, J.

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31 Cal.App.2d 259

MITCHELL v. TOWNE.

Civ. 10800.

District Court of Appeal, First District,
Division 2, California.
Feb. 28, 1939.

Hearing Denied by Supreme Court
April 27, 1939.

1. Trial 🔑330(5)

When a case is submitted to the jury under instructions covering all counts of the complaint, judgment must be affirmed if either count is free from error and will sustain the verdict.

2. Limitation of actions 🔑199(1)

Where facts are agreed upon or ascertained, it is a question of law whether a demand is barred by limitations.

3. Limitation of actions 🔑199(1)

Where issue is joined on a plea of limitations and evidence is conflicting as to when, with reference to filing of complaint, a cause of action accrued, question is for jury as a mixed question of law and fact.

4. Limitation of actions 🔑199(1)

A case may not be taken from jury where plea of statute of limitations is interposed and there is evidence to support the plea.

5. Appeal and error 🔑930(1)

In determining whether claim against client's estate for attorney's services rendered over period of approximately 11½ years was barred by limitations, reviewing court on appeal from judgment against the estate would examine facts relative to services in light most favorable to plaintiff.

6. Limitation of actions 🔑46(3)

Where a contract, either express or implied, is for an indefinite time, and no time for payment is specified, the statute of limitations does not begin to run until the services end.

7. Limitation of actions 🔑197(1)

In action against estate to recover for attorney's services rendered decedent by plaintiff's assignor, evidence that assignor was frequently consulted by decedent for approximately 11½ years, during which time numerous wills and codicils were prepared for decedent, was sufficient to establish that services were continuous in nature and to support implied finding that action was not barred by limitations.

8. Limitation of actions 🔑50(3)

That there was not a contract for rendition of continuous service as an attorney at the time when services were commenced did not bar recovery for services continuously rendered, where there was evidence from which an intention to compensate for services at or after their termination could be inferred. Civ.Code, § 2011.

9. Limitation of actions 🔑50(3)

Recovery of reasonable value of services rendered by plaintiff's assignor as attorney for deceased was not limited, by limitations, to services performed within two years prior to death, where services were continuous in nature and deceased was shown to have intended compensation at termination of services.

10. Witnesses 🔑206

Privilege extending to communications between an attorney and his client extends also to communications made in the presence of attorney's clerk, but only where clerk is present in that capacity. Code Civ.Proc. § 1881, subd. 2.

11. Witnesses 🔑206

Where attorney called in another attorney for express purpose of witnessing conversation with client and client acquiesced in presence of other attorney, testimony of other attorney concerning conversations between attorney and client was not privileged. Code Civ.Proc. § 1881, subd. 2.

12. Witnesses 🔑205

Communications between attorney and client are privileged only when they are intended by client to be confidential. Code Civ. Proc. § 1881, subd. 2.

13. Witnesses 🔑206

Communications between attorney and client, made in presence of a third party, who is present as a witness, are not confidential so as to be privileged communications made to an attorney in the course of professional employment. Code Civ.Proc. § 1881, subd. 2.

14. Limitation of actions 🔑196(1)

In action against estate to recover for attorney's services covering period of more than 11 years, a letter showing intent of decedent not to compensate attorney for services prior to decedent's death was properly admitted where question of limitations was in issue.

15. Attorney and client 🔑166(3)
Evidence 🔑523, 571(7)

While expert testimony is admissible in establishing reasonable value of an attorney's services, it is neither essential nor conclusive, and the court or jury may disregard it entirely.

16. Attorney and client 🔑166(3)

In action against estate to recover for attorney's services performed for decedent, evidence that parties had agreed upon a fee equal to the sum of executor's fees plus a bequest of $2,000 could be accepted by jury in arriving at reasonable value of services where nature and extent of services were in evidence.

17. Attorney and client 🔑141

Where there was evidence that attorney and client agreed to a fee equal to the sum of executor's fees plus a bequest of $2,000, verdict of $2,785.40 as reasonable value of attorney's services rendered over a period of approximately 11½ years was not excessive.

18. Appeal and error 🔑1004(1)

Where it did not appear that jury's verdict fixing reasonable value of an attorney's

services was result of passion or prejudice and there was evidence to support verdict, conclusion of jury was final.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by M. P. Mitchell against Percy E. Towne, executor of the last will of William S. McClure, deceased, on a claim for legal services assigned to plaintiff. Verdict and judgment for plaintiff, and defendant appeals from the judgment and order denying his motion for new trial.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

For prior opinion, see 83 P.2d 959.

Peter A. Breen and Percy E. Towne, both of San Francisco, for appellant.

Livingston & Livingston, of San Francisco (Leonard J. Bloom, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

William S. McClure died March 14, 1936. Charles S. Wheeler, Jr., presented his claim for legal services, performed for deceased over a period of approximately eleven and one half years, to defendant, as executor of the estate of deceased. It was rejected, and thereupon Wheeler assigned his claim to plaintiff, and this action upon the rejected claim was commenced on December 9, 1936. Verdict and judgment were in favor of plaintiff, and defendant appealed from the judgment and the order denying his motion for new trial.

The complaint was in two counts, the first for the reasonable value of the services rendered, and the second on an express contract to compensate plaintiff's assignor by appointing him executor of the will of decedent and by bequeathing plaintiff the sum of $2,000. It was further alleged that the executor's fee would amount to $1,285.40, that a bequest of $2,000 was made but was later reduced by codicil to $500. Plaintiff prayed for judgment of $2,785.40, being the sum of the bequest promised and the executor's fee less the sum of $500 actually bequeathed to plaintiff's assignor. The case was submitted to the jury under instructions covering both counts.

[1] Appellant contends that the case was erroneously submitted to the jury upon both counts of the complaint. It is argued by him that the claim filed with the executor did not state a claim for breach of contract, and, therefore, the contract count was not sustained by the claim. His demurrer to the second count was overruled. A motion to strike was made at the opening of the trial and again at the close of the testimony; both motions were denied. Appellant made no request for special verdicts, and a general verdict in favor of respondent was returned. However, it is well settled that, when the case is submitted to the jury under instructions covering all the counts of the complaint, the judgment must be affirmed if either count is free from error and will sustain the verdict. 24 Cal.Jur. sec. 134, p. 885.

[2-8] The principal contention of appellant is that recovery of the value of the services rendered is barred by the statute of limitations except as to the period of two years immediately prior to the death of McClure in March, 1936. Since a discussion of this point involves a statement of the nature of the service rendered and of the transactions between the parties, we will discuss it first. It was said in Cullinan v. McColgan, 87 Cal.App. 684, 692, 263 P. 353, 356: "Where the facts are agreed upon or ascertained, it is a question of law whether a demand is barred by the statute of limitations (Reed v. Swift, 45 Cal. 255; Towle v. Sweeney, 2 Cal.App. 29, 83 P. 74), but where issue is joined on a plea of the statute and the evidence is conflicting as to when, with reference to the filing of the complaint, a cause of action accrued, the question is properly submitted to the jury as a mixed question of law and fact (Pacific Improvement Co. v. Maxwell, 26 Cal.App. 265, 146 P. 900; Towle v. Sweeney, supra; Crawford v. Duncan, 61 Cal.App. 647, 215 P. 573), and the case may not be taken from the jury where the plea of the statute is interposed and there is evidence to support the plea (Heilbron v. Heinlen, 72 Cal. 376, 14 P. 24)". Under the rule thus stated we must examine the facts relating to the services rendered in the light most favorable to respondent. For a period of years appellant Percy E. Towne was attorney for decedent. In 1924 decedent desired to have a will drawn providing a legacy for Towne. Towne informed decedent that he preferred not to draw a will making any provision for himself and suggested that decedent retain independent counsel for that purpose. McClure then called upon respondent's assignor, Charles S. Wheeler, Jr., in June of

1924. A will was drafted by the latter, and executed on June 5, 1924, and a codicil thereto was executed on August 26, 1925. A second will was executed December 12, 1931, a third will on August 3, 1933, and the service of respondent's assignor terminated with the execution of the will of November 7, 1935. However, the record shows that during the period from 1924 to 1930 McClure was a frequent visitor at Wheeler's office. The witness testified that during this period McClure called from fifty to one hundred times. During 1930 to 1931 he called not less than ten nor more than forty times. From 1931 to 1935 he called from thirty-five to fifty times. During the entire period and in addition to the wills executed, other wills and codicils were prepared. While the evidence does not disclose the purpose of many of these visits, it does show both by oral testimony and written exhibits that Wheeler acted throughout the period as advisor to McClure concerning the disposition of this estate and it is a fair inference that at least a majority of McClure's visits were in connection with that purpose. The facts of the case bring it within the rule stated in Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, 189, 188 P. 1034, 1039. The court there stated the rule as follows: "We think there is no merit in the contention that the claim is barred by the statute of limitations. The services were continuous for a period of 20 years, and it is a fair inference that it was the intention or expectation that they should be rewarded when terminated. They did not cease until the death of Mr. Dutton. The case falls clearly within the rule announced in Krumb v. Campbell, 102 Cal. 370, 36 P. 664; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562; Furman v. Craine, 18 Cal.App. 41, 121 P. 1007; Clark v. Gruber [74 W.Va. 533, 82 S.E. 338]; Morrissey v. Faucett [28 Wash. 52, 68 P. 352]. They are all to the effect that, where the contract is for an indefinite time, and no time for payment is specified, the statute does not begin to run until the services end. Of course, the same rule applies to an express contract and to one implied by law." Appellant argues that the Mayborne case is not applicable because the services in this case were not continuous in nature and because there was no contract for the rendition of continuous service at the time the services were commenced. The evidence on the continuity of the services is sufficient to establish that the services were continuous in nature and to support the implied finding of the jury that the cause of action is not barred by the statute of limitations. As to the second objection of appellant, namely that there was no contract for the rendition of continuous service at the time the services were commenced, we do not understand the law to so require. The essential elements are services continuously rendered and some evidence of an intention to compensate for those services at or after their termination. Corato v. Estate of Corato, 201 Cal. 155, 159, 255 P. 825. In the Corato case it was held that a recovery was barred. The supreme court approved the rule of the Mayborne case, but distinguished it upon the ground that there was no evidence of an intent to compensate for the services at or after the termination of the services, and in the absence of any such evidence properly held that under section 2011 of the Civil Code it was presumed that the hiring was by the month. In the present case, we are not dealing with a situation in which section 2011 is applicable, and we do have evidence from which it may be inferred that the parties intended that payment for the services should be at or after the termination of the services. Appellant relies upon Long v. Rumsey, Cal.Sup., 84 P.2d 146, as establishing that there must be a contract at the time the services began. We do not understand the case to so hold. The language of the court which would so indicate is all addressed to a consideration of a rule proposed by the respondent in that case, which the court assumes, without so holding, to be correct. The action was instituted in that case some sixteen years after the termination of the services and the court held the action to be barred. In so holding, the court does not question the propriety of the rule of the Mayborne case. The essential distinction between that case and the present one lies in the nature of the contract which may be implied by the court. Here, it is necessary only to imply a promise to compensate for the services at their termination. In Long v. Rumsey, supra, it was necessary to imply a promise to pay at the death of the party upon whom the benefits were conferred. To make such implication, respondent therein argued that there was an express but unenforceable promise to devise property by will, and that, until the unenforceable contract was breached, no implied contract could be raised by law. The court assumed this to be the rule and held that the contract upon which respondent relied had not been proved. Such a holding does not justify the conclusion that it is necessary to prove an unenforceable express contract to pay at the termination of continuous services in order to recover upon the implied promise to pay at the termination of continuous services.

[9] The element of intent to compensate for the services at their termination is shown both in the conversation between McClure and Lawrence Livingston and the letter from McClure to Lawrence Livingston, the admissibility of which will be discussed below. It is further shown in the testimony of the witness Shea who testified concerning the conversation between McClure and plaintiff's assignor in which McClure stated his intent to compensate plaintiff's assignor by appointing him executor and bequeathing the sum of $2,000 to him. We therefore conclude that the recovery of the reasonable value of the services is not barred by the statute of limitations.

[10-13] Appellant further contends that the trial court erred in admitting in evidence a letter addressed to Lawrence Livingston and signed by McClure; and in permitting the witness Wagner, an attorney in the employ of Livingston, to testify concerning certain conversations between Livingston and Wagner. The foundation of this contention is that said communications were privileged communications between an attorney and his client. Code Civ.Proc. sec. 1881, subd. 2. The record shows that Wagner was called into Livingston's office for the purpose of witnessing the conversation and not in his professional capacity. It is true that the privilege extends to communications made in the presence of an attorney's clerk, but this is true only where the clerk is present in that capacity. Where, as here, he is present for the express purpose of witnessing a conversation and the client acquiesces in his presence as such, the case does not differ from one where statements are made in the presence of a third party who is not an attorney. The letter, to which reference was made above, was dictated by Livingston in the presence of Wagner and was then signed by McClure. Under these circumstances the privilege was waived both as to the letter and conversation. Communications between attorney and client are privileged only when they are intended by the client to be confidential (Mission Film Corp. v. Chadwick Pictures Corp., 207 Cal. 386, 278 P. 855), and if they are made in the presence of a third party, who is present as a witness, it cannot be said that they were intended to be confidential. Moreover, Code of Civil Procedure section 1881, subdivision 2, expressly relates only to communications made to an attorney "in the course of professional employment".

[14] It is further contended that the letter is inadmissible in evidence because it is not material to any of the issues raised. The letter is addressed to Lawrence Livingston. It recites that McClure had on the same date executed a will in which he appointed Wheeler his executor. That McClure desired to bequeath $2,000 to Wheeler "in appreciation of the services and many kindnesses which he has shown me while acting as my attorney". That Wheeler refused to prepare a document involving a bequest to himself and recommended Livingston; that McClure had discussed the matter with Livingston and after consideration, "I have concluded that $2,000 is a fair amount to leave Mr. Wheeler in recognition of his services and attention to my needs and desires". It closes with a request to prepare a codicil to that effect. The letter is evidence of the intent of McClure to compensate Wheeler for his services by will, thus showing that there was no intent to compensate Wheeler for his services prior to the death of McClure. Therefore, it was properly admitted on the issue of the statute of limitations; moreover it contains a statement by McClure of the amount which he considered to be the fair and reasonable value of Wheeler's services and was, therefore, evidence of the value of Wheeler's services.

[15, 16] It is contended by appellant that there is no evidence of the reasonable value of the services rendered by Wheeler, and, therefore, the judgment must be reversed. In so arguing appellant assumes that expert testimony is essential to establish the reasonable value of an attorney's services. This assumption is not justified. While expert testimony is admissible, it is neither essential nor conclusive, and the court or jury may disregard it entirely. Spencer v. Collins, 156 Cal. 298, 307, 104 P. 320, 20 Ann.Cas. 49; Estate of Straus, 144 Cal. 553, 557, 77 P. 1122; Freese v. Pennie, 110 Cal. 467, 469, 42 P. 978; Reid v. Warren Improvement Co., 17 Cal.App. 746, 748, 121 P. 694. In the instant case the nature and extent of the services were in evidence. Moreover, the testimony of

the witness Shea shows that the parties agreed to a fee equal to the sum of the executor's fees plus a bequest of $2,000. The fee agreed upon by the parties is some evidence of the reasonable value of the services, and the jury could accept this evidence. Ayres v. Lipschutz, 68 Cal.App. 134, 138, 228 P. 720; 7 C.J.S., Attorney and Client, § 204, p. 1121. While appellant strongly contends that no agreement was ever reached fixing the fee, the evidence is, we believe, sufficient to establish that such agreement was reached. From what has been said, it is apparent that there was evidence to support the jury's determination of the reasonable value of the services.

[17, 18] It is further argued that the verdict of $2,785.40 is excessive. As above demonstrated, there is evidence to support the verdict, and it does not appear that the verdict was the result of passion or prejudice. Therefore, we must accept the conclusion of the jury as final. Stuart v. Preston, 2 Cal.App.2d 310, 317, 38 P.2d 155.

It is apparent that there is no error in the submission of the case to the jury under the first count of the complaint. For this reason, the judgment must be affirmed, and it is unnecessary to consider appellant's contentions in regard to the second count of the complaint.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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31 Cal.App.2d 282

PAGE v. CUDAHY PACKING CO. et al.

Civ. 6065.

District Court of Appeal, Third District, California.

March 1, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Automobiles ⇨206

A motorist who had stopped at intersection with through street and started across street at about 15 miles an hour had right to assume that driver of automobile approaching intersection on through street would not exceed speed limit of 25 miles an hour and would observe his automobile and give him the right of way. St.1935, p. 187, § 552.

2. Automobiles ⇨244(43)
Judgment ⇨199(3)

Evidence supported jury's finding that plaintiff motorist who had stopped at intersection with through street and was proceeding across street at about 15 miles an hour when collision with defendants' automobile approaching intersection on through street occurred was not contributorily negligent, and trial court erred in rendering judgment for defendants notwithstanding verdict for plaintiff. Code Civ.Proc. § 629.

3. Automobiles ⇨242(8)

Defendants had burden of showing that plaintiff was guilty of contributory negligence precluding recovery for injuries sustained in collision between plaintiff's and defendants' automobiles at through street intersection.

4. Negligence ⇨136(8)

Contributory negligence is ordinarily a fact question for jury, and it becomes a question of law only when undisputed facts, viewed in light of common knowledge and experience, clearly indicate that plaintiff failed to use that degree of care which an ordinarily prudent person would be bound to exercise under similar circumstances.

5. New trial ⇨70

A jury's finding on contributory negligence which is supported by substantial evidence should not be disturbed by trial court.

6. Judgment ⇨199(3)

A judgment notwithstanding the verdict should be granted under statute only when it clearly appears from a full and fair consideration of the whole evidence, viewed in a light most favorable to plaintiff, that no substantial evidence and no reasonable inferences support verdict. Code Civ.Proc. § 629.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Joe Allen Page for personal injuries against the Cudahy Packing Company and another. There was a verdict for plaintiff, and from a judgment for defendants notwithstanding the verdict, plaintiff appeals.

Judgment reversed, with directions.

J. Leroy Johnson and J. B. Freeman, both of Stockton, for appellant.

Neumiller & Ditz and Dudley W. Sheppard, all of Stockton, for respondents.

Mr. Justice THOMPSON, delivered the opinion of the court.

This is an appeal from a judgment which was rendered under section 629 of the Code of Civil Procedure, notwithstanding the verdict.

The plaintiff brought suit for damages for personal injuries sustained in an automobile collision which occurred at the intersection of two streets in Stockton. The answer denied the alleged negligence on the part of the defendants, and affirmatively charged the plaintiff with contributory negligence. The cause was tried with a jury. At the close of plaintiff's testimony, a motion for nonsuit was denied. A subsequent motion of the defendants for a directed verdict was also denied. The jury returned a verdict in favor of the plaintiff for $750. That verdict implies that the jury found plaintiff free from contributory negligence. Reserving the right to subsequently move for a new trial, the defendants then asked the court to render judgment in their favor notwithstanding the verdict, which was granted. Judgment was accordingly entered in favor of the defendants. From that judgment the plaintiff has appealed.

It is contended the court was without authority to render a judgment notwithstanding the verdict merely because the trial judge believed the preponderance of the evidence indicated that the plaintiff was guilty of contributory negligence; that the trial court may render judgment notwithstanding the verdict only when there is no substantial evidence to support the implied finding of the jury to the effect that plaintiff was free from contributory negligence; that the invariable rule regarding the granting of a motion for judgment notwithstanding the verdict is exactly the same as that which applies to a motion for a nonsuit.

We are of the opinion the court erred in directing judgment in favor of the defendants notwithstanding the verdict. The verdict which was returned against the defendants clearly implies that the jury believed the plaintiff was free from contributory negligence. There is an abundance of evidence to support the jury's finding that the defendants were guilty of negligence which contributed to the accident. The trial judge was convinced of that fact. He said in that regard: "There is no question in my mind that the defendant was guilty of negligence; I don't think there is any doubt about that."

For the purpose of this appeal it is not disputed that there is ample evidence to support the finding of the jury that the defendants were guilty of negligence which proximately contributed to the accident. Moreover, it appears that upon the motion for judgment notwithstanding the verdict, both the trial judge and counsel for the defendants recognized the fact that there is a conflict of evidence regarding the plaintiff's alleged contributory negligence. The court inadvertently assumed the rule of law governing that motion is the same as that which applies to a motion for new trial. The judge said: "It does seem to me that the preponderance of evidence indicates that there was negligence upon the part of the plaintiff, which contributed proximately to his injury, and therefore the Court will direct the entry of judgment in favor of the defendants, notwithstanding the verdict."

In presenting the motion for judgment notwithstanding the verdict, counsel for the defendants said: "The evidence of course is in conflict. The motion will be argued from the standpoint, however, that we have accepted the plaintiff's testimony for the purpose of this argument."

Clearly the evidence regarding plaintiff's alleged contributory negligence is conflicting. There is substantial evidence to support the finding of the jury that he was not guilty of contributory negligence. The night of December 8, 1936, at 9:30 o'clock p. m. the defendant, W. C. Driscoll, was driving an Oldsmobile sedan touring car as the agent of his codefendant, The Cudahy Packing Company, northerly along Wilson way, which is a "through street" in the city of Stockton. Hazelton avenue extends east and west and crosses Wilson way at right angles. It contains stop signs at its intersection with the last-mentioned street.

The plaintiff, who was twenty-three years of age, had driven an automobile eight years before the time of the accident. He was familiar with the intersection of streets in question. He drove his Chevrolet machine to Stockton on the afternoon of December 8th, accompanied by his wife and child. They ate dinner that evening at his wife's sister's home in Stockton. After dinner he drove to the home of his wife's nephew a few blocks east of Wilson way. At 9:30 he was returning westerly along the northerly side of Hazelton avenue. When he reached Wilson way he stopped his machine at the stop sign and looked for approaching automobiles both north and south along Wilson way. There were then no machines in the intersection of those streets. He saw the headlights of an approaching car about 200 feet away coming north on its proper side of Wilson way. He did not know how fast it was running. He knew the approximate point where he first saw it and afterwards stepped off the distance from where his machine then stood near the stop sign, finding it to be 75 paces. Seeing no other vehicles north or south of the intersection, he started his machine and proceeded to cross Wilson way, traveling at the rate of about 15 miles an hour. He was still running in intermediate gearing as he reached the center line of Wilson way. He was then looking north for other machines, and again glancing to his left he was surprised to find the defendant's machine almost upon him and coming directly toward him at a very rapid rate of speed. It was within about 15 feet of his car when he saw it that second time. He attempted to change the course of his machine to avoid the collision, but was unable to do so. The crash occurred almost instantly. There is evidence that the defendant's car was traveling 40 or 45 miles an hour in that 25-mile zone of the city of Stockton. The defendant, Driscoll, turned his machine to his left to pass ahead of the plaintiff's car, but the collision occurred. It is evident the defendant was running at a rapid rate of speed, for his machine landed against a building beyond a lawn on the opposite side of Hazelton avenue. The plaintiff was rendered unconscious and he was removed to a hospital. He was quite seriously injured. He testified regarding his conduct in attempting to cross Wilson way, as follows:

"I stopped there at the boulevard stop, when I was going across the street. * * * I put it [the engine] in neutral gear. * * * I looked both directions. * * * I saw a car down the street there [to my left]. * * *

"Q. How far was that car from where you were? A. I would say a little over 200 feet.

"Q. And did you not step off that distance at my request to determine what the distance was? A. I did. * * *

"Q. And how many steps was it from you—from where you were entering the intersection down the street to where you saw that car coming towards you? * * * A. 75 steps. * * *

"Q. After you had looked down the street to the left what did you do? * * * A. I looked towards the north. * * * I saw other cars quite a ways up the street. * * * I turned then to look back the other way, and the car was right on top of me. * * *

"Q. When you saw this car the second time approximately how close was it to you. A. I would say not more than 15 feet, 20 [feet]."

[1] The plaintiff testified that when he stopped at the intersection he first looked south and saw the defendant's machine "a little over 200 feet" away. He then looked in the opposite direction and seeing cars "quite a ways up the street" he threw his engine into gear and proceeded to cross Wilson way. He had thrown the clutch into second gear and was traveling westerly on his proper side of the street about 15 miles an hour. He had reached the center line of Wilson way, and glanced to his left again to find the defendant's car within about 15 feet of him. He tried to get out of the way to avoid the collision, but failed to do so. He had a right to assume the approaching car would not violate the speed law in that 25-mile zone, and that the driver would observe his car and give him the right of way since his machine entered the intersection first. The plaintiff had only about 30 or possibly 40 feet to travel in crossing the defendant's pathway, while that machine then had about 200 feet to travel to the point of the collision.

Under such circumstances we may not say as a matter of law that the plaintiff was guilty of contributory negligence in attempting to cross Wilson way ahead of the defendant's machine. There is no evidence that the plaintiff knew the defendant's car was traveling at an excessive rate of speed. Certainly the plaintiff was not bound to anticipate that the defendant would violate the law by traveling in that zone at the rate of 40 or 45 miles an hour. It seems reasonable to believe, under the circumstances related by the plaintiff, that if the defendant's automobile had not been running at an excessive rate of speed, the plaintiff would have had ample time to have crossed the street ahead of the machine. We are not warranted in holding that a reasonably prudent person would not have been justified in assuming he could safely cross Wilson way under similar circumstances. Section 552 of the Vehicle Code of California, St.1935, p. 187, provides:

"The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway."

[2] The question to be determined on this appeal is whether under the circumstances related by the plaintiff, seeing the surrounding conditions with respect to that intersection of streets as a reasonably cautious person should have observed them, was the plaintiff charged, as a matter of law, with knowledge that the defendant's machine, 200 feet away, constituted "an immediate hazard" to him if he attempted to cross Wilson way ahead of it? If we should say it did not constitute an immediate hazard under the circumstances related by the plaintiff, then the motion to render a judgment notwithstanding the verdict was erroneously granted. Even though we should conclude that reasonable minds might differ as to whether his attempt to cross the street under such circumstances would constitute an immediate hazard, still the motion should have been denied. It seems clear to us that, in support of the verdict, under the facts testified to by the plaintiff, we must conclude the jury believed the plaintiff's statement and determined that he was not guilty of contributory negligence. We may not say, under the evidence in this case construed most favorably to the plaintiff, that, as a matter of law, he was guilty of contributory negligence. It follows that the motion was erroneously granted.

[3, 4] The burden of showing that the plaintiff was guilty of contributory negligence which precludes him from recovering damages for injuries sustained as a result of the collision rested on the defendants. Swartz v. Acme Express & Drayage Co., 102 Cal.App. 615, 618, 283 P. 358; Huber v. Scott, 122 Cal.App. 334, 339, 10 P.2d 150; 19 Cal.Jur. 697, sec. 119. Contributory negligence is ordinarily a question of fact for the determination of the jury. It becomes a question of law only when the undisputed facts, viewed in the light of common knowledge and experience, clearly indicate that the plaintiff failed to use that degree of care which an ordinarily prudent person would be bound to exercise under similar circumstances. Gleason v. Fire Protection Engineering Co., 127 Cal.App. 754, 756, 16 P.2d 750. In Haight v. White, 16 Cal.App.2d 426, 60 P.2d 548, 549, it is said in that regard: "'Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference pointing unerringly to the negligence of the plaintiff contributing to the injury. * * * In all other cases the question of contributory negligence is a question of fact for the jury.'"

Likewise, it is said in Reinders v. Olsen, 60 Cal.App. 764, 767, 214 P. 268, 269: "The question of whether plaintiff has been guilty of contributory negligence ordinarily is one exclusively for the jury. It is only when, there being no dispute as to the facts and reasonable men can reach but one conclusion—that of plaintiff's lack of ordinary care in the circumstances which contributed directly or proximately to the accident of which he complains—that the judge is warranted in deciding that fact in place of the jury, and declaring therefrom as a matter of law that plaintiff shall not be permitted to recover damages. If reasonable men might differ as to whether or not the plaintiff did what an ordinarily prudent person would have done in the same or similar circumstances, then the judge is not justified in drawing the conclusion that, because in his own mind the plaintiff was guilty of contributory negligence, all other reasonable persons must think likewise."

[5, 6] It is well established by uniform authorities in this state that the finding of a jury with respect to contributory negligence which is supported by substantial evidence should not be disturbed, and that a judgment notwithstanding the verdict should be granted under section 629 of the Code of Civil Procedure, only when it

clearly appears from a full and fair consideration of the whole evidence, viewed in a light most favorable to the plaintiff according to the same rule which prevails on motions for a nonsuit, that there is no substantial evidence and no reasonable inferences to support the verdict returned by the jury. Hunt v. United Bank & Trust Co., 210 Cal. 108, 120, 291 P. 184; Card v. Boms, 210 Cal. 200, 291 P. 190; Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; Tracey v. L. A. Paving Co., 4 Cal.App.2d 700, 41 P.2d 942; Landers v. Crescent Creamery Co., 118 Cal.App. 707, 5 P.2d 934; Locke v. Meline, 8 Cal.App.2d 482, 48 P.2d 176; 15 R.C.L. 607, sec. 46.

The judgment notwithstanding the verdict is therefore reversed, and the court is directed to render judgment in accordance with the verdict.

We concur: PULLEN, P. J.; TUTTLE, J.

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31 Cal.App.2d 234

JOHNSON v. UNION FURNITURE CO.

Civ. 10384.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1939.

1. Negligence 🔑119(1)
Torts 🔑26(2)

In order to maintain an action for damages based on wrongful act or negligence of another, plaintiff must allege and prove that the wrongful act of defendant was a direct and proximate cause of injury.

2. Negligence 🔑60, 62(1)

Generally, the word "proximate," in rule that to impose liability defendant's negligence must be proximate cause of injury, is intended to mean direct or immediate as opposed to remote, and negligence requiring the interposition of new and independent agency to cause injury is too remote.

[Ed. Note.—For other definitions of "Proximate," see Words & Phrases.]

3. Negligence 🔑56(1)
Torts 🔑15

In determining the question of proximate cause care must be taken to avoid confusing that which causes the injury and that without which the injury would not have happened.

4. Negligence 🔑59
Torts 🔑15

To establish liability for wrongful act or negligence it must appear, not only that injury complained of was the natural and proximate consequence of the wrongful act, but also that such consequence might reasonably have been foreseen by a person of ordinary intelligence in the light of attending circumstances unless the act is one of wanton wrong.

5. Negligence 🔑60, 62(1)
Torts 🔑15

If, subsequent to initial cause, a new efficient cause intervenes to effect injury having its origin independent of the initial cause or having its origin therein could not reasonably have been foreseen by a person of ordinary intelligence and prudence as a natural and probable result thereof, it supersedes the initial cause, breaks the connection between the initial cause and the effect, and becomes a "proximate cause" of the injury rendering the initial cause remote.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

6. Negligence 🔑56(1)
Torts 🔑15

To hold a defendant liable in damages, his wrongful act or neglect must be a direct cause of the injury and not merely the cause but for which the injury would not have happened.

7. Death 🔑46

Complaint alleging that defendant removed the only bed from plaintiff's premises during plaintiff's absence, that plaintiff notified defendant that her husband was sick, that defendant promised to return bed before 6 o'clock that evening but did not keep promise, that at 8 o'clock in evening the weather was rainy, cold, and bitter, making it dangerous for husband to venture out to search for a sleeping place, that mattress was placed on floor, and that due to exposure to cold and drafts during night husband contracted pneumonia, which caused his death,

did not state cause of action, since it did not indicate that defendant could reasonably have foreseen the consequences nor that defendant's act was proximate cause of death. Code Civ.Proc. § 377.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Josephine H. Johnson against the Union Furniture Company to recover damages for death of John Johnson. From an adverse judgment, plaintiff appeals.

Affirmed.

Edward D. Mabson, of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

KNIGHT, Justice.

Defendant's demurrer to the seventh amended complaint was sustained without leave to amend, and from the judgment entered pursuant to the order made in that behalf, plaintiff appeals.

The action was for the recovery of damages, and was brought by the surviving wife of John Johnson, deceased, under the authority of section 377 of the Code of Civil Procedure, which provides in part that "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs * * * may maintain an action for damages against the person causing the death * * *."

The substance of the cause of action attempted to be pleaded was that because of respondent's failure to return to appellant's residence before nightfall, as promised, a bed which respondent had wrongfully removed therefrom some three and a half months before, appellant's husband, who had been in ill health for eleven years, was compelled to retire for the night on a mattress spread on the floor, and that on account of the cold and drafts to which he was exposed during the night he contracted pneumonia and died two days later.

One of the points urged by respondent in support of the trial court's ruling sustaining the demurrer is that the statutory right granted by said section 377 to the heirs of a deceased person to sue for damages on account of the latter's death is restricted to cases where death is caused by some tortious act, either of commission or omission; that since no such right to sue existed at common law, the terms of said section cannot be extended judicially to include also actions for death growing out of the breach of contract (citing Willey v. Alaska Packers' Ass'n, D.C.N.D.Cal. S.D.1925, 9 F.2d 937; S. H. Kress & Co. v. Lindsey, 5 Cir., 262 F. 331, 13 A.L.R. 1170; Bloss v. Dr. C. R. Woodson Sanitarium Co., 319 Mo. 1061, 5 S.W.2d 367; Lewis' Adm'r v. Taylor Coal Co., 112 Ky. 845, 66 S.W. 1044, 57 L.R.A. 447; Dice's Adm'r v. Zweigart's Adm'r, 161 Ky. 646, 171 S.W. 195, L.R.A.1916F, 1155; Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385, 90 A.L.R. 1260); and that the present action falls within the latter class, the basis thereof being, according to the allegations of the complaint, the failure of respondent to carry out its promise to return the bed before nightfall. The other point made by respondent is that in any event the facts pleaded in the complaint do not show that the failure to return the bed as promised was the proximate cause of the death of appellant's husband. We are of the opinion that the latter point is well taken; consequently it will be unnecessary to make further inquiry into the merits of respondent's contention as to the construction of said section 377.

The circumstances leading up to the failure to return said bed, as they were alleged in the complaint, were these: On January 12, 1934, appellant and her husband returned to their residence in San Francisco after an absence for several months, and found that respondent, on September 23, 1933, had removed therefrom certain personal property, including a bed, belonging to appellant; and about eleven o'clock on the morning of the same day appellant's husband notified respondent of the wrongful taking of said property, and demanded its immediate return. In response to such demand respondent promised to "look up" said property and take it back before four o'clock in the afternoon; but after waiting until three-thirty o'clock in the afternoon for its return, appellant herself went to respondent's store, notified respondent again of the wrongful taking of said property, and repeated the demand for its immediate return. The complaint then goes on to allege that at that time appellant informed respondent that her husband was sick; that he had "been ill and in very poor health for eleven years and was greatly in need of said bed"; that it was the only bed they had, and that "owing to her husband's poor state of health and physical condition, it was absolutely necessary and imperative that he should have a bed to rest and sleep upon * * *"; that thereupon respondent assured appellant that the bed would be returned before six o'clock that evening. Continuing, it was alleged that at eight o'clock in the evening, appellant and her husband "gave up all hope of said defendant complying with its * * * said promises to return said bed as aforesaid"; that at that time it was raining, and the weather was "cold and bitter"; and believing it would be dangerous for her husband to venture outside "to search for a place to sleep", appellant spread a mattress on the floor upon which they retired for the night; and that due to exposure to the cold and drafts during the night her husband contracted pneumonia with the fatal result already stated.

[1-4] It is well settled that in order to maintain an action for damages based on the wrongful act or neglect of another, a plaintiff must allege and prove that the wrongful act of the defendant was a direct and proximate cause of the injury. Marsiglia v. Dozier, 161 Cal. 403, 119 P. 505. In other words, "To impose liability it is not enough to show that an injury would not have occurred in the absence of the negligent act, but it must be shown that the act was the efficient cause of the injury—the act from which the injury followed in continuous sequence unbroken by any efficient intervening cause. Thus even though one has been guilty of negligence, he may still not be liable * * * if such negligence is remote in the chain of causation and did not contribute proximately to the injury". 19 Cal.Jur. p. 561. And in this connection it is held generally that the word "proximate" is intended to mean direct or immediate, as opposed to remote (Straten v. Spencer, 52 Cal.App. 98, 197 P. 540); and that negligence requiring the interposition of new and independent agencies to cause injury is remote (Oakland Bank of Savings **v.** Murfey, 68 Cal. 455, 9 P. 843). Moreover, in determining the question of proximate cause, care must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not; that is to say, in order to make a defendant liable his wrongful act must be the causa causans, and not merely the causa sine qua non. Klarquist v. Chamberlain & Proctor, 124 Cal.App. 398, 12 P.2d 664. In Sedgwick on Damages, 9th ed., vol. 1, p. 200, the rule is stated thus: "Two entirely independent conditions must be satisfied. First, to be proximate and entail legal responsibility, a cause must be one but for which the result would not have happened. Second, not only must this test be satisfied, but also this cause must be active enough in the result for it to be regarded in the law as efficient in responsibility." It is also well settled that in cases such as this it must appear not only that the injury complained of was the natural and probable consequence of the wrongful act, but also that such consequence might reasonably have been foreseen by a person of ordinary intelligence in the light of attending circumstances, unless the act is one of wanton wrong. Bush v. Weed Lumber Co., 63 Cal.App. 426, 218 P. 618; Newman v. Steuernagel, 132 Cal.App. 417, 22 P.2d 780. As said in the former case, " 'One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, * * * is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so.' And in the case of Mayne v. Chicago, etc., Ry. Co., 12 Okl. 10, 69 P. 933, we find language of similar import: 'What is usual, the law requires a person doing a wrong to anticipate and provide against, but the law does not require that even a wrongdoer shall anticipate and provide against the unusual.' " [63 Cal.App. 426, 218 P. 620.] The same doctrine is summarized in California Jurisprudence (vol. 19, p. 562) as follows: "In order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must not only appear that the injury is the natural and probable consequence of the negligent or wrongful act but that it ought to have been foreseen in the light of attendant circumstances. And if the wrong and the resulting damages are not known by court's experience to be usually and naturally in sequence, and the damage does not in the ordinary course of events follow from the wrong, then the wrong and the damage are

not sufficiently conjoined to support an action."

[5] Furthermore, if, subsequent to the initial cause, a new efficient cause intervenes to affect the injury, having its origin independent of the initial cause, or having its origin therein could not reasonably have been foreseen by a person of ordinary intelligence and prudence as a natural and probable result thereof, it supersedes the initial cause, breaks the connection between the initial cause and the effect, and becomes a proximate cause of the injury rendering the initial cause remote. 19 Cal.Jur. p. 567.

In the present case no facts were pleaded from which it would appear that respondent could reasonably have foreseen that its failure to deliver the bed before nightfall would result in compelling appellant's husband to sleep on the floor, or that such would be the natural or probable consequence of said non-delivery. True, it was alleged that appellant told respondent that the bed was the only one they had; but it would not necessarily follow therefrom that they would not be able to obtain suitable sleeping quarters elsewhere, in case the bed was not returned that night. Nor were any circumstances pleaded to show they could not have done so, except that at eight o'clock that night it was raining and cold, and therefore dangerous for appellant's husband to go outside. But obviously it cannot be successfully maintained that respondent should or could also have foreseen that such would be the condition of the weather. And even assuming that respondent might reasonably have anticipated that if the bed were not delivered as promised the decedent would have to sleep on the floor, it cannot be fairly said that respondent should have foreseen that the room in which he would sleep would be cold and drafty, and that as the probable result of sleeping on the floor he would contract acute pneumonia. In other words, the facts of the case show that it was the unusual that happened; and as pointed out by the authorities hereinabove cited, in cases such as this the law holds a wrongdoer responsible in damages only for the natural and probable results of his wrongful acts, and for the injurious effects thereof which he might have reasonably foreseen.

[6] Furthermore, as respondent points out, it was not alleged directly, nor were any facts pleaded which show that the alleged wrongful act or neglect in failing to deliver the bed was a direct, proximate or efficient cause of the death of appellant's husband. Quite to the contrary, as appears from the affirmative allegations of the complaint themselves, his death was proximately caused by a disease which he contracted by sleeping in cold, drafty quarters, and a weakened physical condition resulting from eleven years' sickness. Those allegations were as follows: "* * * in this behalf plaintiff alleges and shows that while so lying and sleeping on said mattress on the floor as aforesaid, her said husband was exposed to much cold and drafts *and because thereof,* in his said ill and poor state of health his physical powers of resistance were weakened and broken down, and because thereof, *and not otherwise,* he contracted pneumonia and died as aforesaid. * * *" (Italics ours.) The complaint did allege that if respondent had returned the bed as promised, appellant's husband would not have been obliged to sleep on the floor and thereby expose himself to cold and drafts; but as will be noted from the authorities above cited, in order to hold a defendant liable in damages, his wrongful act or neglect must be a direct cause of the injury, and not merely the cause but for which the injury would not have happened.

[7] It is our conclusion, therefore, that upon the grounds and for the reasons stated the trial court was justified in holding that the seventh amended complaint failed to state a cause of action. Accordingly the judgment is affirmed.

I concur: TYLER, P. J.

31 Cal.App.2d 317

MASON et al. v. COALINGA UNION HIGH SCHOOL DIST.

Civ. 2231.

District Court of Appeal, Fourth District, California.

March 2, 1939.

1. Appeal and error ⚷611

Where reporter's transcript was insufficient, reviewing court could consider only judgment roll partially contained in clerk's transcript, not notice of motion to vacate default, supporting affidavit, court minutes and decision in clerk's transcript, which clerk alone could not authenticate. Code Civ.Proc. § 953a.

2. Appeal and error ⚷553(2)

A transcript certified by reporter as comprising correct copy of notices, motions, affidavits, and minute orders in connection with motion to set aside default and default judgment could not be considered a "reporter's transcript." Code Civ.Proc. § 953a.

3. Appeal and error ⚷553(2)

A "reporter's transcript" is a transcription of the reporter's notes at the trial and the proceedings on motion for new trial. Code Civ.Proc. § 953a.

4. Appeal and error ⚷612(4)

A trial judge's certificate that so-called reporter's transcript was "true and correct," without allegation that any of the papers were used on the hearings in trial court, was insufficient and such papers could not be considered on appeal. Code Civ.Proc. §§ 951, 953a; Rule 29 of the Supreme Court and District Court of Appeal.

5. Appeal and error ⚷901

A record on appeal must show error, or the order appealed from must be affirmed.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Harry M. Mason and another against the Coalinga Union High School District. From an order vacating defendant's default and judgment entered thereon, and permitting defendant to file answer, the plaintiffs appeal.

Affirmed.

F. E. Butler, of Coalinga, for appellants.

Dan F. Conway, Dist. Atty., Henry A. Hunter, Deputy Dist. Atty., and Conley, Conley & Conley, all of Fresno, for respondent.

MARKS, Justice.

This is an appeal from an order vacating the default of defendant, and vacating a judgment entered after the entry of such default, and permitting defendant to file its answer.

[1] The record on appeal is in such form that we cannot consider any of the questions presented and argued in the briefs of counsel as there is no proper authentication of any part of the record except the judgment roll.

The record is typewritten and consists of a clerk's transcript and a purported reporter's transcript.

The clerk's transcript, besides containing the judgment roll, minus a formal judgment, the order appealed from, and the notice of appeal, contains the notice of defendant's motion, affidavits of both parties in support of and contesting the motion, minutes of the court on the trial and on the hearing and decision of the motion. This transcript has annexed to it the usual certificate of the county clerk but there is no certificate of the trial judge.

In speaking of a similarly authenticated clerk's transcript, the Supreme Court in Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748, 749, said: "There are but three things the clerk alone may authenticate, viz. the judgment roll, the order appealed from, and the notice of appeal. Code Civ.Proc. § 951; Martin v. Pacific Gas & E. Co., 195 Cal. 544, 546, 234 P. 321; Jeffords v. Young, 197 Cal. 224, 227, 239 P. 1054. The signature of the trial judge is necessary to authenticate a record under section 953a, supra. Bell v. Brigance, 194 Cal. [445], 448, 229 P. 27. The same is, of course, true of a bill of exceptions. Sections 650, 651, Code Civ. Proc."

To properly understand the purported reporter's transcript it is necessary to bear in mind the various dates which are important here.

The order to the clerk to enter the default is dated August 11, 1937. We can find no record of the entry of any default by the clerk or by the court. A copy of the court minutes of November 9, 1937, shows the case was tried on behalf of plaintiffs on that day. Evidence was taken and the cause submitted to the court. The minutes of November 12, 1937, contain an order for judgment, totaling $2,773.31, in favor of plaintiffs. A notice of motion to vacate the default and judgment and to permit defendant to answer, with supporting affidavits, was filed on November 22, 1937. Counter affidavits were filed on behalf of plaintiffs on December 1 and 2, 1937. The court minutes show that defendant's motion was made, argued, submitted and granted on December 10, 1937.

The certificate of the reporter to the reporter's transcript recites that he was in court on November 9, 1937, and reported the trial on that day. None of the evidence then taken is in the record. His certificate concludes as follows: "And I further certify that the foregoing and annexed pages, numbered from 1 to 44, inclusive, comprise a full, true and correct copy of all notices, motions, affidavits, and minute orders in connection with the motion to set aside default and default judgment."

[2, 3] It is clear that the so-called reporter's transcript can by no stretch of the imagination be classified as such. Such a record is a transcription of the reporter's notes at the trial and the proceedings on motion for new trial. Sec. 953a, Code Civ.Proc. While the reporter was present at the trial on November 9, 1937, these notes were not transcribed and he was not present at the hearing of the motion. The so-called reporter's transcript is nothing more than a copy of the clerk's records which are also copied in the clerk's transcript. We know of no authority of law giving the court reporter the right to make any such transcript, or, giving this court the right to consider it, if made, as a reporter's transcript.

The certificate of the trial judge to the so-called reporter's transcript is as follows: "I, Ernest Klette, Judge of the Superior Court of the State of California, in and for the County of Fresno, do hereby certify that no objection having been made to the foregoing transcript within five days after the receipt thereof by myself, I further certify the same to be true and correct, and it is hereby settled and allowed."

Section 951 of the Code of Civil Procedure provides as follows: "On appeal from a judgment rendered on an appeal, or from an order, except an order granting a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below."

Rule XXIX, Rules of the Supreme Court and District Courts of Appeal, provides as follows: "In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by these rules or otherwise by law."

[4] In Guyot v. Cassab, 118 Cal.App. 742, 5 P.2d 912, 914, we had before us a certificate of the trial judge substantially in the same form as the one in the instant case. We there held that the certificate was too incomplete to permit us to consider the record. Neither certificate states that any of the papers in either of the records were used on the hearings in the courts below. In that case we said: "As we have seen, section 951, Code of Civil Procedure, requires the appellant to furnish this court with a copy of the notice of appeal and of the order appealed from and copies of all papers used upon the hearing resulting in the order. The certificate of the trial court in the instant case does not inform us whether or not the papers which are copied in the transcript were used upon the hearing or whether there were other papers so used. As far as the certificate goes, it might well be that none of these papers were used on the hearing and that many others were submitted to the trial court. As was said in Clark v. McCain, supra [107 Cal.App. 668, 290 P. 901, 902]: 'The affidavits filed by the plaintiffs were not merely a part of the "moving papers" to be submitted to the judge as the basis for an ex parte order. They were evidentiary in character, and had as their object, the vacation of a final judgment. Whether or not these, or any affidavits were read or submitted to the court, we are not informed by record. We think that we are justified in declining to consider the same.' " See, also, Harrison v. Cousins, 16 Cal.App. 515, 117 P. 564; Patterson v. Rutherford, 39 Cal.App. 647, 179 P. 704; Salinas v. Riverside Finance Co., 126 Cal.App. 675, 14 P.2d 1025.

It follows that the only record we have before us is the judgment roll which does not disclose any error in granting the defendant's motion.

[5] A record on appeal must show error or the order appealed from must be af-

firmed. Golish v. Van Pelt, 109 Cal.App. 257, 292 P. 1010.

Although the record is imperfect we have examined it and have concluded that there was no abuse of discretion on the part of the trial judge in granting defendant's motion.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

31 Cal.App.2d 295

CALIDINO HOTEL CO. OF SAN BERNARDINO v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 2170.

District Court of Appeal, Fourth District, California.

March 1, 1939.

Rehearing Denied March 31, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Mortgages 🔑193

Generally, a subsequent lessee of mortgaged property, taking under a lease from the mortgagor, takes subject to the mortgage.

2. Mortgages 🔑193

Where mortgage in express terms or by clear implication authorizes mortgagor to lease mortgaged property for benefit of mortgagee, lease made in pursuance of such authority is binding on mortgagee and those claiming under him.

3. Mortgages 🔑193

Where owner of ground lease on hotel property hypothecated leasehold as security for bond issue under trust indenture requiring owner to lease property to advantage, fraud or collusion which would entitle trustee after default to possession as against lessee which had occupied hotel under subsequent lease for two years with knowledge of trustee could not be presumed. Code Civ. Proc. § 1963, subd. 19.

4. Mortgages 🔑193

Where owner of ground lease on hotel property hypothecated leasehold as security for bond issue under trust indenture requiring owner to lease property to advantage, to pledge leases as additional security, and to pay rentals thereunder to trustee, rights of trustee after default by owner were subject to right of possession of subsequent lessee.

5. Appeal and error 🔑1008(3)

When the construction given an instrument by a trial court appears reasonable and consistent with intent of parties, appellate courts will not substitute another interpretation, though it seems equally tenable.

6. Landlord and tenant 🔑133(3)

Peaceable possession by lessee in addition to forcible entry by trustee under prior trust indenture was all lessee was required to show in order to maintain action for forcible entry and detainer. Code Civ.Proc. § 1172.

7. Landlord and tenant 🔑81(2)

Indenture authorizing trustee to take possession of hypothecated leasehold on default did not authorize trustee to enter leasehold by force and exclude lessee to whom owner of leasehold had leased the property under additional provision in indenture requiring owner to lease property to advantage. Code Civ.Proc. § 1172.

8. Landlord and tenant 🔑133(1)

An instrument must contain direct and positive language in order to amount to consent by tenant that his possession be invaded by forcible entry.

9. Landlord and tenant 🔑277(3)
Mortgages 🔑187
Vendor and purchaser 🔑296

Where right to take possession is given mortgagee in mortgage or to seller in contract of sale or to lessor in lease, right may be exercised only where it can be exercised peaceably, and if it cannot be exercised without force or violence, possessor of right must resort to court of law.

10. Landlord and tenant 🔑133(3)

In action by lessee against trustee for forcible entry and detainer, testimony as to possession of weapons by agents of trustee was admissible as circumstance from which court could reasonably infer that agents had ability to use force in carrying out general threat of gaining possession and that weapons could have been used if necessary. Code Civ.Proc. § 1172.

11. Landlord and tenant 🔑133(3)

Angry words and threats of force may be, in and of themselves, sufficient to constitute acts of "forcible entry."

[Ed. Note.—For other definitions of "Forcible Entry," see Words & Phrases.]

12. Landlord and tenant ⚿133(3)

The breaking of locks is of itself evidence of "forcible entry."

13. Landlord and tenant ⚿133(3)

In action by lessee of hotel property against trustee for forcible entry and detainer, evidence that representatives of trustee, some of them carrying weapons, entered hotel, appropriated cash from cash registers, directed employees to obey their instructions, replaced locks, and forcibly ejected hotel manager and employee, supported finding that trustee was guilty of "forcible entry." Code Civ.Proc. § 1172.

14. Judgment ⚿829(3)

Judgment in proceedings under Bankruptcy Act for reorganization of owner of ground lease on hotel property wherein manager of owner's property was appointed was not res judicata of issue between trustee under indenture covering leasehold and subsequent lessee of owner respecting whether lessee or owner was in possession at time trustee made forcible entry. Bankr.Act § 77B, 11 U.S.C.A. § 207.

15. Estoppel ⚿116

Trustee relying on estoppel in pais or an estoppel by act or representation as basis for assertion that lessee was estopped from claiming that it rather than owner of ground lease was in possession at time of forcible entry by trustee was required to show some declaration, act or failure to act by reason of which some representation was made with respect to possession.

16. Estoppel ⚿4

Lessee of hotel property was not estopped by recital in petition of owner of ground lease for reorganization under Bankruptcy Act, that owner was engaged in business as lessee of hotel from asserting that it was in possession at time that trustee under trust indenture covering property forcibly entered the premises. Bankr.Act § 77B, 11 U.S.C.A. § 207.

17. Landlord and tenant ⚿133(3)

Loss of prospective profits was allowable as damages sustained by lessee of hotel property when forcibly deprived of possession by trustee under trust indenture covering the premises.

18. Landlord and tenant ⚿133(3)

In action by lessee of hotel property against trustee under trust indenture covering same premises for forcible entry and detainer, evidence sustained finding that lessee had been damaged in the sum of $4,000.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action for forcible entry and detainer by the Calidino Hotel Company of San Bernardino, California, against the Bank of America National Trust & Savings Association. Judgment for plaintiff, and defendant appeals.

Affirmed.

Freston & Files and James A. McLaughlin, all of Los Angeles, for appellant.

Guthrie & Curtis, of San Bernardino, for respondent.

GRIFFIN, Justice.

On March 8, 1938, appellant bank, acting as trustee under a trust indenture which was then in default, entered the premises in the city of San Bernardino known as the California Hotel. Solt, Inc., a corporation, successor of Durbin Building Corporation, was the owner of a ground lease upon the premises and was the debtor or trustor under a trust indenture dated May 1, 1925. By this trust indenture the Durbin Building Corporation conveyed, among other things, its leasehold interest in certain property in San Bernardino to Hellman Commercial Trust & Savings Bank, as trustee, for the purpose of securing its issue of $200,000 in first closed mortgage 7 per cent leasehold gold bonds. These bonds matured serially on May 1st of each of the years commencing with 1928 and ending with 1935, and bore interest at the rate of 7 per cent per annum payable semi-annually. The leasehold hypothecated as security for the bonds was evidenced by a lease from the Roman Catholic Bishop of Los Angeles and San Diego, as lessor, to R. E. Durbin and Stella K. Durbin, lessees and assignors of Durbin Building Corporation. Thereafter, and in 1931, Durbin Building Corporation, a California corporation, caused its corporate name to be changed to Solt, Inc., by which name it has since been designated. Also, through various consolidations and mergers, all transpiring prior to 1930, the present defendant and appellant, Bank of America National Trust and Savings Association, became the successor trustee under the trust indenture.

At the time of appellant's entry, $167,000 in principal amount of the bonds was still outstanding and unpaid and all of these bonds had become due, the last of the serial maturity accruing in 1935. Likewise, interest was unpaid on these bonds since 1931. At the time of entry the respondent corporation was in possession of the premises as lessee of Solt, Inc., under a lease dated August 31, 1936.

The respondent contended that the entry had been effected with force and violence and commenced an action for forcible entry and detainer, asking for restitution of the premises and damages for wrongful detention. The appellant appeared, pleading by way of defense (1) that it had taken peaceable possession as trustee of the premises under and pursuant to the deed of trust; (2) that the respondent had consented to and acquiesced in appellant's entry; (3) that respondent was estopped to assert possession by reason of the alleged representations made in a certain 77B (bankruptcy) proceeding before the United States District Court; (4) that Solt, Inc., and not the respondent, was in possession at the time of the entry; (5) that the action was not brought in good faith, but for the purpose of harassing the appellant; and (6) that Solt, Inc., and not the respondent, was the real party in interest.

The trial court found that while the respondent was in actual, quiet and peaceable possession, and entitled to possession of the same, the appellant, with violence and a strong hand and by force, and without the consent of respondent, entered upon and broke open and into the premises, and with force and violence removed, put out and expelled the respondent therefrom; and that the said entry was commenced on the 8th day of March, 1938, and completed on the 11th day of March, 1938; and accordingly the court gave judgment in favor of the respondent, and awarded it possession of the premises and damages in the sum of $4,000. The court further decreed that the rights of the respondent to the possession of the premises under and by virtue of the provisions of its lease with Solt, Inc., were paramount and superior to the rights of the appellant, pursuant to the trust indenture.

Appellant now contends (1) that the lease to respondent, even if respondent were actually in possession at the time of appellant's entry, was subject to and subordinate to the rights of appellant under the trust indenture; (2) that even though appellant had excluded respondent by force, the provisions of the indenture are a bar to any recovery in this action; (3) that appellant's entry was not accomplished by the use of force or threats of force as the same have been defined by the decisions; (4) that the trial court erred in admitting evidence which was prejudicial to appellant; (5) that the evidence conclusively shows that Solt, Inc., and not respondent, was in possession at the time of appellant's entry; and (6) that there is no proper evidence to sustain the recovery of damages awarded.

[1, 2] The general rule is to the effect that a subsequent lessee of mortgaged property, taking under a lease from the mortgagor, takes subject to the mortgage. McDermott v. Burke, 16 Cal. 580; Nineteenth Realty Co. v. Diggs, 134 Cal.App. 278, 25 P.2d 522; Mercantile Trust Co. v. Sunset, etc. Co., 176 Cal. 458, 168 P. 1036; Schroeder v. Berlin Arcade Real Estate Company, 175 Wis. 79, 184 N.W. 542; vol. 2, Jones on Mortgages, 8th ed., p. 367; Dugand v. Magnus, 107 Cal.App. 243, 290 P. 309. Yet, where the mortgage in express terms or by clear implication authorizes the mortgagor to make such a lease for the benefit of the mortgagee, a lease made in pursuance of such authority is binding upon the mortgagee and those claiming under him. Sammons v. Kearney Power & Irr. Co., 77 Neb. 580, 110 N.W. 308, 8 L.R.A.,N.S., 404; 19 R.C.L. 321, sec. 97.

Considering the first and all important point presented for consideration in the light of this general rule, it becomes necessary to examine the terms of the trust indenture. Section 7, article V, contains the following provision: "The said company (Solt, Inc., lessor) covenants and agrees that it will use every endeavor to lease all portions of the building erected upon said premises hereinabove described and that, upon the expiration or surrender of any portion of said building, it will immediately use its best endeavors to re-let the said vacated portion of said building upon the most favorable terms and at the highest rent reasonably to be obtained."

Section 10, article V, further provides: "The company covenants and agrees that it will well and truly keep, observe and perform any and all obligations and regulations now or hereafter imposed upon it by contract or prescribed by any law of the United States or of any state, or by any ordinance of any municipality or governmental body having jurisdiction or control thereof, or in respect thereto, as a lawful condition to the continued enjoyment of the leases, contracts or rights now owned or held by the company, or hereafter acquired by it, to the end that such leases, contracts and rights may be maintained and preserved and may not become abandoned, forfeited or in any manner impaired; * * *"

Sections 5 and 6 of article V provide:

"The company covenants and agrees that upon the making of any lease on any portion of the real property described in the granting clause, or of the buildings erected upon said real property, it will at once deliver to and pledge with the said trustee the said lease to be held by said trustee as a further and additional security for the payment of all of the bonds secured hereby, and the performance by the company of every term, covenant and condition imposed upon it by this indenture. * * *

"The said company further covenants and agrees that it will from time to time execute and deliver to the said trustee such further assignment or transfers, or other instruments as the trustee may, from time to time, require, to enable it, in the event of its taking possession of said property, to collect or receive all moneys, rentals or tolls, due or to grow due to the company in any manner whatsoever."

Section 24, article V, provides for the collection of rentals as follows: "The company covenants and agrees that it will on or before the 15th day of each month commencing on the 15th day of the month following the month in which said building is completed, pay to the Trustee all sums collected by it as rentals for any portion of the said premises since the 15th day of the preceding month. The moneys so received by the Trustee from the company shall be set apart by the trustee in a separate trust fund and shall be used by the trustee and expended by it to meet the next ensuing payment of ground rent as provided in said lease, and next ensuing installment of taxes upon the property covered hereby, and the next ensuing semi-annual installment of interest upon said bonds and the principal payment requirements as provided for in section 2 above. In the event that after the payment by the trustee of all said sums out of said rentals, there shall remain with the trustee any surplus on the first day of March, 1926, and on the termination of any quarterly period thereafter, then the trustee shall pay over all such sums to the trustee under that certain trust indenture securing the second mortgage eight per cent leasehold serial gold bonds of the company to be used in the manner provided in said trust indenture. In the event that such rentals are so deposited with the trustee and used by it for the payment of the items hereinabove provided for, the company shall be relieved of the duty to make monthly payments to apply upon interest, principal and ground rent as required by section 20 of this article."

Section 1, article VI, provides: "Unless and until one or more of the events of default shall have happened as herein specified, the company shall retain possession of the trust estate and shall manage, operate and use the same and every part thereof with rights and franchises and privileges pertaining thereto and shall receive, take and use the rent, income earnings and profits thereof."

Section 9, article V, reads: "The company covenants and agrees that this indenture now is and always will be kept a first lien upon all property described or mentioned in the granting clause hereof, and upon all property that hereafter shall be acquired with proceeds of bonds secured hereby; * * *"

Several grounds of default under the trust agreement may be declared. (a) In case default shall be made in the payment of interest on any bond. (b) In case default be made in the payment of any ground rent. (c) In case the company shall go or be put into bankruptcy. Section 2, article VII recites:

"If one or more of the events of default shall happen, then and in each and every such case the trustee, either personally or by its agents or attorneys, may in its discretion, and upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby then outstanding, and upon being tendered reasonable indemnity * * * forthwith shall enter into and upon and take and hold possession of the trust estate, and may exclude the company and its agents and servants and all other persons or corporations wholly therefrom and may use, operate, manage and control the trust estate and conduct the business of the company to the best advantage of the holders of the bonds secured hereby.

"Upon every such entry the trustee from time to time, at the expense of the trust estate, either by purchase, repair, or construction, may maintain and restore and insure and keep insured, the trust estate and make all necessary repairs, renewals, replacements, alterations, additions, betterments and improvements, as it may deem judicious. The trustee in case of such entry, shall have the right to manage the trust estate and exercise all the rights and powers of the company, either in the name of the company or otherwise, as the trustee shall deem best; and shall be entitled to collect, take and receive all tolls, earnings, income, rents, issues and profits of the trust estate."

Section 4, article VII, reads:

"If one or more of the events of default shall happen, the trustee in its discretion may, and upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby and then outstanding, and upon being tendered reasonable indemnity, *shall proceed to protect or enforce its right or rights of the bondholders under this indenture by a suit in equity or action at law, either for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy as the trustee shall deem most effectual in support of any of its rights or duties hereunder; and upon instituting such proceedings or in order to take possession as hereinbefore provided, the trustee shall be entitled to the appointment of a receiver of the trust estate and to the sale of the trust estate as an entirety, if the court in its discretion shall so order."* (Italics ours.)

Section 10, article VII:

"Any such sale or sales shall divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of the company of, in and to the property and premises sold, and shall be a perpetual bar, both at law and in equity, of the company, of, in and to the property and premises sold, and shall be a perpetual bar, both at law and in equity against the company, its successors and assigns, and against any part thereof, from, through or under the company, its successors or assigns." (Italics ours.)

The form of bond contains this provision: "For a description of the properties mortgaged, the nature and extent of the security. the rights of the holders of the bonds and of the Trustee in respect to such security, and the terms and conditions upon which said bonds are issued and secured, reference is made to said mortgage or deed of trust, to all of the provisions of which the holder hereof by accepting this bond, assents."

Appellant forcefully presents the argument that the lease terminated upon breach of the conditions of the trust, and accordingly claims under section 2, article VII that the trustee was automatically empowered to take possession of the hotel and to exclude the tenants and to operate the properties, and cites in support of this contention vol. 2, Jones on Mortgages, 8th edition, at page 375, and the case of Nineteenth Realty Co. v. Diggs, supra. That case involved a bond issue for the erection of an apartment house and the plan of operation embarked upon was a contract for the leasing of the apartments for long terms. There was evidence of fraud in reference to payment of the full purchase price of the long-term leases. The leases were not then in effect but were to become operative at a date several years in the future. The tenants were claiming right of possession under a contract of purchase of a lease not fully performed, *and there had been a trustee's sale under which plaintiff took the title in fee to the entire property.* The court gave to it possession of the premises in an unlawful detainer action.

[3] In the instant case the executed lease was for a term of ten years at a total rental of $150,000, payable $1,250 per month. Respondent had occupied the hotel under the lease for a period of two years with full knowledge of the trustee. It was not in default under its lease. It was not contended at the trial that the lease was not on the most favorable terms and at the highest rent reasonably to be obtained. There was no trustee's sale under which appellant took title to the property. No element of fraud was involved and we cannot presume fraud or collusion from the record before us. Section 1963, subd. 19, Code Civ.Proc.

The cited case of Sammons v. Kearney Power & Irr. Co., supra, is very similar to the case at bar. In that case the Kearney Power & Irrigation Company executed and delivered a mortgage on certain of its property to secure a bond issue, and we must assume from the import of the decision that subsequent to the execution of the mortgage the Kearney Company contracted to give to Northwestern Electric

Heat & Power Company the right to take water for a period of fifteen years for a consideration. There was a default upon the bond issue, and certain bondholders brought an action to foreclose the mortgage. The Northwestern Electric Heat & Power Company was permitted to intervene and to set up its rights under its contract with the Kearney Company, the mortgagor, whereupon the court found in favor of the bondholders upon foreclosure and ordered the sale of the property subject to the rights of the Northwestern Electric Heat & Power Company under its contract. Upon appeal, the Nebraska supreme court said:

"The plaintiff assigns several errors, but they all turn on the single question: Did the court err in providing in the decree that the sale thereunder should be subject to the rights of the intervening company under its contract with the mortgagor? The plaintiff invokes the general rule to the effect that, where a corporation mortgages its property, the mortgagee is not bound by subsequent contracts of the mortgagor with respect thereto, whether such contracts are leases, sales, mortgages, or otherwise. [Citing cases.] The foregoing rule is easily recognizable, as it is grounded on the general rule, applicable to all mortgages, that an interest subsequently acquired by a third party in the mortgaged property is subject to the mortgage; but the question is whether the facts in this case bring it within that rule. It will be conceded, notwithstanding the positive language in which such rule is stated, that it would be competent for the parties to a mortgage to take it out of the operation thereof by express stipulation; that is to say, that in case the mortgage should expressly provide that the mortgagor should be authorized to lease the property, or portions thereof, or enter into contracts with respect thereto, and that such leases and contracts, when made, should pass to the mortgagee as further security for the mortgage debt, leases and contracts made by the mortgagor in the exercise of such authority would be valid and binding as against the mortgagee and those claiming under him. It will also be conceded that the same result would follow, whether such authority rest on express grant or clear implication. Hence, in order to determine whether the mortgagor had authority under the mortgage to make the contract or lease under which the intervening company claims, an examination of the provision of the mortgage becomes necessary. It is not claimed that such authority is expressly given. It remains to determine whether it is given by implication. The solution of this question is to be found, we think, in the familiar rules of construction applicable to the facts in this case, rather than in precedents resting, as they must, on instruments differing materially from that under consideration." [77 Neb. 580, 110 N.W. 309.]

[4] However, the holding in that case was differentiated in the case of Schroeder v. Berlin Arcade Real Estate Company, supra. We are impelled to conclude that by the provisions of the trust indenture above quoted and the circumstances of this case, the trial court was justified in finding that the appellant and bondholders consented to and authorized the leasing of the premises on the most favorable terms and at the highest rent reasonably to be obtained. The leasing of the property was for the protection of the bondholders, as anticipated in the trust indenture. The parties must have contemplated that no one would care to enter into a lease of such premises as a hotel wherein the investment of considerable money would be required and wherein the success of the undertaking depended upon a long term plan of operation and the good will which was in this way created, unless such lessee had had some guarantee from the bondholders that he would not be disturbed provided he performed according to the terms of his lease. This case, we believe, falls clearly within the rule laid down in the Sammons case.

[5] When the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the parties, appellate courts will not substitute another interpretation, although it seems equally tenable. Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, at page 582, 300 P. 34.

In considering the second point presented, appellant urges that by the terms of article VII, section 2 of the indenture, the trustee was authorized to take possession of the premises upon default, exclude the tenant, and operate the properties, and that this provision in the indenture was a complete defense to respondent's action of forcible entry, citing Mines v. Superior Court, 216 Cal. 776, 16 P.2d 732; American Securities Co. v. Van Loben Sels, 13 Cal.App.2d 265, 56 P.2d 1247; American

Securities Co. v. Van Loben Sels, 218 Cal. 662, 24 P.2d 499; Templar Min. Co. v. Williams, 23 Cal.App.2d 45, 72 P.2d 566.

[6] Assuming the correctness of our interpretation of the first point discussed, respondents, in addition to having the right of possession, were peaceably in the actual possession of the property entered. This peaceable possession, in addition to showing the forcible entry complained of, would be the only necessary showing required of the plaintiff in a forcible entry action. Code Civ.Proc. § 1172.

In the case of California Products, Inc., v. Mitchell, 52 Cal.App. 312, 198 P. 646, it was held that in an action of forcible entry, it is necessary for the plaintiff to show, only, in addition to the forcible entry, that at the time of the entry he was peaceably in the actual possession of the property entered, and therefore questions of title and right of possession cannot be litigated. Also, that the lessors of demised premises are not entitled to take possession by forcible entry under a provision of a lease that provided in case the rent was not paid it should be lawful for them "without previous notice or demand, to re-enter the demised premises and the same peaceably to hold and enjoy thenceforth as if this lease had not been made."

[7, 8] We see nothing in article VII, section 2 of the indenture that gave appellant leave to enter the demised premises in defiance of the salutary statutes against forcible entries. Considering the nature of the provisions of the statutes on the subject and the decisions construing them, some of which have been cited above, the instrument must contain most direct and positive language in order to amount to a consent by a tenant that his possession may be invaded by a forcible entry. Such a consent would place him at the mercy of his landlord. Forcible entries, made in the best of faith, may easily lead to brawls, affrays, and breaches of the peace. We are aware of the rule that where there are contractual relations between the parties involving the right to possession of the premises upon default, the lessor under the contract may take possession if it can be done peaceably. Francis v. West Virginia Oil Co., 174 Cal. 168, 162 P. 394.

In Baxley v. Western Loan & Bldg. Co., 135 Cal.App. 426, 27 P.2d 387, the court makes a distinction between cases in which force was used to complete the entry and where force was used to retain possession after it had been peaceably acquired. However, in Kerr v. O'Keefe, 138 Cal. 415, 71 P. 447, 450, the court said: "To make a case under the pleadings, it was not necessary to prove that the entry was in fact by force and threats. The intention of the statute was to meet just such a case as this, where the entry is accomplished without force, but is retained, and the rightful owner or person entitled to possession is driven off or excluded, by force and violence." To the same effect is Templar Mining Co. v. Williams, supra. So far as we have been advised, this rule has not been modified.

[9] The authorities amply support the rule that where a right to take possession is given to a mortgagee in a mortgage or is reserved to a seller in a contract of sale or to a lessor in a lease, such right to possession may be exercised only where it can be exercised peaceably and without force or violence. If such right cannot be exercised without force or violence, the possessor of such right must resort to a court of law.

In McDermott v. Burke, 16 Cal. 580, at page 586, it was stated: "It is not contended that a mortgagor in this State cannot lease mortgaged premises. He can do so even after default in payment, and his lessee cannot be treated as a trespasser by the mortgagee until foreclosure, sale and conveyance. * * * The interest of a lessee in possession under a lease made subsequent to the mortgage, is extinguished by the foreclosure and sale."

[10] This question then presents itself. Was there sufficient evidence to support the finding that the entry was accomplished by the use of force? Appellant contends that the evidence would support only a finding that the entry was peaceful and quiescent.

The record, tersely related, discloses that on March 8, 1938, Mr. Tripp, an attorney representing certain holders of first bonds and a group of men representing the appellant, entered the California hotel. A Mr. R. M. Thomason testified that there were present fourteen men in all. The group included Mr. McLaughlin, one of the attorneys for the bank; Mr. A. J. Robillard, trust officer of appellant bank; Mr. John A. De Long, who was to be the new manager of the hotel; Mr. Duni, an investigator; a Mr. Cunningham and his son, two deputy sheriffs and others. Mr. Thomason was in possession and operating the hotel as president and manager. At least three of the men who entered the hotel approached Mr. Thomason in the coffee shop and one of them said: "We are taking possession of the hotel * * * for the Bank of America." In order to avoid an unpleasant scene, the parties adjourned to a room in the hotel where there ensued a discussion contemplated to bring about an amicable settlement. These negotiations failed. Mr. T. F. Brioady, presumably respondent's agent, testified that he noticed five or six men seated in the lobby; that they appeared very nervous; that they arose and followed him upstairs, rushed in the office behind him and one of them said: "We are taking possession of the hotel. Give us the key and the contents of the safe." Mr. Brioady said: "What order—have you got a court order?" They then threw a piece of paper toward him. He read the paper and found it was not a court order but was a letter from the bank outlining its rights. Thomason sought to maintain possession and operate the hotel by instructing all employees to disregard the trespassers and to take orders from only himself and Mr. Brioady. On numerous occasions in the interim between the entry and the time the possession of the appellant became complete, representatives of both appellant and respondent took cash from cash registers used in connection with the business operations of the hotel. Mr. Brioady collected cash as late as March 10th. Appellant's agents went to various departments in the hotel collecting money from cash registers and persuading employees to follow their instructions upon the representation that they were officers and that they were so empowered by a court order. On Thursday, March 10th, one of the appellant's agents grabbed the bar-tender employed by respondent and forcibly ejected him from the building, saying, "Don't ever come in here again. If you do, you won't be able to walk out." On one occasion, on the 9th day of March, Mr. Cunningham, one of appellant's agents, engaged in a scramble or scuffle with Mr. Brioady and Mr. Linfesty, both employees of respondent, in an attempt to obtain keys to one of the cash registers, and, although all three persons had their hands on the keys, Mr. Cunningham grabbed and jerked them from the hands of the other two persons. The undisputed testimony of the janitor was to the effect that pursuant to instructions which he received from appellant's representatives, he cut the lock on the liquor cupboard with a hacksaw and replaced it with a lock belonging to the appellant. Although it does not appear that appellant's agents flourished arms, it does appear that two of them were armed. Mr. Grantham, called as a witness for respondent, testified that on the 9th of March he saw Mr. Cunningham take a blackjack out of his pocket and slip it to his son. Mr. Linfesty also testified that he saw a holster with a gun in it on Mr. Doolin when the latter took off his coat and vest and changed his suspenders. On March 10th Mr. Cunningham and Mr. Brioady had a conversation in which Mr. Cunningham threatened to use such force as might be necessary to complete possession in the appellant bank. Mr. Brioady relates the conversation as follows: "Mr. Cunningham stated that I had an uphill battle, that if I still resisted, that they would have two men follow me wherever I went; in fact, about that time they were following me around the different parts of the building. He said, 'If you bring men in to throw us out, we will bring in twenty men; if necessary we will bring in 100 men to gain possession of the hotel.' "

Shortly after midnight on March 10th or early in the morning of March 11th, Mr. Thomason was forcibly ejected from the hotel after a controversy with Mr. Cunningham. His testimony is as follows: "* * * and I said, 'It is senseless to stand here and argue about this house; if you (Cunningham) are going to put me out, put me out. If not, I am going upstairs and go to bed.' * * * He said, 'You are going out,' and he called the other man to come over and help him, and he grabbed me under the arm and shoved me across the lobby and out the front door."

The evidence pertaining to the two men being armed was received over the strenuous objection of appellant and error is claimed for this ruling of the court. While the evidence does not indicate that the agents of appellant flaunted or flourished any arms or weapons, the testimony in reference to the possession of arms and weapons was admissible as a circumstance from which the court could reasonably infer that the agents had the ability to use force in carrying out the general threat of gaining possession and that the weapons could have been used if necessary.

[11, 12] The invasion consisted of a number of incidents commencing on the

8th day of March, 1938, and ceasing with the forcible ejection of Mr. Thomason early in the morning of March 11, 1938. The record of all of these incidents has been fully considered and examined. Angry words and threats of force may be, in and of themselves, sufficient to constitute acts of forcible entry. Gray v. Collins, 42 Cal. 152; O'Callaghan v. Booth and Deal, 6 Cal. 63; Pacific States Auxiliary Corporation v. Farris, 118 Cal.App. 522, 5 P. 2d 452. The breaking of locks is of itself evidence of force. Saferian v. Baer, 105 Cal.App. 238, 287 P. 142; Rutledge v. Barger, 82 Cal.App. 356, 255 P. 537.

[13] It therefore appears to us from a study of the entire record that the evidence is more than ordinarily replete with circumstances indicative of force which overshadow the argument that the entry was of that peaceable character which the law permits an authorized possessor to make, and impels the ultimate conclusion that appellant, under the circumstances, was guilty of forcible entry; that the terms of the indenture as to possession were no defense, and that the findings inveighed against are supported by the evidence.

[14, 15] Appellant next contends that the evidence shows that Solt, Inc., and not the respondent, was in the possession of the property at the time of the entry and that respondent is estopped from claiming otherwise in view of the proceedings under section 77B of the Bankruptcy Act, 11 U.S.C.A. § 207, in the United States District Court. It is true that on March 12, 1937, Solt, Inc., by R. M. Thomason, president, filed in the District Court of the United States a petition entitled: "In Proceedings for the Reorganization of a Corporation Under Section 77B, Bankruptcy Act," wherein it obtained an order effective January 1, 1938, appointing Thomas F. Brioady as sole and exclusive manager of the property and estate of Solt, Inc., including the California Hotel. After several proceedings were had, on February 23, 1938, that court made an order dismissing all of the proceedings but retained jurisdiction "through T. F. Brioady, as manager, over receipts, cash on hand, and deposits in bank", etc.

The issue of possession cannot have become res judicata by any judgment entered in the 77B proceedings, for those proceedings did not involve the same parties nor the same issues. Apparently the estoppel upon which appellant relies is an estoppel in pais or an estoppel by act or representation. The first essential under this rule would be a showing that respondent made some declaration, acted, or failed to act, by reason of which some representation was made with respect to possession. The record does not disclose such a showing.

[16] The petition recites: "The debtor (Solt, Inc.) is engaged in a business as lessee of that certain hotel, apartment and store building known as 'The California Hotel' and the conduct of enterprises incidental thereto. * * * The debtor corporation is the lessee of the entire premises under the long term ground lease." Although there appear to be some inconsistencies as to the various representations made, the trial court's finding on the defense of estoppel cannot be said to be erroneous.

[17] Finally, we approach the remaining and important question of damages. Appellant vehemently maintains that the finding of fact to the effect that respondent was damaged in the sum of $4,000 and the judgment for recovery of that amount is not sustained by the evidence. While it does not appear what elements the court considered in ascertaining the amount of damages, there is evidence that the loss of profits from the period of entry until the time of trial would be $200 per day. This, in itself, would amount to $4,200. Loss of prospective profits under the circumstances here related are allowable. Landon v. Hill, 136 Cal.App. 560, 29 P.2d 281.

[18] In addition to the above testimony and after relating in particular the reasons for his opinion, Mr. Brioady testified that the net profit resulting from the operation of the hotel property for the same period, i. e., March 8th to March 31st, would be between $5,000 and $6,000. There is evidence that the rent for this entire period had been paid by respondent. Mr. Thomason testified over objection that the business was damaged in the sum of $20,000 to $25,000, in addition to the other items of damage hereinabove mentioned. There is sufficient competent evidence to support the judgment in the sum of $4,000.

In the light of the reasons herein expressed, the judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

33 Cal.App.2d Supp. 768

PEOPLE v. CASEY.

No. 95145.

Appellate Department, Superior Court, San Diego County, California.

March 4, 1939.

1. Vagrancy 🔑3

A police officer's testimony that he saw defendant walking on streets or sitting in public card rooms in city on ten or twelve occasions during three months before vagrancy trial was insufficient to warrant conviction. Pen.Code, § 647, subd. 3.

2. Vagrancy 🔑1

The phrase, "place to place," in statute defining offense of being person "who roams about from place to place without any lawful business," means any substantial change of position, not merely from one city to another. Pen.Code, § 647, subd. 3.

Appeal from Municipal Court of San Diego; Philip Smith, Judge.

Joe Casey was convicted of being a person who roams about from place to place without any lawful business, and he appeals.

Reversed.

D. L. Ault, City Atty., and William Macomber and Morey S. Levenson, Deputy City Attys., all of San Diego, for appellant.

Edgar G. Langford, of San Diego, for the People.

MUNDO, Judge.

The defendant was charged with and convicted of being a person "who roams about from place to place without any lawful business," in violation of the provisions of Section 647, subdivision 3, of the Penal Code.

[1] The evidence upon which the defendant's conviction was predicated consisted solely of the testimony of a single police officer, who testified that he had seen the defendant walking on the streets or sitting in public "card rooms" in the City of San Diego, at various hours of the day and night, on ten or twelve occasions during the three months next preceding the date of trial, but that he did not recall any particular time when or place where he had ever seen the defendant. The insufficiency of this evidence for conviction is at once apparent. Not only does the testimony lack definiteness as to dates and places, but it is no more than could be offered against any citizen who has occasion to walk upon the city streets or patronize licensed places of business, or who, perchance, may wander about "taking in the sights."

[2] "Roaming" as used in subdivision 3 is qualified by the phrase "without any lawful business." If the defendant was moved by the demands of some lawful business he would not be amenable to the charge of vagrancy because of his roaming proclivities. The record herein is entirely silent as regards the business of the defendant; whether it was lawful or unlawful, is not disclosed.

"Place to place" as employed in the subdivision has never, so far as we know, been construed by our courts. The phrase obviously means any substantial change of position and is not necessarily restricted to mean from one city to another. One who roams from one place to another within the city without any lawful business would be amenable to the statute. The evidence in this case, however, is insufficient to show the existence of facts constituting a public offense.

The judgment is therefore reversed.

We concur: HAINES, P. J.; TURRENTINE, J.

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33 Cal.App.2d Supp. 763

PEOPLE v. MOSS.

Cr. A. 1549.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 27, 1939.

1. Licenses 🔑40

Evidence that defendant bought materials, hired labor and enlisted superintendent's services to build structure on defendant's property was insufficient to sustain conviction of engaging in business of contractor without license, as property owner does not become "contractor" by performing services for himself. Gen.Laws 1937, Act 1660.

[Ed. Note.—For other definitions of "Contractor," see Words & Phrases.]

2. Licenses 🔑11(5)

The word "undertakes" in provision of Contractors' License Law defining contractor as one who undertakes, offers to undertake, or purports to have capacity to undertake, to construct building, means "undertakes with another," though latter two words, formerly in statute, were omitted from subsequent amendments thereof. Gen.Laws 1937, Act 1660.

The word "undertake" has been defined as meaning "to take upon oneself; to engage in; to enter upon; to take in hand; set about; attempt; as, to undertake a task," but also "to lay oneself under obligation, or to enter into stipulations, to perform or to execute; to covenant; contract."

[Ed. Note.—For other definitions of "Undertake," see Words & Phrases.]

3. Statutes 🔑209

A word appearing several times in statutory definition of term should be given same meaning on all its appearances, in absence of reason to believe that Legislature used it with different meaning at different times.

4. Licenses 🔑11(5)

A person erecting building on his own property is not a "contractor" within Contractors' License Law. Gen.Laws 1937, Act 1660.

5. Licenses 🔑11(5)

The provision of Contractors' License Law that it shall not apply to property owners building or improving structures on their property for their occupancy takes on no new meaning, precluding conclusion that such owners are not contractors within statute, because of its reappearance in amended version, omitting words "with another" from definition of contractor as one undertaking with another to construct building. Gen. Laws 1937, Act 1660, § 2(d); Pol.Code, § 325.

6. Licenses 🔑11(5)

While Contractors' License Law should be given interpretation in furtherance of its beneficent purpose, a limitation therein on citizen's right to go about his business without governmental interference by requiring landowner to have contractor's license before erecting building on his land should not be recognized by courts, unless clearly and constitutionally imposed. Gen.Laws 1937, Act 1660.

7. Licenses 🔑42(3)

A complaint, charging that defendant "did engage in the business or engage in the capacity of a contractor" without license required by statute, was defective as charging one or the other of acts declared unlawful, so as to require reversal of conviction therefor and remand of cause with instructions to dismiss complaint. Gen.Laws 1937, Act 1660, § 1.

◆

Appeal from Justice's Court, Downey Township; G. B. Gamble, Judge.

Mike M. Moss was convicted of engaging in the business or capacity of a contractor without a license, and he appeals.

Reversed and remanded, with instructions.

Robert H. Wallis, of Los Angeles, for appellant.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, Judge.

[1] The defendant-appellant was convicted on the charge that he "did engage in the business or engage in the capacity of a contractor" without a license as required by the Contractors' License Law, Act 1660, Deering's Gen'l Laws 1937. Viewing the evidence most favorably to the conviction, it may be said to warrant the conclusion that the defendant bought materials, hired labor and enlisted the services of a superintendent, all to the end that a structure was built on property owned by the defendant. Inasmuch as we are of the opinion that an owner does not become a "contractor" because he performs for himself services that, if done for another, would bring him within the purview of the statute, we find this evidence insufficient to sustain the conviction which led to the judgment appealed from.

[2] To ascertain the meaning of the word "undertakes" as it appears in the statute's definition of "contractor," is the problem presented by this appeal. The word is susceptible of the meaning which the People would give it in support of their judgment: one may undertake a task by and for himself. This use of the word is embodied in one of the dictionary definitions: "To take upon oneself; to engage in; to enter

upon; to take in hand; set about; attempt; as, to undertake a task, a journey." But the word has also a definition which connotes an agreement with another person: "* * * to lay oneself under obligation, or to enter into stipulations, to perform or to execute; to covenant; contract." Both definitions are found in Webster's New International Dictionary, Second Edition.

As "contractor" was defined when the statute was adopted in 1929, Stats.1929, p. 1591, and as amended in 1931, the use in which "undertakes" was employed was unambiguous. Quoting enough of section 3, as amended in 1931, St.1931, p. 1257, to make clear our point, it provided: "A contractor within the meaning of this act is a person * * * who for * * * compensation, other than wages, undertakes or offers to undertake with another, or purports to have the capacity to undertake with another, to construct * * * any building * * *." Beginning with an amendment in 1933, p. 1484, the words "with another" have been omitted, and the modern version is: "A contractor within the meaning of this act is a person, * * * who in any capacity other than as the employee of another with wages as the sole compensation, undertakes or offers to undertake or purports to have the capacity to undertake or submits a bid, to construct * * * any building * * *." It is our conclusion that the omission of the words "with another" has not changed the scope of the definition at all; it still uses the word "undertake" in the sense in which it was formerly used; "with another" is still its meaning.

Several considerations, jointly and severally, bring us to this conclusion. To begin with, it would require a clear expression of legislative intent for us to believe that the statute intended to make such an unwarranted use of the word "contractor" as to have it embrace a person who had avoided entering into a contract. The employment of a word which means not only to set about doing something, oneself, but also to agree with another to do something, does not result in a clear expression of a legislative desire to give an entirely artificial meaning to "contractor."

[3, 4] The word "undertake" appears several times in the definition; so, there being no reason to believe that the legislature used it with a different meaning one time than another, it should be given the same meaning on all appearances. Coleman v. City of Oakland, 1930, 110 Cal.App. 715, 295 P. 59. Plainly more than one person is involved when the definition refers to one who "offers to undertake or purports to have the capacity to undertake or submits a bid." To avoid a definition which would give us a contractor without a contract, and to follow the interpretation which uses "undertake" in the same sense throughout the definition, a sense which is common and correct, we must conclude that a person, erecting a building on his own property, is not a contractor, within the meaning of the Contractors' License Law.

[5] An argument may be made against this conclusion by pointing to subdivision (d) of section 2 of the statute and asking: "What purpose does this provision have if an owner is not to be considered a contractor?" The provision referred to is: "Sec. 2. This act shall not apply to: * * * (d) Owners of property, building or improving structures thereon for the occupancy of such owners, and not intended for sale." Deering's Gen.Laws 1937, Act 1660. We cannot answer the question, but the argument referred to loses whatever potency it would have when we note that for some reason, possibly an excess of caution, an exemption of identical import, though varying in expression from time to time, has been in the statute throughout its existence, and by no stretch of construction possible prior to 1937 could it be said that a contractor's license was required of an owner building on his property. Unless some reason indicates a contrary construction, the provision takes on no new meaning by virtue of its reappearance in the 1937 version. Section 325, Political Code; Carter v. Stevens, 1930, 208 Cal. 649, 284 P. 217; Blodgett v. Superior Court, 1930, 210 Cal. 1, 13, 290 P. 293, 72 A.L.R. 482.

[6] We do not question the beneficent purpose of this statute, and it should be given an interpretation in furtherance of that purpose. It imposes, however, another limitation upon the right of a citizen to go about his business without governmental interference, and we are of the opinion that such a limitation should not be recognized by the courts, especially where the sanction is possible imprisonment, except as the legislative power clearly, and constitutionally, imposes it. Without passing on any constitutional question, we conclude that the least that may be said is that it is not clear that the legislature has intended to require

an owner of a piece of land to have a contractor's license before he can himself erect a building on it.

[7] We are directing that the action should be dismissed not only because it seems most unlikely that a new trial would be fruitful, in view of what we have held, but also because the complaint is faulty. Section 1 of the statute declares that it shall be unlawful for a person to engage in the business or act in the capacity of a contractor without a license. The acts thus named as unlawful are not synonymous and a complaint is defective which charges that one *or* the other was done, as does the complaint in this action. People v. Tomlinson, 1868, 35 Cal. 503, 508, and cases cited. The complaint, furthermore, contains inaccurate and possibly misleading references to the statute, referring to the "Contractors' Law," "as amended in 1931." We need not inquire and do not determine whether any of these defects in the complaint would of themselves require a reversal, in view of the fact the judgment must be reversed for the reason first advanced.

The judgment is reversed; the cause is remanded to the trial court with instructions to dismiss the complaint.

We concur: SHAW, P. J.; SCHAUER, J.

BRAUN v. BROWN et al.

L. A. 16889.

Supreme Court of California.

March 9, 1939.

Rehearing Denied April 6, 1939.

1. Parties 🔑42

In action against public administrator to recover property on ground of gift causa mortis from decedent, motion of decedent's heir to intervene was properly denied when not made until after trial, when administrator moved for new trial. Code Civ.Proc. § 387.

2. Appeal and error 🔑143

One whose motion for leave to intervene had been denied could not appeal from final judgment for plaintiff, nor join in defendant's appeal. Code Civ.Proc. § 938.

3. Appeal and error 🔑151(2)

Only a party to the record can appeal, under statute providing that any "party aggrieved" may appeal. Code Civ.Proc. § 938.

[Ed. Note.—For other definitions of "Aggrieved Party," see Words & Phrases.]

4. Appeal and error 🔑482

Where one whose motion for leave to intervene had been denied attempted to join in defendant's appeal, and obtained writ of supersedeas on application in which defendant did not join, writ of supersedeas must be recalled upon determination that proposed intervener could not join in the appeal.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas and Robert W. Kenny, Judges.

Action by Teresa A. Braun against Ben H. Brown, administrator of the estate of Julius H. Schmidt, deceased, and the Estate of Julius H. Schmidt, deceased, for claim and delivery, to quiet title, and for conversion, wherein plaintiff had judgment, and defendant administrator moved for a new trial. Raymond G. Assmann joined in the motion, and at the same time petitioned for leave to intervene. From a judgment for plaintiff, defendant administrator appealed and the unsuccessful intervened joined in the appeal, and from the order denying motion to intervene, intervener appealed. On motions to dismiss the intervener's appeal from the order denying motion to intervene or to affirm the order, to dismiss intervener's appeal from the judgment, and to recall writ of supersedeas.

Motions granted.

J. H. O'Connor, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for defendants and appellants.

C. M. Castruccio and Horace W. Danforth, both of Los Angeles, for Raymond G. Assman, proposed intervener and appellants.

J. Marion Wright and Owen E. Kupfer, both of Los Angeles, for respondent.

CURTIS, Justice.

This is a controversy over $19,703.11 worth of personal property left by Julius H. Schmidt, who died intestate in Los Angeles on February 11, 1937. Three persons are interested; the public administrator, as administrator of the estate, to whom the property was delivered and who still has it in his possession; Raymond G. Assmann, resident of Oregon, a nephew of decedent who claims the property as decedent's sole heir; and Teresa A. Braun, who claims the property as a gift causa mortis from decedent.

Teresa A. Braun brought an action against the public administrator for claim and delivery, to quiet title, and for conversion. On April 21, 1938, she had judgment as prayed, decreeing her ownership of the property and ordering the public administrator to deliver it to her forthwith. The public administrator promptly moved for a new trial. Raymond G. Assmann joined in the motion and at the same time petitioned for leave to intervene in the action. Plaintiff opposed the intervention and the court, after hearing the matter, denied a new trial, and also denied the petition for intervention. The unsuccessful intervener then appealed from the order denying his motion to intervene. The public administrator appealed from the judgment entered in favor of plaintiff, Teresa A. Braun, and the unsuccessful intervener joined with said public administrator in his appeal from said judgment. By stipulation the two appeals from the judgment were consolidated. There are, therefore, three appeals now pending; the appeal of the public administrator from the judgment in favor of plaintiff, the appeal of the proposed intervener from the order denying his motion to intervene upon the motion for a new trial, and the appeal of the unsuccessful intervener from the judgment in favor of the plaintiff and against the public administrator. Plaintiff now moves to dismiss the appeal of the proposed intervener from the order denying his motion to intervene or to affirm the judgment and order denying him leave to intervene, and to dismiss his appeal from the judgment in favor of plaintiff. Contemporaneously with said motion to dismiss, the plaintiff has moved this court to recall the writ of supersedeas heretofore issued by this court upon the petition of the said proposed intervener, the public administrator not having joined with the proposed intervener in his application for said writ.

[1] We are of the opinion that both motions of the respondent, Teresa A. Braun, should be granted. The order of the trial court denying the proposed intervener's motion to intervene was proper by reason of the fact that the application to intervene came too late. The code section which authorizes intervention expressly provides that the motion shall be made "before trial", and it has been definitely decided that a motion to intervene after judgment has been entered was made too late. Sec. 387, Code Civ.Proc.; Mack v. Eummelen, 31 Cal.App. 506, 160 P. 1096; Kelly v. Smith, 204 Cal. 496, 501, 268 P. 1057. In the case of Eggers v. National Radio Co., 208 Cal. 308, 281 P. 58, cited by the proposed intervener, the motion for a new trial having been granted, the application of the proposed interveners therein to intervene was held to be timely. If the motion for a new trial by the public administrator in the instant case had been granted, the proposed intervener herein could rely upon the case of Eggers v. National Radio Co., supra, as authorization for the granting of his motion to intervene. It has no application to the instant case. It follows that the motion of the respondent to affirm the order of the trial court denying the motion of the proposed intervener to intervene upon the motion for a new trial should be granted.

[2] The motion of the respondent in so far as it is directed to the appeal of the unsuccessful intervener from the final judgment rendered against the defendant public administrator should likewise be granted. It has been held that the only appeal open to an unsuccessful intervener is from the order denying his motion to intervene and he is not entitled to appeal from the judgment rendered in the action. Ryan v. McKinley, 124 Cal.App. 765, 13 P.2d 522; 20 Cal.Jur., p. 529, sec. 31.

[3] The proposed intervener argues, however, that he is entitled to appeal from said judgment by virtue of the provisions of section 938 of the Code of Civil Procedure, which provides that, "any party aggrieved may appeal". There can be no doubt that the proposed intervener as sole beneficiary of the estate of Julius H. Schmidt is aggrieved by reason of the entry of said judgment. However, it is a well-established rule that only a person who is a party to the record can appeal. In Elliott v. Superior Court, 144 Cal. 501, 507, 77 P. 1109, 1111, 103 Am.St.Rep. 102, it was held that "It has been settled as a rule of practice by a long series of decisions that only a party to the record can appeal." The proposed intervener has taken none of the appropriate steps necessary to make himself a party to the record and he cannot become a party simply by joining with the public administrator in the appeal. 2 Cal.Jur., p. 208, sec. 52.

[4] With reference to the motion for the recall of the writ of supersedeas, it should be noted that the public administrator did not join in said application, and the writ was issued at the instance of the proposed intervener alone. Inasmuch as it is apparent that he is not a party to the proceeding, it follows that the writ of supersedeas issued to preserve the status quo of the subject-matter of the judgment appealed from, pending the determination of his right to appeal, should now be recalled.

The motion of the respondent to affirm the order of the trial court, denying the proposed intervener's motion to intervene upon the motion for a new trial, is granted. The motion of the respondent to dismiss the appeal of the proposed intervener from the judgment rendered in said action is granted. It is ordered that the writ of supersedeas heretofore issued be recalled.

We concur: WASTE, C. J.; SEAWELL, J.; EDMONDS, J.; SHENK, J.; LANGDON, J.; HOUSER, J.

UNION TRUST CO. OF SAN DIEGO v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.*

L. A. 16626.

Supreme Court of California.

March 3, 1939.

Mandamus ⚿190

Effect of Supreme Court's grant of hearing on petition for writ of mandate after Court of Appeal had granted peremptory writ was to entirely eliminate prior decision of Court of Appeal, and hence decision was not before Supreme Court for "review" within statute providing that when decision of court of inferior jurisdiction in special proceeding is brought before higher court for review, other than by appeal, same costs must be allowed as in cases on appeal. Code Civ.Proc. § 1027.

[Ed. Note.—For other definitions of "Review," see Words & Phrases.]

In Bank.

Proceeding by the Union Trust Company of San Diego for a writ of mandate directed to the Superior Court of the state of California in and for San Diego County, and others, wherein judgment denying writ of mandate was entered. On motion of respondents for allowance of costs incurred in resisting petition for writ of mandate before District Court of Appeals and the Supreme Court.

Motion denied.

Stearns, Luce, Forward & Swing, of San Diego, for petitioner.

C. J. Novotny, of San Diego, for respondents.

WASTE, Chief Justice.

The respondents seek to recover their costs incurred in resisting a petition for writ of mandate before the District Court of Appeal and before this court after hearing granted herein.

They filed a memorandum of costs, and have moved this court for its order allowing costs, directing the issuance of a writ of execution, directing the manner of collection, and, if necessary, amending our decision denying the writ so as to provide for the allowance and collection of costs.

The petition for mandate was granted by the District Court of Appeal, but, after hearing in this court, was denied on June 29, 1938, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259. No petition for a rehearing in this court was filed, and the judgment became final on July 29 last, and is not now open to modification or attack. Notice of motion for allowance of costs was filed here and noticed for the Los Angeles calendar in September, at which time it was denied from the bench without presentation. Later, on representation of moving counsel that the motion had been called and acted upon during his absence from the courtroom, a rehearing was granted, and the motion was presented and argued on the Los Angeles December calendar, and later submitted.

Respondents contend that the costs they seek to recover must be allowed them by this court under the provisions of section 1027 of the Code of Civil Procedure, which provides that "When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case." The inapplicability of that section to the present situation is at once apparent, because in the mandate proceeding there was not, before this court for review, the decision of any court in a special proceeding. The effect of the granting of the petition for hearing here after decision and judgment in the District Court of Appeal was to entirely eliminate the prior decision of that court from the proceedings. The petition for writ of mandate was, therefore, before this court as an original application, and not for the purpose of reviewing the decision of the other court. Neither was there any decision of the superior court against which the judgment was directed.

Section 1095 of the Code of Civil Procedure provides that if an applicant for mandate is successful, he may recover costs. But the respondents were unsuccessful in this court, and it is now needless to speculate as to what costs might have been awarded the applicants, for not only were they unsuccessful in this court, but no provision for costs was made in the judgment denying the writ.

The motion is denied.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

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*For subsequent opinion see 90 P.2d 582.

13 Cal.2d 56

GAVIN v. LANDFAIR REALTY CORPORATION.

L. A. 16776.

Supreme Court of California.

March 3, 1939.

1. Appeal and error ⟹659(4)

A motion on appeal for diminution of record which asserted facts occurring after appeal was required to be denied, since it did not tend to bring up anything that was before the trial court at time of rendition of decree appealed from.

2. Courts ⟹113

In action by contractor's surety against owner of building for delivery of notes and trust deeds in escrow which were to be delivered to surety upon completion of building, where notes and trust deeds were held in custodia legis, on surety's appeal from judgment finding building not to be completed, motion to withdraw notes and trust deeds from such custody was required to be denied, since to grant it would be to prejudge merits of case.

3. Appeal and error ⟹373(1)

In action by contractor's surety against owner of building for delivery of notes and trust deeds in escrow, which were to be delivered to surety upon completion of building, where notes and trust deeds were placed in custodia legis, and both parties appealed, owner was not required to file appeal bond. Code Civ.Proc. § 943.

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action for declaratory relief and for delivery of notes and trust deeds held in escrow, by James M. Gavin against the Landfair Realty Corporation, wherein defendant filed a cross-complaint. From the judgment, both parties appeal, plaintiff moving in diminution of record, for permission to withdraw the notes and trust deeds from custody of the clerk, and to require defendant to file an appeal bond or dismiss appeal.

Motions denied.

W. C. Smith and Everett H. Smith, both of Los Angeles, and Alton & Ratcliff, of Beverly Hills, for appellant and respondent Gavin.

Glen Behymer, D. Howard Painter, and Bettin, Painter & Wait, all of Los Angeles, for Landfair Realty Corporation.

Hugo A. Steinmeyer, of Los Angeles, for respondent Bank of America Nat. Trust & Savings Assn.

WASTE, Chief Justice.

Plaintiff Gavin, who has appealed from a portion of the judgment entered herein, moves this court for orders allowing diminution of the record, permitting withdrawal of certain notes and trust deeds, and requiring the defendant Landfair Realty Company, which has also appealed from a portion of the judgment, to post an appeal bond and in the absence thereof for a dismissal of the appeal.

In our consideration and determination of these several motions we shall generally state only so much of the facts underlying this litigation as are essential to an understanding thereof. It appears that the defendant Landfair Realty Company let a contract to the cross-defendant John L. Hudson, as contractor, for the erection of a building to cost $42,000. A faithful performance bond and a bond to laborers and materialmen were respectively executed by Hudson, as principal, and by Hudson's father and plaintiff Gavin, as sureties, each bond being in the sum of $21,000. In addition, the plaintiff Gavin agreed to loan $35,000 for the construction of the building. Hudson, the contractor, was to provide the balance necessary to complete the building. Certain notes secured by deeds of trust were to be executed to insure repayment of the sums so advanced. These instruments were placed in escrow with instructions for their delivery to Gavin 35 days after filing of notice of completion, providing no liens were on file. Gavin advanced and paid into the escrow from time to time sums aggregating $23,750 and, in addition, paid out $19,869.72, in an effort possibly to avoid liability under the faithful performance bond. After these sums had been paid, Gavin and Hudson, the contractor, claimed that the building was complete in accordance with the plans and specifications. This the owner and architect denied and a certificate of completion was refused. Thereupon Gavin commenced this action for declaratory relief and for delivery of the notes and trust deeds above mentioned. The Landfair Realty Company cross-complained. The escrow holder delivered the notes and trust deeds to the clerk of the court and they are now held in custodia legis.

At the conclusion of the trial the court below found that it would require an additional seventy days and $7,003 to complete the building according to specifications and that the Landfair Realty Company, as owner, had been damaged in the sum of $3,774 by delay in construction and consequent loss of rentals. By the terms of the judgment thereafter entered the Landfair Realty Company recovered, on its cross-complaint, against Gavin and Hudson, the sum of $10,777 and costs. The clerk was directed to retain the promissory notes and deeds of trust until seventy days after signing of the judgment in order to permit completion of the building, and then to deliver same to Gavin in the event he did not prosecute an appeal from the judgment and further that if any party to the action, except Landfair Realty Company, should prosecute an appeal the clerk was to retain custody of the documents until further order of the court. In other words, if no appeal was taken, or if Landfair Realty Company alone appealed, the documents were to be delivered to Gavin at a time when it would be too late for him to notice an appeal. Gavin was also ordered to pay Landfair Realty Company the sum of $200 to satisfy the architect's claim of lien. It was also decreed that the escrow holder pay Gavin $100 theretofore paid on account of one of the notes. The notes and trust deeds were decreed to be valid and the latter to be subsisting liens on the property. As stated above, both Gavin and the Landfair Realty Company appealed from portions of the judgment.

[1] Gavin now moves in diminution of the record that an affidavit of one of his counsel be added thereto wherein are averred asserted facts concededly occurring after the appeal had been perfected to the effect that Landfair Realty Company was in possession of and using the building. The undoubted purpose of such affidavit is to show that the building is complete, contrary to the findings and judgment of the trial court. In opposition to the motion, a counteraffidavit has been filed denying possession and use of the building by Landfair Realty Company. The granting of the motion for diminution of the record can avail the appellant Gavin nothing inasmuch as it is not sought to bring up thereby anything which was before the trial court at the time of the rendition of the decree appealed from. In Hiett v. Inland Finance Corp., 202 Cal. 277, 259 P. 1102, it is held that a motion for diminution of record is not the proper method by which to bring before an appellate court factual matters occurring after the rendition of judgment and which tend to show that the appeal has become moot. It is there pointed out that the proper remedy is by motion to dismiss upon that ground. In the present case, the purpose of the proffered affidavit and the motion for diminution is to show possession and occupancy of the building by Landfair Realty Company subsequent to the entry of judgment which, in turn, would tend to establish completion of the building contrary to the provisions of the judgment now on appeal, thereby rendering the appeal substantially moot. As indicated, it is not the province of a motion for diminution to disclose matters occurring after the entry of the judgment appealed from. The motion must therefore be denied.

[2] Nor do we find any merit in the motion requesting permission to withdraw the promissory notes and trust deeds from the custody of the clerk. As indicated in the above statement of facts, the judgment expressly provides that in the event of an appeal by the plaintiff Gavin, the notes and trust deeds should be held by the clerk pending further order of the court below. The continued possession of said instruments by the clerk of that court is a part of the judgment appealed from and may not be dissociated from the merits of the appeals. Moreover, in commencing this action Gavin principally sought possession of these instruments. To grant the motion to withdraw the instruments would be to prejudge the merits of the case and the appeals in a material respect. The motion must be denied.

[3] In support of his third and final motion by which it is sought to require the Landfair Realty Company to file an appeal bond or in lieu thereof to dismiss its appeal, plaintiff Gavin relies on section 943 of the Code of Civil Procedure. Under the very terms of the cited section no appeal bond is required of Landfair Realty Company inasmuch as the instruments which by the terms of the judgment are to be delivered to Gavin have been deposited with the clerk of the court below and, in view of Gavin's appeal, are to be

so held until the further order of the court. This motion likewise lacks merit.

The several motions are, and each is, denied.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; HOUSER, J.

12 Cal.2d 720

PEOPLE v. FRENCH.

Cr. 4135.

Supreme Court of California.

Feb. 27, 1939.

As Modified on Denial of Rehearing
March 29, 1939.

1. Homicide 🔑27

Alleged muddled and deranged condition of mind, with actions controlled by emotions and consciousness only of moral justification for shooting, did not constitute defense to charge of murder. Per Seawell, J., Waste, C. J., and Curtis, J.

2. Homicide 🔑151(2)

In prosecution for murder, wherein accused entered plea of not guilty by reason of insanity, accused had burden of proving by preponderance of evidence that he was insane, in sense that he was unable to appreciate nature and quality of his act and did not know it was wrong to commit it. Per Seawell, J., Waste, C. J., and Curtis, J.

3. Homicide 🔑237

In murder prosecution, plea of not guilty by reason of insanity was refuted by accused's own acknowledgment to neighbor after shooting that he had killed victim, accompanied by request that neighbor shoot accused, since in so doing, accused was either moved by consciousness that he had committed an act which his conscience did not justify, or that he was conscious that he had committed a wrongful and forbidden act. Per Seawell, J., Waste, C. J., and Curtis, J.

4. Homicide 🔑27

Neither emotional, moral, nor partial insanity, nor insane delusions, nor hallucinations, nor irresistible impulse, accused being conscious as to nature and quality of his act and that it was wrongful and punishable by law, constitute defenses in homicide prosecution. Per Seawell, J., Waste, C. J., and Curtis, J.

5. Criminal law 🔑419(12)

In murder prosecution, newspaper articles were inadmissible except on theory that they contained threats to do accused, or some member of his family, bodily harm, and that accused acted in real or apparent necessary self-defense in taking life of victim. Per Seawell, J., Waste, C. J., and Curtis, J.

6. Homicide 🔑309(3)

In murder prosecution, where intent to kill was formed in absence of victim and accused sought out victim some considerable time thereafter and executed his purpose without act done, or word spoken by victim, consideration of verdict of manslaughter might properly have been excluded. Pen. Code, § 192. Per Seawell, J., Waste, C. J., and Curtis, J.

7. Criminal law 🔑331

Burden is on accused urging special issue of insanity or mental incapacity to overcome presumption of sanity by preponderance of evidence. Per Seawell, J., Waste, C. J., and Curtis, J.

8. Criminal law 🔑48

Generally, insanity when interposed as a defense in a criminal prosecution is either a complete defense or none at all. Per Seawell, J., Waste, C. J., and Curtis, J.

9. Criminal law 🔑48

Insanity is not available as a defense unless accused when act was committed was so deranged and diseased mentally that he was not conscious of wrongful nature of act committed. Per Seawell, J., Waste, C. J., and Curtis, J.

10. Criminal law 🔑48

An accused who has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, and who has knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, must be *held* responsible for his conduct. Per Seawell, J., Waste, C. J., and Curtis, J.

11. Criminal law 🔑286

The "plea of insanity" is a plea of confession and avoidance, and cannot be invoked as a justification for taking human life. Per Seawell, J., Waste, C. J., and Curtis, J.

12. Homicide 🔑179

In murder prosecution, newspaper articles, letters, and conversations showing a bitter newspaper rivalry as the exciting cause of a mental disturbance, were relevant to issue of insanity, but were not admissible on trial of issue of not guilty as an aid to the jury in fixing punishment. Pen.Code, §§ 190, 1016 et seq., 1026. Per Seawell, J., Waste, C. J., and Curtis, J.

13. Criminal law ⇨884

The discretion which the jury may exercise in fixing punishment must be determined from facts and circumstances attending commission of offense. Pen.Code, § 1016 et seq. Per Seawell, J., Waste, C. J., and Curtis, J.

14. Criminal law ⇨304(6)

The Supreme Court would take judicial notice that Alturas was the county seat of Modoc county, a political subdivision of the state. Per Seawell, J., Waste, C. J., and Curtis, J.

15. Criminal law ⇨564(5)

Evidence that victim was killed in home in county seat was sufficient to establish venue of prosecution in such county. Per Seawell, J., Waste, C. J., and Curtis, J.

16. Criminal law ⇨1169(1)

In murder prosecution, where there was no claim that shots were fired in self-defense, admission of photograph of room in which shooting occurred, showing undisputed relative positions of parties, was not prejudicial. Per Seawell, J., Waste, C. J., and Curtis, J.

17. Criminal law ⇨1169(1)

In murder prosecution, where autopsy physician described wounds and jury knew that entry of bullet had caused death, admission of X-ray photographs showing courses which bullets took after entering body, was not prejudicial, if erroneous, notwithstanding jury's request for further examination of the photographs. Per Seawell, J., Waste, C. J., and Curtis, J.

18. Assault and battery ⇨66

No words of insult or reproach, however grievous, will justify an assault, or threatening demonstration with a deadly weapon. Per Seawell, J., Waste, C. J., and Curtis, J.

19. Homicide ⇨45

Neither provocations by words only, however opprobrious, nor contemptuous, or insulting actions or gestures without an assault on the person, are of themselves sufficient to reduce offense of intentional homicide with deadly weapon from murder to manslaughter. Per Seawell, J., Waste, C. J., and Curtis, J.

20. Homicide ⇨101

Newspaper articles, letters, and conversations showing a bitter newspaper rivalry, were not sufficiently provocative to justify homicide. Per Seawell, J., Waste, C. J., and Curtis, J.

21. Homicide ⇨9

The act of killing may follow intent to kill as rapidly as follow the successive thoughts of the mind. Pen.Code, § 192, subd. 1. Per Seawell, J., Waste, C. J., and Curtis, J.

22. Homicide ⇨311

In murder prosecution, where killing was deliberately committed with deadly weapon some time after intent to kill had been formed, but court covered murder and manslaughter fully by its charge, it could not be said jury's consideration as to degree of punishment was improperly limited because court limited consideration of provocative evidence to question of whether it was sufficiently provocative to justify reduction of punishment should they find accused guilty of first degree murder. Per Seawell, J., Waste, C. J., and Curtis, J.

23. Criminal law ⇨494
Homicide ⇨237

In murder prosecution, evidence relating to allegedly provocative newspaper articles, letters, and conversations, coupled with other evidence and testimony of experts, *held* insufficient to sustain plea of not guilty by reason of insanity. Pen.Code, §§ 1027, 1127b. Per Seawell, J., Waste, C. J., and Curtis, J.

24. Criminal law ⇨918(1)

The trial of cases should be conducted in an orderly manner and with due respect to opposing counsel but where infractions occur under circumstances such as could not have affected judgment of reasonable men, new trial will not be ordered. Per Seawell, J., Waste, C. J., and Curtis, J.

25. Criminal law ⇨919(1)

Alleged misconduct of district attorney in thanking jury for bringing in a just and right verdict, after verdict of guilty had been returned, but before trial on issue of insanity had been had, was proper matter to be presented on motion for new trial. Per Seawell, J., Waste, C. J., and Curtis, J.

26. Criminal law ⇨660

Court will not halt the trial of a cause to consider mere errors that may be presented in an orderly manner and in the time provided by law. Per Seawell, J., Waste, C. J., and Curtis, J.

27. Criminal law ⇨1129(1), 1130(2)

The Supreme Court will not, except under exceptional circumstances, consider questions which are not properly assigned as prejudicial error, nor presented in briefs of counsel. Per Seawell, J., Waste, C. J., and Curtis, J.

28. Criminal law ⇨1186(4)

Alleged misconduct of district attorney in thanking jury for bringing in a just and right verdict, after return of verdict of guilty but before trial on issue of not guilty by reason of insanity, and alleged failure of court to admonish jury before excusing it for four day recess, was, in light of facts found by trial court, mere technical error not requiring reversal of conviction. Pen. Code, § 1122; Code Civ.Proc. § 475; Const. art. 6, § 4½. Per Seawell, J., Waste, C. J., and Curtis, J.

29. Criminal law ⇨1163(2)

Prejudice will not be presumed from failure to admonish the jury before adjournment as required by statute if no injury appears to have resulted. Pen.Code § 1122; Code Civ.Proc. § 475; Const. art. 6, § 4½. Per Seawell, J., Waste, C. J., and Curtis, J.

30. Criminal law ⇨624

A motion that issue of not guilty by reason of insanity be tried by a new jury was matter resting in trial judge's discretion. Per Seawell, J., Waste, C. J., and Curtis, J.

31. Criminal law ⇨624

Denial of motion that issue of not guilty by reason of insanity be tried by new jury because of alleged conversation which third party, engaged in with two of jurors after trial on plea of not guilty, was not abuse of discretion, where truth of facts alleged in affidavit relating to conversation was controverted. Per Seawell, J., Waste, C. J., and Curtis, J.

32. Homicide ⇨179

In murder prosecution, proceedings had before judge arising out of refusal by accused to permit alienist appointed by court to examine him, indicating that accused may have opposed examination because of fear of result, were admissible on trial of plea of not guilty by reason of insanity, as indicating accused's state of mind. Pen.Code, § 1027. Per Seawell, J., Waste, C. J., and Curtis, J.

33. Homicide ⇨179, 338(1)

In murder prosecution, court's criticism of counsel's advice, that accused refuse to submit to examination by alienist appointed by court, was improperly admitted on trial of plea of not guilty by reason of insanity, but was not prejudicial, since directed against counsel and not against accused. Pen.Code, § 1027. Per Seawell, J., Waste, C. J., and Curtis, J.

34. Criminal law ⇨848

In murder prosecution, where court concluded that court room would be most convenient place for deliberation of jury on issue of insanity, the fact that two alternate jurors remained in court room with regular jurors for a few minutes while room was being put in order, but before deliberation or discussion of case was had, was not reversible error. Per Seawell, J., Waste, C. J., and Curtis, J.

35. Criminal law ⇨1137(2)

Where time for pronouncing judgment was fixed at request of accused on the last day within the time provided by statute, and on that day accused induced court to extend time for pronouncing judgment to date exceeding the normal jurisdictional period within which court could have acted, accused could not urge as ground for new trial that judgment was not pronounced within time provided by statute. Pen.Code, §§ 1191, 1202. Per Seawell, J., Waste, C. J., and Curtis, J.

36. Criminal law ⇨655(1)

In murder prosecution, evidence *held* not to support charge of alleged bias on part of trial judge. Per Seawell, J., Waste, C. J., and Curtis, J.

37. Homicide ⇨347

The Supreme Court is without power to reduce the punishment fixed by jury for murder in the first degree from death penalty to life imprisonment. Per Seawell, J., Waste, C. J., and Curtis, J.

38. Homicide ⇨22(2), 282½

A homicide committed with deliberate premeditation and malice aforethought is murder in the first degree, with absolute power in jury to determine the penalty. Per Seawell, J., Waste, C. J., and Curtis, J.

39. Homicide ⇨253(1)

Evidence sustained conviction for murder in the first degree. Per Seawell, J., Waste, C. J., and Curtis, J.

40. Homicide ⇨237

A conviction of murder in the first degree was affirmed as against a plea of not guilty by reason of insanity, where two justices concurred in the opinion as written, three in the judgment of conviction, and one justice dissented. Pen.Code, §§ 26, 190, 192, 195–198, 1016 et seq., 1026, as amended by St.1935, p. 1075.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jameson, Judge.

Harry A. French was convicted of murder, and he appeals.

Affirmed.

Rehearing denied; LANGDON and HOUSER, JJ., dissenting.

S. Luke Howe, of Sacramento, C. S. Baldwin, of Alturas, and F. Walter French, of San Francisco (O. F. Meldon, of Sacramento, of counsel), for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., A. K. Wylie, Dist. Atty., of Alturas, and Herbert P. Welch, Asst. Dist. Atty., of Lakeview, Or., for the People.

SEAWELL, Justice.

The defendant was accused by an information filed against him in the superior court of the county of Modoc, this state, by the district attorney of said county, with having, on March 25, 1937, in said county, killed one Claude L. McCracken, a human being, with malice aforethought. The legal sufficiency of the information charging murder is not questioned. Upon arraignment he entered two pleas, not guilty, and not guilty by reason of insanity. The jury returned a verdict of guilty as charged in the information with respect to the plea of not guilty, which carried with it the imposition of the death penalty; as to the plea of not guilty by reason of insanity, the jury found the defendant to be sane at the time he committed the homicide. Judgment upon the verdict was pronounced imposing the death penalty and defendant has appealed from said judgment and from the orders denying his motion for a new trial.

There is no question as to the commission of the homicide by the defendant. The evidence shows without contradiction that the defendant drove in his automobile to the McCracken residence at about 7 o'clock in the evening of March 25, 1937, parked his automobile, walked to the front door and entered without giving an alarm of his approach, and passed through the front room into the kitchen, holding in his hand an automatic revolver of the target practice model, where Claude L. McCracken and two ladies, Donna Conwell, a business associate, and Evelyn Olen, a young lady employed in the McCracken household, were seated about a small round dining table listening to a radio program after having finished their evening meal. No word was spoken or vocal expression was made by the defendant at any time except possibly a short inarticulate sound resembling "hi," which Donna Conwell, one of the women seated at the table, thought he uttered in response to her salutation to him as he crossed the threshold into the kitchen. He immediately opened fire at the deceased who was seated but a few feet from him. Neither of the women was certain as to the exact number of shots he fired. One or more were fired over and near the head of Donna Conwell. Mr. McCracken, in the course of the firing, arose from his chair and made his way to the kitchen sink, where he rapidly weakened from the effects of the bullets which had entered his body. He was soon taken to a hospital attended by surgeons. An operation was performed in an attempt to save his life, but he expired approximately three and one-half hours after receiving said bullet wounds from shock caused thereby. His body disclosed five distinct bullet wounds, one of which apparently passed through his arm before entering the body. The four body wounds were in the regions of the lungs, heart and liver. The intestines were severed in several places by the course of the bullets, which, in one or two cases, passed entirely through the body. The firing was done with unerring aim. No question is made that the bullet wounds were not the proximate cause of death. Two young men from adjoining premises saw the defendant park his car and enter the McCracken home.

The defendant left the scene of the tragedy much as he went upon it, without speaking to any one, and drove to the residence of Charley Chapman, knocked at the door, and as it was opened he pushed the gun toward him and said: "Shoot me, I have shot McCracken." He made inquiry for "Aunty" Hazelton who had some years before occupied the premises. Mr. Chapman, who had known the defendant since his boyhood, invited him in the house. The defendant told him he had shot McCracken and after talking a while he began to cry. Chapman said to him that he would have to call the sheriff and the defendant said: "All right, call the sheriff." This was done. Chapman further testified that he asked the defendant why he had come to his house and he said: "I used to come here when a boy, because Mrs. Hazelton lived there." The witness said he "argued" with him because he was doubtful as to whether he had shot McCracken but the defendant removed his doubt by saying: "I shot him all right." Chapman then said to him, "Why did you shoot him, Harry?" He replied, "That son of a bitch insulted my folks." Deputy Sheriff George Kelley arrived presently and the defendant in answer to questions again assured them that he had shot McCracken. The defendant was properly dressed and was wearing an overcoat but he was "all over mud, he had fallen down". It had been raining, the witness added. Continuing, he said the defendant was "perspiring and his eyes were wild". He described his speech as being "a little thick, but he talked all right".

George M. Kelley, a deputy sheriff, in answer to a call, arrived at the Chapman home a short time after the sheriff's office was notified by Mr. Chapman of the shooting. He found the defendant seated in a chair. He had seen the defendant twice before on the day of the homicide, once at ten o'clock in the morning at a barbershop and once in the afternoon in a building he was unable to recall. Mr. Kelley said he was too excited to remember all that was said but he recalled the defendant said he had shot McCracken at the latter's home. He said his car was in the neighborhood. Deputy Sheriff George Kelley then asked him how the gun might be unloaded and the defendant said he didn't know anything about it. Mr. Kelley asked him how he was able to shoot if he didn't know how to unload it and the defendant replied that he "pulled the trigger". He thought he had shot McCracken three times. Asked why he had shot the deceased he said: "I am sorry, George." On the way from Chapman's house to the sheriff's office the defendant said: "There is some things people can't stand, George. I just stood more than I could stand." In this connection he said something about his mother and baby. Kelley called up the hospital with the consent of the defendant and inquired the extent of McCracken's injuries and notified the defendant's family. The defendant was given a bed in the jail and slept well until he was awakened about 6 o'clock the following morning. Sheriff John C. Sharp testified to finding a broken box of long rifle cartridges, low speed, in the defendant's overcoat pocket, one loaded shell in the barrel and two or three in the magazine of the pistol. Five empty shells were found in the room where the shooting was done.

At the time of said homicide, the defendant was twenty-seven years of age. He was married in 1931, and a son was born as the issue of his marriage, January 5, 1935. The defendant, his wife and child had, for a period, resided across the street from the deceased during the continuance of their acrimonious business and newspaper rivalry. He had resided with his parents at Alturas, Modoc county, from infancy to the time of his marriage. He had attended the grammar and high schools of Alturas. A special course in business at Oakland, California, seems to have concluded his scholastic training.

R. A. French, and Mrs. Gertrude P. French, parents of the defendant, were, and had been since 1910, publishers and proprietors of the Alturas Plaindealer, a newspaper printed and circulated in Modoc county. R. A. French was the business manager, and his wife, Gertrude French, was the editor of said newspaper. During and since his school days, the defendant was continuously associated with his parents in the publication of said journal. He had worked in every department of the Plaindealer, including the mechanical, news and business departments. At one time he was the advertising manager. In 1933 the defendant was appointed a minute clerk of the state senate and he and his wife spent several months at Sacramento. Thereafter he resumed his connection with the Plaindealer. On September 1, 1933, he was appointed by the state board of equalization a sales tax collector, auditor and enforcement officer in the tax sales division which included Modoc and a portion of Lassen county. He was holding this position at the time he committed the homicide of which he stands convicted. At all times he has maintained general headquarters at the Plaindealer office. Being a long established journal, the Plaindealer doubtless had more or less prestige in the business and political affairs of the county of Modoc. It would seem that it exclusively occupied the field of journalism until the Modoc County Times, some years later, made its appearance as a competitor.

In 1934, and prior thereto, Mr. McCracken was in the employ of the Modoc County Times. The Plaindealer, in December, 1934, absorbed the Modoc County Times, which was then published and owned by C. D. Fitzpatrick and edited by Mr. McCracken, and annexed to the name "Alturas Plaindealer", the name "Modoc County Times". Adopting the practice of counsel, we will continue to refer to said newspaper merely as "Plaindealer".

Mr. McCracken, then being without employment, began the publication of the Modoc Mail, which was first printed at Lakeview, Oregon, situated a short distance across the state line, and circulated in Modoc county. Publication of the Modoc Mail was suspended in April, 1935, and resumed by Mr. McCracken in August, 1936, at Alturas, Modoc county, under its former name. In December of that year Donna Conwell, referred to herein as seated at the dining table in company with Evelyn Olen and McCracken at the time defendant fired said shots, purchased a partnership interest in the Modoc Mail and her name was announced in the Mail as one of its owners and publishers. The paper was published bi-weekly and in form contained eight pages, 13 x 8½ inches in dimension, and was a mimeographic print. It purportedly printed the local and general news and carried display advertisements in the form and fashion, but lacking the mechanical clearness and attractiveness which characterizes the products of the modern printing press. Mr. McCracken and Donna Conwell were associated in the publication of the Modoc Mail to the time of the former's death.

[1-4] It is one of the contentions of counsel that the defendant at the time he committed the homicide was in a "muddled and deranged condition of mind and the emotions controlled his actions, and that he acted self-conscious only of a moral justification of his act." The obvious fallacy of the proposition is that it would not have constituted a defense to a charge of murder under the law of this state even if the suggested psychological phenomena had in fact existed. It was necessary to go further. The burden was upon the defendant to prove by a preponderance of the evidence that he was insane in the sense that he was unable to appreciate the nature and the quality of his act and did not know it was wrong to commit it. No such contention is tenable under the evidence. It is conclusively refuted by the defendant's own acknowledgment made to his neighbor but a few minutes after he had shot McCracken that he had killed him and he handed the neighbor the gun used by him and requested the neighbor to shoot him. In so doing he was either moved by the *consciousness* that he had committed an act which his conscience *did not justify* or else he was conscious that he had committed a *wrongful and forbidden act* which was punishable by law. No alternative is possible. Moreover, it has long been the settled law of this state that neither emotional, moral nor partial insanity nor insane delusion nor hallucination, nor the irresistible impulse theory (the accused being conscious as to the nature and quality of his act and that it was wrongful and punishable by law), affords grounds in this state as the basis of a defense or as an excuse for the commission of a homicide. People v. Nihell, 144 Cal. 200, 77 P. 916; People v. Kerrigan, 73 Cal. 222, 14 P. 849; People v. Hurtado, 63 Cal. 288; People v. Worthington, 105 Cal. 166, 38 P. 689; People v. Harris, 169 Cal. 53, 145 P. 520; People v. Ward, 105 Cal. 335, 38 P. 945; People v. Trebilcox, 149 Cal. 307, 86 P. 684; People v. Ebanks, 117 Cal. 652 49 P. 1049, 40 L.R.A. 269; People v. Willard, 150 Cal. 543, 89 P. 124; People v. Troche, 206 Cal. 35, 46, 273 P. 767.

Appellant's basic defense to the act of killing, and particularly the contention that the case was not one in which the extreme penalty of the law should be imposed, is stated in condensed form in the following paragraph of his brief: "It was, as claimed by the defense, the long continued and persistent system of libelous insult and personal abuse of the defendant's family, as well as of himself, which produced and brought about such a mental condition of the defendant, that he was incapable of the cool deliberation and intent essential to constitute murder in the first degree, or any degree. Certainly not that cool, deliberate premeditation and complete consciousness of the wrongfulness of his act essential to justify a jury in rendering a verdict of murder of the first degree without fixing a penalty of life imprisonment."

[5, 6] In addition to this major contention in the case, numerous assignments of error are urged as grounds for reversal, most of them arising on questions of law as to the admissibility of evidence offered on trial of the general issue, not guilty. These many assignments relate to offers of newspaper articles printed either in the Times or Mail (referred to in abbreviated form) which date back to 1934 and intermittently appeared to the day before the

homicide. It cannot be claimed that any of the articles published during the entire period of controversy contained any threats to do bodily harm to the defendant or indicated that the deceased was a dangerous man or had in any way placed the life or limb of the defendant in jeopardy, nor were they in any sense a part of the res gestae. The only grounds upon which said articles could have been admissible at all on the plea of not guilty would have been on the theory that they contained threats to do the defendant or some member of his family bodily harm and that he acted in real or apparent necessary self defense in taking the life of the deceased. No claim is made that he so acted and there is not the slightest evidence to support such a claim. The defendant offered no evidence which would tend to justify or excuse the homicide as provided by any of the subdivisions of sections 195, 196, 197, 198, Penal Code, or by any other rule applicable to the law of homicide. The defendant was wholly without the presence of the deceased at the time he formed the intent to kill and at all times thereafter until he sought the deceased out at the latter's home some considerable time after he had formed the intent and purpose to kill his victim. He executed said purpose without any act or word done or spoken on the part of the deceased. The court would have been entirely within the law if it had excluded all consideration of a verdict of manslaughter by the jury on the admitted facts of the case. There was no pretense that the act was committed upon "a sudden quarrel or heat of passion" within the letter and meaning of section 192, Penal Code. The claim of the defense, which was the only one available to the accused, was, and is, that the killing was the result of an *old* feud which finally carried him to the point where he was rendered insane as that term is defined by the law. Malice is indisputably shown by the evidence offered by the defense. The defendant did not take the witness stand on the trial of the general issue, not guilty, but he did testify at the trial on the issue of not guilty by reason of insanity. His testimony was devoted somewhat to describing the feelings which were aroused in him by the published articles which reflected on the members of the French family, and more particularly upon his mother, the editor of the Plaindealer, who he claimed was made the central figure of said newspaper thrusts and castigations. His testimony does not indicate the slightest mental defect but on the contrary it discloses a well coordinated and sound mind. He was positive and accurate in statement and displayed an exceptionally good memory. His powers of expression betray no mental infirmity whatever. In fact, he made no pretense that he was without understanding during his preparation for and commission of the homicide. He offered nothing by way of legal extenuation or justification of his act. That he was angered by said articles and entertained a feeling of long standing hostility toward the deceased was admitted. In his testimony he made no reference whatever to the act of killing. In the main he confined himself to a recital of unfair competitive methods practiced by the deceased and what he denounced as indecent and libelous publications in which his family and his father's family were defamed, humiliated and insulted. He expressed extreme dislike and contempt for the deceased and said he had been tempted on several occasions to go to his place of business and assault him with a club, but his mother dissuaded him from executing his purpose. His mother also testified that she had restrained him from committing threatened acts of violence upon the person of the deceased on several occasions.

A number of said articles denominated as "provocative" of the homicide by counsel for the defendant were admitted at the trial of the main issue and practically the contents of all of them in one form or another where materiality was discernible, were called to the attention of the jury on the trial of the issue of insanity. The court, in every instance but one, during the trial of the first issue, instructed the jury that said newspaper articles were not received as supplying grounds upon which the jury might wholly relieve the defendant of the consequences of his homicidal act, but said articles were submitted for their consideration as an aid in determining whether in the circumstances of the homicide he should, in their judgment, be relieved of the extreme penalty of the law; in other words, the jury was frequently told that it might consider them as affording mitigating circumstances. In the single exception the court included murder of the *second* degree. Some of the articles of which complaint is made were rejected on the grounds of remoteness; or lack of certainty as to identity of person; or lack of proof of authorship or on the ground that they were so obscure and vague as to render them unintelligible and thereby immaterial. Appellant assigns those rulings as constituting reversible error. The articles in the main were received in evidence for the limited purpose of reducing the penalty from death to life imprisonment, on the first issue, but its purpose was not so limited as to the issue of insanity.

Counsel for the defendant insisted throughout the trial and insist on this appeal that all of said articles were admissible on the main issue as being highly provocative and aggravative in nature, inasmuch as they had created in the defendant an undefinable mental disturbance which swept him on as by irresistible impulse to avenge wrongs which in his mental state appeared to him to be immedicable to relief save only by the slaying of the author.

[7] On the first or main issue the defense offered no substantial evidence which tended to justify the homicide as prescribed by the subdivisions of sections 195, 196, 197, 198 Penal Code, or by any other rule of law. Notwithstanding the admitted fact that the homicide was committed in the manner herein set forth and therefore as a matter of law precluded any claim, and none is made, that the defendant acted in self defense, the court nevertheless gave in full the definition of manslaughter, as well as the two degrees of murder, and instructed the jury that it was within their discretion to return a verdict of manslaughter, and repeatedly during the trial of the issue of not guilty gave instructions at the request of the defense which were more favorable to him than he was entitled to have given, and went further and instructed the jury that if it had a *reasonable doubt* as to whether the defendant possessed sufficient mental power or ability to premeditate and deliberate upon the act charged, its verdict should be not guilty of murder in any degree. This in effect was to instruct the jury that if it entertained a reasonable doubt as to the mental responsibility of the defendant it should acquit him, contrary to the rule consistently stated from the earliest decisions of this court to the latest which declares it to be settled law that the burden is upon the accused urging the special issue of insanity or mental incapacity, to overcome the presumption of sanity by a preponderance of the evidence. Said instruction is also in conflict with the express provision of section 1026, Penal Code, as adopted in 1927 and amended by the statute of 1935, p. 1075, which provides that in cases where the defendant in addition to a plea of not guilty also pleads not guilty by reason of insanity as here, the accused on trial of the general issue shall be conclusively presumed to have been sane at the time he committed the homicide. Said instruction was therefore more favorable to the defendant than the law justifies. Clearly the instruction deals with a question of mental capacity to commit a homicide and is governed by the rule which is applicable to insanity as a defense.

The defendant further testified that he had been thrown into fits of anger by his mother informing him of receiving telephone calls from the deceased and by letters she had received from deceased which were shown to him or their contents related to him and which caused her great mental grief. The most denunciatory and malicious of said letters which it was claimed deceased had written to Mrs. French were not produced but were said to have been destroyed. Said destroyed letters were claimed to have been exceptionally libelous and indecent, one of which in particular assailed the chastity of one of Mrs. French's daughters. This letter was not called to the attention of the federal or state authorities. The reason for not doing so, the defendant testified, was that other libelous matter had been called to the attention of the U. S. Postal Department and he had been advised that the letter did not contain any threats to commit an offense and therefore no criminal charge could be lodged against the author. All of said lost or destroyed letters, the defendant testified, were intended to injure and insult members of the French family, and in particular Mrs. French, as editor of the Plaindealer, and R. A. French, her husband and business manager. One of the newspaper articles which the defendant named as having caused him the greatest mental grief appeared under the heading, "Rambling Around", and stated that the local representative of the state board of equalization had been "fired" for incompetency. Defendant said he was the only representative of that body in Modoc county and he went to the deceased's office to see him about the article. Mr. McCracken replied that his name did not appear in the article. Defendant said that he made it plain to him that he was the person the deceased had in mind. McCracken said he could not prove it and defendant became quite angry and talked to him "pretty straight". Defendant said that McCracken seemed to treat the matter in a jocular fashion and said that he had written other articles in cryptic fashion for fun and that the names of the parties involved were not given and that it could not be proven that he meant any particular one of a group of individuals. The defendant stressed several circumstances as being especially annoying to him and which caused him to be angered to the extent that he had made up his mind several times to go to his office with a club and use it on him, but in each instance he yielded to his mother's advice. This state of mind usually occurred after the mother had related to the defendant some grievous insult which she claimed was communicated to her by telephone or through the mail by the deceased. One of the circumstances which provoked the defendant to considerable anger was the tendency on the part of the deceased to boost the Times and decry the Plaindealer by claiming that the Plaindealer did not publish all of the news and that the Times had the larger circulation. Upon one occasion during the publication of the Times the deceased pasted the first pages of the Times and Plaindealer side by side in his office window and made notations in ink calling attention to certain items of news which appeared in the Times but which did not appear in the Plaindealer. Defendant contends these articles were provocative and had a tendency to greatly irritate him.

The testimony of the defendant, considered by itself, or in connection with the evidence as a whole, makes it very plain that the controversies which had been waged by the opposing parties had developed into a settled feud and that growing feelings of enmity and ill-will reached their climax on March 25, 1937, as the defendant observed on the cigar counter of the "Tavern" a few copies of the Mail containing paragraphs which the defendant testified he believed were by way of innuendo intended as reflections on his family name. Defendant's counsel contend that the act of the defendant was the result of a long course of provocative conduct and acts amounting to persecution on the part of the deceased which so wrought upon the mind of the defendant as to overcome his powers of self-restraint and overthrow reason to the degree that he was not legally responsible for a condition brought about by the wrongful acts of the deceased. On the other hand, it is claimed by the people that the homicide was committed in a merciless manner and was the result of deliberation and premeditation and was founded in malice engendered by reason of the deceased having entered in competition with the French family in the newspaper business in a field formerly exclusively occupied by said family. Many of the newspaper articles about which complaint is made and which were introduced in evidence by the defense were written in caustic veins in the heat of a newspaper war in which business supremacy and political domination seemed to have been the coveted fruits of competitive extermination. Many of them clearly indicate they were retaliatory in character. However far one side as against the other may have transgressed the rules of fair or legitimate business methods or ethics, we do not assume to judge. It is quite probable that neither was without fault.

[8] It appears to be in order at this point to consider whether the acts of the deceased which are claimed to have been the cause of defendant's alleged insanity were admissible on the trial of the issue of not guilty on the theory that knowledge of said acts tending to establish insanity would materially assist the jury in the exercise of its discretion as to which of the two punishments prescribed by section 190, Penal Code should be imposed. This court in People v. Troche, supra, adopted the following statement of the law as set forth in 14 R.C.L., page 599: "It is the general rule that insanity, when interposed as a defense in a criminal prosecution, is either a complete defense or none at all, and it has been held that there is no degree of insanity sufficient to acquit of murder but not of manslaughter." [206 Cal. 35, 273 P. 772.]

Continuing the discussion in the Troche case, we added (page 47, 273 P. page 772):

"It follows, therefore, that any evidence tending to establish the insanity of the defendant under his plea of not guilty by reason of insanity at the time of the commission of the homicide, other than evidence of the immediate circumstances of the offense, would have been irrelevant and immaterial on the trial of the general issue as to the guilt or innocence of the defendant raised by the general plea of not guilty. As the statute accorded the defendant his full right, and ample opportunity to submit to a jury his plea of insanity at the time of the commission of the offense, in excuse of his act and as a reason why no penalty of the law should be visited upon him, it follows that the trial court correctly excluded the evidence on the trial of the general issue.

"Furthermore, the only evidence admissible for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed in the event the defendant should be found guilty of murder in the first degree was the evidence which the court did admit, and which concerned 'the circumstances connected with the offense.' People v. Golsh, 63 Cal.App. 609, 613 et seq., 219 P. 456. See, also, People v. Witt, 170 Cal. 104, 110, 148 P. 928. The insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal in both degrees. State v. Maioni, 78 N.J.L. 339, 74 A. 526, 528, 20 Ann.Cas. 204."

For other cases on the point we cite the following: People v. Leong Fook, 206 Cal. 64-71, 273 P. 779; People v. Perry, 195 Cal. 623, 234 P. 890; People v. Hurtado, 63 Cal. 288. In this state, so far as "accountability to the law is concerned, there is no middle ground." People v. Perry, supra [195 Cal. 623, 234 P. 896.] People v. Troche, supra, and cases therein cited.

[9, 10] Partial insanity is not sufficient alone to excuse the commission of a homicide. "In order that 'insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed.'" People v. Troche, supra. Every act of the defendant both before, at the time and immediately after he committed the act shows that he was conscious of the act he prepared himselt to commit and which he did commit by a surprise attack. By no process of reasoning can the conclusion be reached that he was unconscious as to his act and its wrongfulness. "If he [the accused] has reasoning capacity sufficient to distinguish between right and wrong, as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct." People v. Troche, supra. This rule has been so frequently stated and restated by the decisions of this court substantially in the language of the above quotations taken from the Troche case as to make it unnecessary to further revert to the subject, except, possibly, to emphasize the fact that the accused in the Willard case shot and killed the sheriff a few moments after the court had signed the commitment adjudging him insane. Willard had twice before been committed to a state institution for the insane. The jury found him guilty of first degree murder without recommendation and this court affirmed the judgment. People v. Willard, 150 Cal. 543, 89 P. 124.

Another kindred question pressed by appellant is that the verdict of the jury should not have been higher than murder of the first degree fixing the punishment (in the exercise of the jury's discretion) at confinement in the state prison for life. The argument advanced in support of the contention that mental deficiency or certain types of mental deficiencies or disorders which the law does not recognize as an excuse for a criminal act, although not legally sufficient to exempt the accused from punishment, may, nevertheless, be considered by the jury as a circumstance warranting mitigation of the punishment which the law would not reflect if no mental infirmities existed, finds no favor in the law of this and other jurisdictions. It was the theory of defendant at the trial, and is here, that it was proper to admit evidence which bore upon the feeling of mutual contempt, dislike and ill-will which the respective newspaper rivals held for each other as expressed in their respective publications, and shown in other ways. This evidence, appellant claims, was properly admissible for the jury's consideration on the issue of not guilty. Rather, it may be suggested that this evidence tended to show *motive* on the part of the defendant. People v. Hurtado, supra.

[11] The advantage, no doubt hoped to be gained by the defendant by the admission

of the questioned evidence was that the jury, on the general issue of not guilty would have before it evidence which could not have been brought to its notice in any other way. Insanity cannot be invoked as a defense or justification of taking human life. It is a plea in excuse of crime. "The plea of insanity is, and of necessity must be, a plea of confession and avoidance." People v. Troche, supra; People v. Leong Fook, supra; State v. Lawrence, 57 Me. 574.

[12] Section 1026, Penal Code, provides in specific language that when the defendant pleads not guilty by reason of insanity and not guilty of the offense charged he shall be tried as if he had entered the latter plea only and "in such trial he shall be *conclusively* presumed to have been *sane* at the time the offense is alleged to have been committed." (Italics ours.) If he is conclusively presumed to be sane how can the causes which it is claimed produced insanity be relevant or material to a defense that is foreclosed against him on the trial of the issue of not guilty? That issue is tried on the grounds of justifiable or excusable homicide as provided by the ample provisions of Sections 195, 196, 197, Penal Code. An insane person is a person incapable of committing crime. Sec. 26, Pen. Code. This constitutes a special issue which is examined as such unmixed with any other issue. No other conclusion is possible under the wording of section 1016, et seq., Penal Code, as amended, other than that the matters (newspaper publications, letters and conversations had with his mother, etc.) which were offered on the trial of the issue of not guilty, as the exciting cause of mental disturbance, were relevant solely to the issue of insanity, and to none other. It could not be otherwise if any regard is given to the statutes. There could be but one sequence to appellant's contention. If any part of the evidence bearing on the question of insanity was admissible as to the issue of not guilty, no good reason can be urged against the introduction of all of the evidence claimed to be relevant to the issue of sanity. Such a result would lead to an absurdity. We would, in such a case, have the court and jury hearing evidence bearing on an issue which neither court nor jury has any power to decide but which, forsooth, might be considered in the determination of the only issue properly before them for decision. This would be in violation of the mandate of a statute which this court has held to be valid and, further, opposed to our former ruling holding "that any evidence tending to establish the insanity of the defendant under his plea of not guilty by reason of insanity at the time of the commission of the homicide, other than evidence of the *immediate circumstances* of the offense, would have been irrelevant and immaterial on the trial of the general issue as to the guilt or innocence of the defendant raised by the general plea of not guilty. * * *" People v. Troche, supra. (Italics ours.)

Under the general plea of not guilty, prior to the amendments of the statute, evidence relevant to the issue bearing upon mental competency, but which had no relevancy to the issue of not guilty, was presented to the jury under the plea of not guilty and there is reason to believe that in many cases evidence as to mental competency in its almost illimitable field of exploitation had the effect of over-exciting the emotions of jurors by the introduction of matters not relevant to the question of guilt, to the extent of mitigating punishment in cases where it was not merited. Under the former system two issues were submitted in a single action. The intermingling of these issues provable by different degrees of proof may have caused some confusion in the minds of the jury. To remove such a possibility, as well as to prevent the jury from being influenced by matters which were solely relevant to the issue of insanity, may have constituted considerations which account in a measure for the changes made in the statute.

As to the admissibility of the questioned evidence, under the statute prior to said amendments, this court in People v. Jamarillo, 57 Cal. 111, announced the rule with respect to the jury's right of discretion in precisely the language approved in People v. Perry, supra; People v. Troche, supra; People v. Hall, 199 Cal. 451-456, 249 P. 859. In the Leong Fook case, supra, this court, in commenting upon the exercise of discretion accorded the jury, cited the case of People v. Witt, 170 Cal. 104, 111, 148 P. 928, and called attention to the limitation placed by the Witt case upon the rule announced by the Jamarillo case. In the Witt case the issue of insanity was not made a specific issue. The evidence offered and refused admission did not include any of the facts and circumstances connected with the commission of the offense, but consisted solely of evidence relevant to the character and previous habits of the defendant. Justice Richards, author of the opinion in the Leong Fook case, in discussing the Witt case said: "This court held [People v. Witt] that such evidence was not admissible for the sole purpose of enabling the jury to assess the punishment, in the event of conviction, at death or life imprisonment. This conclusion was adopted by the District Court of Appeal in People v. Golsh, 63 Cal.App. [609], 612–613, 219 P. 456, wherein the defense of insanity had been expressly disclaimed by the defendant. * * *" [206 Cal. 64, 273 P. 781.]

[13] It is convincing from the statutes themselves which specify the grounds upon which homicide is justifiable or excusable and from the decisions of this court that it was never the intention of the law that the two issues should be so commingled as to confuse the jury in its effort to obey the rules of law. The discretion which the jury may exercise must be determined from the facts and circumstances attending the commission of the offense. "Such other reasons" mentioned in the cases above cited must mean those which appear upon a consideration of the facts and attending circumstances relevant to the commission of the homicide, in short, the res gestae, and not stale, extraneous facts and circumstances which transpired two years or more before the homicide and which could not have "attended the commission of the offense", nor tend to justify or excuse it. But whatever argument may be made in support of appellant's views the question has been definitely settled by the provisions of section 1016, Penal Code, et seq., and our decisions contrary to his contentions.

There would be but little merit in appellant's contentions if the law were as he contends it to be since many of the newspaper articles and provocative acts which counsel for appellant contends disorganized his mental powers to the extent that he was rendered irresponsible for his act, were admitted over the objections of the prosecution made on the grounds that said evidence was self-serving, hearsay and immaterial to the issue being tried. The offers which were admitted were representative of those excluded and the latter could have added nothing to the evidence which though erroneously admitted inured to the benefit of the defendant in support of his contention that it might be considered in mitigation of the punishment. In view of the evidence given by Mrs. French and several members of her family and published articles, letters and writings introduced by the defendant, it abundantly appears that the parties thought, spoke and wrote illy of each other. The ultimate fact on the trial of the second issue being whether the defendant was insane, it follows that the things which caused his insanity were but probative matters by which insanity might be shown.

Some question is raised by appellant as to the sufficiency of the proof to support a finding that the homicide was committed in the county of Modoc.

[14, 15] The sufficiency of proof as to venue cannot be seriously questioned as it appears from the testimony of several witnesses that the homicide was committed at the home of the deceased, located at Alturas, county of Modoc, this state. This court will take judicial notice that Alturas is the seat of government of Modoc county, a political subdivision of the state. This proposition is too well settled by the authorities to require more than passing mention. Besides proof is ample from many sources that the deceased was killed in the McCracken home and that the McCracken home was located in Alturas, California. The map or plat offered in evidence descriptive of the McCracken premises, together with the illustrative testimony of the county surveyor, lays the venue beyond question in Modoc county.

[16, 17] Objection was made to the introduction of photographs in evidence showing the relative places or positions which Mr. McCracken and the two ladies occupied at the table at the time of and during the shooting, and also to X-ray photographs taken of the body of the deceased showing the point of entry of the bullets. The order in which the parties were seated at the time the defendant entered the dining room has never been questioned. A photographic illustration of the positions or order in which they were seated could in no way have prejudiced the defendant with respect to a matter which is not disputed, but which, on the contrary, has been seized upon by the defense as a circumstance so wanton in execution as of itself to give support to the issue of insanity. Absolutely no claim can be made that the shots were fired in self-defense and therefore a photograph of the room and the relative positions of the parties could not possibly

have prejudiced the defendant. Likewise, the admission of two X-ray photographs showing the courses which the bullets took after entering the body could not have been prejudicial, if erroneous. The autopsy physician had described the wounds to the jury and the jury knew that the entry of the bullets in the body had caused death. Therefore no prejudice could have resulted. Moreover, an examination of the X-ray photographs may have given the jurors a better understanding of the situation than they were able to get from the technical terms used by the medical experts. The course of the bullets was material as tending to show whether the body of the deceased at the time the several shots were fired was in an upright or recumbent or prone position. They were therefore relevant to the issue as to whether the physical evidence tended to show that the several shots were fired with a "willful, deliberate and premeditated" intent to take life. The course of the bullets was some evidence as to whether the deceased was in a falling position or was wholly prostrate on the floor. But if it could be said that the X-ray photographs added nothing to the oral testimony no harm could have been done the defendant by granting the request of the jury for further examination of the exhibits.

The situation is unlike a case in which the proof as to whether the defendant *committed* the act charged presents a close question. In such cases immaterial or irrelevant matters of a highly emotional or prejudicial character may so seriously tend to degrade and disgrace the accused in the eyes of the jury as to render it less considerate of his defense than it would have been had the prejudicial and degrading evidence been excluded. Where such situations are shown to exist, retrials must be granted, but here nothing is shown by the photographs which tended to establish a single controverted fact. The defendant claims that the photographs must have had very great influence upon the jury's deliberations from the fact that after retiring to deliberate it returned sometime thereafter and asked for and was permitted to take said photographs to the jury room. The fact that said photographs were the only exhibits requested and eleven hours after receiving the exhibits the jury returned a verdict of guilty, is of no special moment. The jury entertained no doubt as to who killed McCracken. Their task was to determine whether the killing was done wilfully, deliberately and with malice. Contention that an inspection of said photographs did or could have inflamed the jurors' minds to improperly impose excessive punishment is too insubstantial to merit further consideration.

At the trial appellant adopted and urges here a three-fold defense, to-wit: First, that the articles published in the Times beginning August 27, 1934, and afterwards published in the Mail ending on the day prior to the homicide, together with the letters and telephone calls which Mrs. Gertrude French testified she received from the deceased, were sufficiently provocative to justify the homicide; second, that if the killing was not wholly justifiable, nevertheless the circumstances out of which it arose were such as should preclude greater punishment than life imprisonment, if not manslaughter; third, that the defendant was excusable on the grounds of insanity. A defense on provocative grounds necessarily assumes as its premises a sane mind. Insanity is predicated upon a totally different ground—lack of or disturbance of the reasoning faculties. They present inconsistent defenses.

[18-20] It is the law, so long and firmly established in this state, that no words of insult or reproach, however grievous, will justify an assault or threatening demonstration with a deadly weapon, that it will suffice merely to make reference to a few of the cases.

"Nothing is more surely calculated to arouse the blood of some men to a heat of passion than grievous words of reproach, yet no words are sufficient provocation to reduce an offense from murder to manslaughter; and this principle is so well established in this state that discussion would be out of place." People v. Bruggy, 93 Cal. 476, 29 P. 26, 28; People v. Turley, 50 Cal. 469; People v. Manzo, 9 Cal.2d 594, 72 P.2d 119.

This rule thus early announced as the law of the state has never been departed from. In People v. Jackson, 78 Cal.App. 442, 248 P. 1061, 1063, the rule was again stated in the following language: "In considering what is regarded as such adequate provocation, it is a settled rule in law that neither provocation by words only, however opprobrious, nor contemptuous, or insulting actions, or gestures without an assault upon the person * * * are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from a murder to manslaughter."

[21, 22] The jury, in the instant case, found upon overwhelming evidence that the killing was intentionally committed with a deadly weapon. The jury impliedly found that the killing was done with premeditation and deliberation and that the intent was formed without the presence of the deceased, and that quite an appreciable period of time intervened between the formed intent to kill and the act of killing which was done after preparation made and upon reflection. No claim of sudden combat is made and no facts or circumstances were present which could have made applicable the defense that the homicide was committed "upon a sudden quarrel or heat of passion", as provided by section 192, subdivision 1, Penal Code. The act of killing may follow the intent to kill as rapidly as follow the successive thoughts of the mind. The court did not in any way limit the jury's consideration as to the degree of punishment it should impose. It merely limited its consideration of the so-called provocative evidence which was not material to the issue of not guilty to the single question as to whether it was sufficiently provocative as to justify a reduction of punishment should they find the defendant guilty of first degree murder. In all other respects the jury was given absolute and unrestrained freedom to return such a verdict as the evidence in their judgment would warrant. In fact the court instructed the jury that it might find the defendant guilty of murder of the first degree, imposing life imprisonment or the death penalty at its discretion; guilty of murder of the second degree; or manslaughter or not guilty. Murder and manslaughter were fully covered by the court's charge. Absolutely no fair or reasonable claim may be made that the jury was not free and untrammeled in the exercise of its judgment as to the degree of crime of which the defendant should be held guilty, if any. In fact, in its final charge on the trial of the general issue of not guilty the court in not less than three instructions told the jury it was its duty to consider the provocative evidence as bearing on the question as to whether or not it rendered the defendant "incapable of the deliberation and premeditation necessary to constitute malice aforethought".

Instruction No. 12 reads as follows: "Provocation, as the term is used in law, means that treatment of one person by another which arouses passion and anger. In cases of homicide it negatives the idea of malice and premeditation because the hot blood engendered by provocation produces a temporary suspension of the reflective faculties, and the passion aroused excludes the idea of deliberation. Therefore, evidence tending to establish provocation may be considered by you, and if, after due consideration of such evidence you should entertain a reasonable doubt as to whether there existed at the time of the homicide in the mind of the defendant the malice, deliberation and premeditation essential to constitute the crime of murder, it would be your duty to acquit the defendant of that charge."

The above instruction and Nos. 11 and 13 opened the door wide for the consideration of the so-called provocative evidence for all conceivable purposes and leaves appellant no possible grounds for complaint.

[23] Counsel for appellant rest their defense on the psychopathic condition of the defendant which it is claimed had its origin in the attachment and deep-seated affection for his mother from early infancy. They argue that an increasing devotion to his mother's well-being developed in him a sense of filial solicitude so overmastering that her cares became his cares and he became grieved to an inordinate and exaggerated degree whenever his mother manifested the slightest unhappiness. It is not contended that he was afflicted with general insanity, but it is claimed that his peculiar type of mental structure was overthrown by what he regarded as the unpardonable acts of McCracken and he acted on the impulse that he was justified in taking the life of McCracken. It is also contended that he was moved by an irresistible impulse to his act. Much of the newspaper controversy had no personal reference to the defendant but was directed to the policy of the Plaindealer and chiefly at Mrs. Gertrude French, its editor, with occasional thrusts in the nature of satire, lampoonery, or burlesque mention of the defendant, and Barr French, his father, and Jim Payne, his uncle, all of whom were in the public service. Occasional references were made to other members of the French family.

Mrs. Gertrude French, mother of the defendant, was called to the witness chair and the foundation was laid for the introduction of a long list of newspaper articles which appeared in the Times and Mail during a portion of the year 1934 to and including March 24, 1937. The same objections were made to this class of evidence as was made to the testimony of witness Hopfield, the first witness called by the defense, with the added grounds of hearsay. The objection was overruled and she testified to a great number of published articles and acts which she asserted were intended to humiliate her and to reflect on the good repute of the French family. Among other things, she testified that at some time in 1934 McCracken called her on the telephone and said, "Hello, God, I have got the one greater than God." The probable meaning intended to be conveyed by the detached remark was that the deceased implied to Mrs. French a grandiose complex as to her importance and power in the politics of Modoc county and in directing social and business life. McCracken attributed an air of arrogance and hauteur to the French family begotten of the fact that Jim Payne, Mrs. French's brother, held a position in the national re-employment service; the defendant was in the employ of the state board of equalization, and his sister was in the service of the state. These circumstances were occasionally made the basis, in controversial differences between the parties, for insinuations by McCracken in the discussions of public and business matters, to the effect that the French family, speaking through the columns of the Plaindealer, were influenced in their advocacy of or opposition to matters of public concern, by the dictations of officialdom rather than by any consideration of general public welfare. In one issue of his newspaper McCracken printed a paragraph in which Jim Payne was quoted as having boasted of the great political influence the French family wielded in Modoc county and intimated that the family would use it against Sheriff Sharp at the next election in retaliation of his refusal to deputize a number of police officers sent from the southern section of the state to guard the northerly state line against a threatened excess of homeless wanderers into the state. These matters, it is claimed, greatly agitated Mrs. French and the defendant as she would relate them to her son quite frequently. She testified that she did not communicate the defamatory telephone messages and lost or destroyed letters which she received from McCracken to her husband, for fear that he would resort to acts of violence. She did continue to report them to her son and their effect upon him, as described by her, was extremely distressful. Several times he threatened to do McCracken bodily harm, but she restrained him in each instance. The defendant at times after she told him of her troubles appeared depressed and would walk the floor without saying scarcely anything; he could not apply himself to his work for quite a while thereafter; he became extremely restless. His state of mental equipoise was greatly disturbed by the unhappiness which said articles caused her. She testified she was often moved to tears and brought to the brink of nervous collapse while recounting to the defendant the mental anguish which said articles caused her. Many of the articles which she testified had caused her and her son grievous mental suffering, were apparently retaliatory and were written in the heat of a bitter struggle for business and political supremacy in a community in which the field of journalism was limited. That the deceased on several occasions overstepped the proprieties which should be observed as canons of journalistic ethics, even though the controversy at times wages furiously, is apparent from an inspection of the few publications which are in part reproduced. Many of them were overstressed by Mrs. French and her son while others are too trifling to merit more than passing mention.

Upon calling its first witness the defense sought to show by Frank Hopfield, former editor of the sports column of the Plaindealer, that Hopfield in April, 1935, acting as a voluntary conciliator sought to make peace between the heads of the two newspapers but McCracken declared his determination of carrying the strife to a final conclusion. The prosecution objected to the admission of the line of evidence which had to do with newspaper publications or personal criticisms communicated by letters or telephone on the grounds that such evidence was irrelevant, incompetent and inadmissible as to the main issue, not guilty. The court ruled that while such evidence could not be deemed sufficient to justify the homicide the jury was entitled to consider it in mitigation of punishment. The court thereupon instructed the jury as follows: "In other words, if the jury finds the defendant guilty of murder in the first degree they can take into consideration such evidence for the purpose of mitigating the punishment and recommending life imprisonment instead of the death penalty." The witness then proceeded to relate a conversation he claimed to have had with McCracken in April, 1935, approximately two years before the homicide, in which he asked McCracken why he didn't leave the Frenches alone and advised him that he, McCracken, having recently come into the community, "should try to get along with people instead of using the tactics that he did." McCracken replied that "he was out after their hides" and he would not "lay off" until he "broke them." The witness said he communicated these words to Mr. and Mrs. French, the proprietors of the Plaindealer.

Harry L. Payne, an uncle of the defendant, testified that shortly after the election in 1936 the deceased told him he would "lay off" of him but he would not "lay off" the Frenches.

Mrs. Gertrude French testified at great length and most of the testimony which she gave was of the type referred to by counsel as "provocative" of the homicide. Much of it was trivial and consisted of passing quips and paragraphs written in the style of the columnist under headings such as "Around The Town", "This 'N That", or under headings cleverly phrased to catch the reader's eye. Among the published articles which Mrs. Gertrude French and appellant stress as being exceptionally provocative and as tending to disturb the mental balance of the mother and son was an editorial published in the Mail February 15, 1935. This issue was one of the earlier publications and indicated the policy which the paper would pursue. The editorial stated that "certain citizens with the welfare of the community at heart requested the writer * * * to establish an independent newspaper in the county. Immediately the forces behind the other alleged newspaper began throwing cat-fits with the peculiarities common to the feline breed." Among the things promised its readers were that the editor "will never grow so large that we believe we are God." Another promise was that the paper "will seek to never be carried away by chance of political advancement for ourselves or our relatives, to the extent that we will sell out the interest of the people of Modoc." No worthy cause will be without a champion and no wrong will go unopposed. "If a man bites a dog in Kankakee County that is news in Kankakee but we do not intend to run a temperature over it here. * * * We intend to try to carry a complete account of the doings of Modoc County people—each article will not injure some one. We shall seek never to diagnose the reason for a woman having a baby as due to the fact that she was a victim of an automobile accident a short while before."

The following excerpt is taken from a published article of April 5, 1935: "A weekly circular, published in Alturas, piqued because it, in its guise of a newspaper, had missed forty news items * * * which were published in the Modoc Mail last week published a tirade of misinformation about the Mail editor. Thanks, Gertrude, for the 'free advertising' which you declined to give us last spring. If you believe you can throw enough mud in your columns to dust over the eyes of the public enough that they overlook the fact your circular is devoid of news * * * then you are entitled to practice the sort of tactics in which you seem to enjoy to indulge yourself."

Article of December 11, 1936:

"* * * Mrs. Gertrude P. French appeared before the Board of Supervisors * * * to protest the payment of a claim of $16.97 to the Modoc Mail. The claim was for printing the report of the grand jury. It was published by court order. * * * The Plaindealer had a claim for $19.00 for the same job. The Mail did not protest it * * * The Modoc Mail is not desirous of seeing the Plaindealer people go hungry. * * * If and as when we become a meddlesome old lady we shall endeavor to protest items our competitors claim. Until then we will stick to our knitting. Inasmuch as there will perhaps be ample time later for Gertrude to sob over bruised pride, her tears at this point leave us singularly unaffected."

April 5, 1935, the following matter appeared in the Mail, under the heading of "Panaceas and Painkillers." Mrs. Gertrude Payne French is a daughter of H. G. Payne and a sister of Harry L. Payne, commonly called Jim Payne. All resided at Alturas, were active in community affairs, and were closely united by family ties. The above alliteration was a play on the family name Payne. The author of the article wrote that he always believed "that a person addicted to grandiose ideas * * * always suggested * * * that anything couldn't be done * * * without their aid. * * * One of our modern painkillers * * * in Alturas * * * you know who I mean * * * has always insisted * * * that it was in business * * * because of some God-given right * * * which accidently precipitated * * * the perpetrators of this rag * * * into this region * * * a hundred years ago."

September 8, 1936: "Some folks are wondering if Sales Tax Harry is French, Latin or Greek. One more cent please."

A matter to which publicity was given by the Mail on several occasions in 1935, and which was bitterly resented by the owners of the Plaindealer and the French family, consisted of a statement which R. A. French, business manager of the Plaindealer, was charged with having made with respect to a proposed concert to be given by the local high school under the auspices of the American Legion. The remark charged to him in disapproval of the Legion sponsorship of the concert was: "That gang doesn't enjoy a good reputation here." The alleged statement was scathingly rebuked by the Mail in the following words: "* * * when a two-bit newspaper publisher presumes to lift himself above the crowd it looks bad. When the one-time heroes whom all of us cheered in 1917 are referred to as 'that gang', and slurred by any citizen not in service in the recent unpleasantness, it smelleth to heaven. * * * 'Me and Gott' was the alleged slogan of Wilhelm II in 1917. R. A. French does not include the latter in his books. It is just 'me'. The firemen were criticised by the worthy gentleman because they gave an advertisement to the Modoc Mail."

The several announcements published by the Mail in 1935-1936 that there was definite assurance that at least two newspapers were to enter the field at Alturas, which had "suffered from lack of newspapers" in the past, accompanied by warm words of welcome, were offered as provocative and exasperating conduct on the part of the editor of the Mail.

The following "Open letter to a well wisher", appeared Oct. 9, 1936, and is listed as one of many grievances which justified the homicide or rendered it excusable on the grounds of insanity. It reads:

"Dear Gertrude: I understand that you have been having trouble with your bird cage. I am mailing you the Mail. It is thicker than the paper you edit. Perhaps if you fold it and are careful, you might utilize it in the bottom of your bird cage until the next time we publish, at which time you will be at liberty to clip out all news you had previously overlooked and publish same for your new clientele.

"Thank you for your courtesy,

"L. & K.
"Claude."

It is claimed the letters L. & K. were intended as abbreviations for Love and Kisses, and that same was meant as an insult to Mrs. French.

In an undated letter to her he said:

"You just can't keep that tongue of yours telling the truth, can you? * * * Another funny one regarding the non-committalness of Councilman Morgan, on the closing of gambling. Did it ever occur to you that it isn't quite cricket to ask a public official why the law is being enforced? I wish to apologize to Bard. (Her husband.) I came down town Thursday with a dirty shirt on and was mistaken for Bard by at least three persons.

"Love and Kisses
"Claude L. McCracken."

McCracken was the local representative of the United Press and the Associated Press. It is clear from the record that the Plaindealer had challenged the accuracy of the news he had sent by wire to the press from Alturas. He wrote several sharp letters to Mrs. French charging her with wilful misrepresentations as to the accuracy of several of his news items. Her action, he claimed, was actuated by a desire of discrediting him with the managers of the news service as a correspondent. The following letter, dated January 23, 1936, addressed to Mrs. French, admitted in evidence, is claimed to have been a source of great mental disturbance to her and to the defendant:

"My dear Gertrude:

"Here is a letter to the editor which you will not print because it isn't a bouquet.

"In your last issue you made the assertion that one 'over-zealous' reporter sent the report to the press that Alturas was under water, etc., etc. Now, Gertrude, you shouldn't have done that, because when you did you uttered and published a malicious lie, wholly without foundation, in fact, something you might have verified by asking a few questions before rushing into print. I have no scruples in calling a woman (notice I didn't say a lady) a liar, so I hereby notify you that you are an unscrupulous, infamous, notorious and utterly indefensible liar. I might sue for libel, but a judgment against you would be worth about as much as six bits in confederate money. I really shouldn't waste my time calling you on this because you can't get as little a thing as the appointment of Dr. John Stile as Superintendent of the hospital correct when that appointment is published on the minutes of the Supervisors. I naturally assume that you are accustomed to popping off your mouth without regard to truth.

"You may consider this a written notice to you to keep my name, or any reference to me, out of that sheet you erroneously term a newspaper.

"I am also signing this with a salutation you can't imitate.

"Yours truly,
"Claude L. McCracken."

Before closing consideration as to the admissibility of said articles offered on the issue of not guilty, all of which we have held to be inadmissible with the possible exception of those published in three or four successive issues immediately preceding the homicide, about which the defendant testified, it may be proper to consider the following article, which appears to have been denied admission on the first issue but which was admitted on the insanity issue. The erroneous admission of evidence similar in character did not affect the rule of law as to what may constitute legal evidence. The errors made redounded to the defendant's benefit. Said article is marked defendant's exhibit "J" and was published on December 27, 1934. It follows:

"Around the Town

"Getting subscriptions for the Times is pleasant work * * * listen to the story told by a young matron * * * 'The climax was nearing * * * I knew what was coming but I was putty in his hands * * * did not have the power to stop him * * * should I accede to his desires? * * * I listened to his passionate appeals and felt weak * * * I was but a woman alone and with no one to keep me company * * * what should I say? * * * I tried to get a grip on myself * * * How could I say no to the poor boy * * * Suppose I did as he wished * * * who would know? * * * Harry was away * * * Nevertheless I felt weak * * * All right boy * * * I almost whispered * * * I'll subscribe for your paper'. * * *"

The defendant testified that the article could have referred to no one else but his wife and himself as there was no other young matron in the town whose husband's name was Harry who was likely to be away from home a great deal of the time, and that the article was intended as a slur on his wife. The above article, if intended in the venery sense which it seems capable of interpretation, is by far the most reprehensible and the least defensible of any one of the articles which appeared in print. It was, however, printed more than two years prior to the homicide and if the particular article was intended to suggest immoral propensities or tendencies on the part of defendant's wife it does not appear that any reference was thereafter made to such propensities during the two years of intermittent newspaper strife that followed. The Times was at that time published by C. D. Fitzpatrick and edited by Mr. McCracken. If the article complained of was intended to mean what the defendant interpreted it to mean, the author was amenable to criminal prosecution by virtue of our criminal libel statutes as well as to an action for damages against the publisher of said newspaper. Under the well settled rule, the publication could not have justified a homicide committed two years thereafter.

Mrs. Gertrude French testified that some time prior to March 4, 1937, McCracken called her on the telephone and told her that he was going to start a guessing contest department in the Mail so "blase" that the people would not know who was meant by the names used, but she would be the subject of the story.

On March 4th the following advance explanatory article appeared in the Mail:

"Contest Department. We announce * * * that we'll start a contest soon * * * to determine a few names * * * in a story so blase * * * it might be titled * * * quote * * * It can't happen here * * * unquote * * * but we laugh * * * and we feel you will * * * and maybe you'll guess * * * the names of the parties * * * to whom we will refer * * * I'll start Monday * * * in the Modoc Daily Mail * * * and it'll be continued * * until it is guessed * * * don't miss it * * *"

As a part of the announced plan the following articles appeared, the last being published on the day preceding the homicide:

March 20, 1937: "Mayor William J. McCracken of Oakland announces his city will be ready to receive the entire world at the big world's fair in 1939."

"Cecil Payne, the murderer of the Chief of Police of North Sacramento is appealing for clemency from the penalty of death under which he is sentenced."

March 22nd: "T & WA Manager William P. McCracken shows that air passenger travel miles were safer last season than ever before * * * N. H. French, a former employee of the state, is trying to keep from being convicted of accepting a bribe in Los Angeles."

March 23rd: "Dr. Henry Nobel McCracken, President of Vassar College, was recently the subject of an entire edition of Life, the new picture magazine * * * W. A. French of Kansas, expects to get out of the pen soon where he is confined for stealing money."

March 24th: "The last man hanged for horse stealing in Teton County, Montana, was named Burr French * * * Former Congressman Robert McCracken of Teton, Idaho, observes his sixty-seventh birthday today * * * He was once a nominee of the Republicans for Governor of that state * * * He was no relation to the Modoc Daily Mail editor."

The last several issues of the paper were published daily. The publication of these latest articles was stressed by the defendant as being the exciting cause of his act in that they aroused in him a feeling of great indignation and urge for retribution.

Besides the many articles admitted in evidence at the trial of both issues, Mrs. French claimed to have received a number of letters from McCracken which attacked the moral character of her daughters and tended to defame and degrade the French family and the relationship, which appears to have been numerous in Modoc county. She was unable to produce any letters except those which were received in evidence or marked for identification. The only letters which she produced included the one set out in full herein and a few others which were in the nature of personal rebukes arising out of newspaper competition. The defendant testified that quite some time prior to the homicide, during 1936, he opened his mother's desk and by chance discovered four or five letters which she had laid aside. He read them. He said they were of the type described by his mother and contained charges of immoral conduct on the part of his sisters. Both Mrs. French and the defendant testified that they took one or two of the letters written by Mr. McCracken to the district attorney with the purpose of proceeding criminally against him, but the district attorney advised against criminal action as he was doubtful as to the contents of the letters amounting to criminal libel. He also advised that a conviction would be unlikely in cases where the cause of action was an inseparable part of a prolonged newspaper quarrel in which the publishers of rival newspapers had written their worst against each other. Mrs. French said she and the defendant took one of the letters to the United States postal authorities, but were told that the letter did not warrant action on the part of the government. Mrs. French presented three or four letters during trial which she had preserved, but none contained any reference to her daughters bearing illegitimate offspring which she and her son testified was written in lost or destroyed letters. Neither does it appear that any such letter was exhibited to the state or federal officers. All of the letters produced were of the tenor of the one dated January 23, 1936, set out in full herein.

It appears in the testimony of the defendant that the tires of his automobile were cut in 1935 and he became suspicious upon investigation that McCracken was guilty of the offense. He made complaint to the district attorney, who, after investigation, advised against the filing of a complaint charging McCracken with the offense. It appears that other acts of tire cutting had occurred at Alturas about the same time and the Plaindealer had published articles severely condemning the persons engaged in this kind of vandalism. Mrs. French testified to an incident of a man presumably peeking through the window of her bathroom while her daughter was taking a bath, and upon being discovered said person ran from the scene. Her informer who claimed to have seen the act was unable to positively identify the man in the darkness. Mrs. French was of the belief that it was McCracken. She related another incident in which she said McCracken fired shots or set off some kind of explosives over her head, and "laughed and laughed" at her consternation. On the other hand, McCracken in an issue of his paper published March 29, 1935, printed a part of an anonymous letter written to Mr. McArthur, presumably a financial backer of McCracken, in which the writer advised Mr. McArthur to withdraw his support from the Mail, giving his reason therefor. McCracken in a published comment on the style and phraseology of the letter and the paper on which it was written intimated that the Plaindealer was the source and inspiration of the anonymous letter. Another letter written to McCracken and threatening him with "a long ride" if he didn't lay off the tax question was credited to the same source in a printed article.

The Plaindealer contended that the dissolute revelries in which intoxicated Indians indulged was chargeable to the inefficiency of the sheriff's office while McCracken charged that the fault was with the state board of equalization which had issued fifteen liquor licenses for the sale of liquor in Alturas, a small community. McCracken charged the board with having totally failed in proper and efficient control of the liquor problem. The defendant was an employee of said board.

Mrs. French, defendant and one or two of his intimate friends testified that the defendant had expressed himself on several occasions as entertaining fears that McCracken might kidnap or injure Bobby, his young son. Mrs. French testified that on one occasion McCracken warned her that something might happen to him. She also said that he once telephoned her that the defendant would not be home that night as he had been arrested on a charge of embezzling public funds.

A large mass of the so-called "provocative" evidence, not specifically referred to herein, arose out of events that transpired in the year 1935. Much of it is not only exceedingly remote but was irrelevant and immaterial to any issue in the case except possibly as to insanity in some instances. All of it was offered by the defense and that which was admitted went to the jury for consideration on whatever theory the defense chose to adopt, not inconsistent with the law of homicide.

We now come to a consideration of the things that occurred a few hours before the killing. The defendant was a member of the 20–30 Club and belonged to a social set which frequently met at the family homes of a group of young people who amused themselves by playing ping-pong, pinochle, and such other games as come and go in the seasonal order of social activities. He was also a member of a gun club which held contests in pistol target practice. He was a good pinochle player and he was rated as a good ping-pong player. On the afternoon of March 25th the defendant drove in his car to the Tavern, where he was accustomed to meet with his close personal friends for a social period. The Tavern seems to have been conducted after the fashion of a club. It served liquors, and furnished tables and apparatus for those who desired to play ping-pong and other kinds of games. The defendant arrived at the Tavern between 4 and 4:30 o'clock p. m. His friend, Robert Dorris, was in the Tavern when he arrived and several others of his circle came and left while he was there. The defendant and Robert Dorris engaged in playing ping-pong from about 4:30 to 6:30. Dorris said that he won. At the conclusion of the game defendant wrote a check for $5, but Dorris said he tore it up inasmuch as the money should be put up on every game. They had, however, played for cash stakes. At the conclusion of the game the defendant said to Dorris: "You may be able to beat me at ping-pong, but I am betting twenty bucks you cannot beat me at target practice tomorrow." While in the Tavern Dorris told him he would take him home. They walked out together. Dorris got in his car and he thought the defendant started to get in when Johnny Justis and defendant's wife drove beside the Dorris car and the defendant went over to where his wife was seated in the car and talked a minute or two with her and then walked around a near-by street corner where he had parked his car and drove to the gun store, where he procured cartridges and a pistol. Dorris could not hear the conversation between husband and wife. Justis did not testify in the case. Neither Mrs. Vayle French, defendant's wife, nor the defendant, in their testimony made any reference to anything said by either in their last conversation immediately preceding the homicide. The things that transpired upon defendant's arrival at the gun store and subsequent to his purchase of the revolver have been told.

There was nothing notably unusual about the defendant's demeanor during the two hours he was in the company of Dorris. Evidently his several brother club members who were also at the Tavern did not observe anything which could have reasonably given them any cause to suspect that he was not mentally normal.

Deputy Sheriff and Jailer, George M. Kelly, called by the defense on the insanity issue, testified that he entered a barbershop slightly in advance of the defendant on the forenoon of March 25, 1937, and they joshed about Kelly beating the defendant to the "next" turn. Kelly said he observed him before he sat down, and he saw there was something wrong with him. He expressed himself in these words: "It struck me there was something wrong. I could not say what it was." He further testified that he and the defendant joshed like they always did when they met under similar circumstances. He talked rationally and he understood him. He waited his turn in the shop. The deputy sheriff also testified as to the arrest of the defendant and his conduct since he has been confined in jail and in his care. He appeared rational at all times. He received company, played cards with visiting friends and inmates of the jail and his appetite was good. He sometimes complained of being hungry. The deputy sheriff had visited him many times and discussed matters generally with him and had found him at all times entirely rational. He slept soundly at night.

A number of defendant's intimate friends, family relations and acquaintances were called to give specific examples as to the temperamental qualities of the defendant. His mother gave a detailed account from his birth of all the diseases he had suffered and described the physical and mental oddities and idiosyncrasies which he had exhibited during his entire life. Dr. John Stile, thirty-three years a practicing physician at Alturas, had attended to the defendant's medical needs since he was about nine months of age. He testified that he had had all the diseases common to the childhood and adolescent stages such as measles, whooping cough, and rickets, and in addition St. Vitus dance and infantile paralysis which manifested itself in his lower limbs at the age of nine years. His full power of locomotion was not regained until some time thereafter. His appendix was removed in early manhood and at the same operation the surgeon discovered and removed a growth or pouch which had formed on an intestine and which is known in medical science as Meckel's diverticulum. It is medically described as a blind tube connected with the lower ileum. It has no special or peculiar significance with respect to mental soundness. His physical health was described by the doctor as frail, his weight being much under normal for a person of his height and age and he was described as a highly nervous and neurotic person.

Dr. Edward W. Twitchell, a clinical psychiatrist on neuropsychiatry to the San Francisco City and County Hospital and consulting psychiatrist to the Alcatraz Federal Prison, testified that he had read the record evidence and had made physical examinations of defendant regarding his nervous system, and had given consideration to the family history and his past life in all its details including reports that some of his relatives had been pronounced insane; also his illnesses, education, occupations and other matters which may have affected his life. He described the defendant's physical build as long limbed, very slender, long oval face, a long thorax and rather sharply defined features. He observed evidences of the defendant having had the rickets in infancy. He pronounced him to be of the asthenic type. He took into consideration all of the diseases which he had suffered, including several attacks of "flu" and the operations for appendicitis and removal of the bowel appendage heretofore described. He placed the defendant in the group of schizoids. Persons in that class are introverts, they live within themselves. They are dual or split personalities—they have two personalities. "They will do things one time entirely different from the things they do another time." He testified that persons in the above classification may appear normal and go unnoticed by intimate acquaintances for long periods until "the thing bursts forth and becomes patent to the world". He testified that he felt that a man may be insane and still exhibit marked ability in practically all the affairs of ordinary life. His belief was that the defendant had been emotionally surcharged for weeks or months before he committed the act which, when done, immediately relieved his mind from a burden which rested upon him. The specialist said he believed that the defendant thought he was not only doing right by killing McCracken, but he believed he was destined to do it. The alienist said he was able to reconcile those portions of the evidence which might appear to be consistent with the deliberate and preconceived act of a sane person with the theory of insanity and gave it as his opinion that the defendant did not know that he was doing a wrongful act.

Two other physicians and surgeons, Dr. Philip McKenney and Dr. John Paul McKenney, both practicing their professions in Alturas, and with personal acquaintance with the defendant, qualified as experts in nervous diseases, gave it as their opinion respectively that the defendant was insane and was not conscious that the act he committed was wrong. The opinions of said alienists were based largely on the testimony given by near relatives and intimate acquaintances of the defendant and in many cases it consisted of isolated acts of passing moment which may have appeared strange or exceptional to the observer who was without knowledge of the many and various undisclosed thoughts which operate upon the human mind. A number of the things testified to by his intimate acquaintances and which were incorporated by the experts as elements considered by them as indicating insanity may have been repudiated by the jury as being too insubstantial to support their conclusions, or the jury may have discredited such testimony. The record discloses several examples cited by intimate acquaintances as indicating eccentric or abnormal conduct on the part of the defendant. The jury may well have regarded and probably did regard the defendant's conduct in some of the cited cases as the exercise of good judgment. One of such instances had to do with his refusal to readmit party guests who had returned to his home at the hour of 2 o'clock in the morning with a supply of liquor; another was his insistence on his companions leaving a bar upon the repeated requests of the proprietor that the closing hour had arrived and his license would be canceled if he did not obey the closing ordinance. Another had to do with a conversation had on the forenoon of the homicide with Dr. Philip McKenney, the alienist, at his office. It seems that the defendant had brought some tickets to him to be used for some future social event. The doctor had recently built a new home. The defendant expressed a desire to build a new home. The doctor's impression was that the defendant was not in a position to build a new home. He and the defendant discussed, at some length, the financial problem of building. The defendant asked him how he liked his new home and said he thought they would sell their house and build a new one. The doctor said that the thing which defendant admired most was the tiled bathroom, "and he insisted he wanted one like it in his house". "Q. (By Mr. Howe.) In other words, he was going to build a new house to get a tiled bathroom? A. That is the way it struck me." It by no means follows that the conclusion reached by the witness that the defendant was desirous of building a new house for the main or sole purpose of having a tiled bathroom similar to the one built by the doctor was warranted by the facts as related by him. It is also true that the alienists for the defense in forming their opinions as to the irresponsibility of the defendant took into consideration the long strain which the newspaper strife had upon his nervous organism, which they believed had been affected by the sicknesses which he had suffered and the excitations caused by the articles and letters heretofore set forth. The records contain evidence that in youth he was jovial and happy in disposition but that during the past year or more he had exhibited spells of moroseness and irritability and had assumed a more serious aspect. There was also testimony that he had expressed much fear that McCracken would kidnap his young son and he had furnished his wife with a rifle and instructed her as to its use should an emergency arise when he was absent from home attending to the business of his office, which was quite often. His wife testified that during the latter months he took the boy to his own bed. She said he was very nervous at times and would get out of bed and smoke cigarettes for a considerable while. It was also testified to by an intimate acquaintance that on one occasion he seemed to be unusually depressed and upon inquiry as to the trouble, he exclaimed, "If McCracken would only leave my mother alone." Several times he expressed apprehension that McCracken might injure his son. When McCracken's name was jocularly brought into conversation by his club associates his discomfort was instantly noticeable by his face changing color and by the period of moroseness which followed.

The defendant was exceptionally active in social and club affairs. While a number of his intimate friends testified to acts and described incidents and conditions which, standing alone and unexplained, may be regarded as unusual conduct, their close social relations with the defendant continued unbroken to the day of the homicide. None of his intimate acquaintances was asked if he believed the defendant to be insane as provided by section 1870, subd. 10, Code Civ.Proc., or if he believed he knew the nature of the act he committed and that it was wrong to commit it.

The court, by authority of the provisions of section 1027, Penal Code, selected and appointed the following alienists to examine the defendant and investigate his sanity: Dr. Edward M. Hummel, for five years one of the assistant physicians at the Mendocino State Hospital; Dr. Joseph Catton, who qualified as having had a wide experience in state and federal institutions maintained for the study and treatment of mental and nervous diseases; and Dr. Waldo H. Pate, a practicing physician of Alturas, Modoc county. The examinations of the two first named cover many pages of the transcript and touch every phase of the subject of insanity which could in any way apply or relate to the mental condition of the defendant both before, at the time of and immediately after the homicide. Upon an extended review of the evidence adduced by the defendant (which was assumed to be true), and conceding the defendant was a neurotic, Dr. Catton was decidedly of the opinion that the defendant was not insane on March 25, 1937, or at any other time, and that he was conscious that he was doing a wrongful act. The other alienists called by the court were also of the opinion that the defendant was sane and was conscious that he was committing a wrongful and unlawful act punishable by law.

Aside from the testimony given by the experts, it is the law, section 1127b, Pen. Code, that "The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable." In the light of the facts and circumstances of the homicide surely this court would not be justified in holding that the defendant had proved by a preponderance of evidence that he was insane at the time he fired the fatal shots.

[24] Counsel for appellant make numerous complaints of alleged misconduct on the part of opposing counsel and the failure of the court to admonish counsel for their transgressions. Many of the complaints are as to trivial matters which frequently occur in the trial of causes and make no lasting impression on anyone except the counsel who feels aggrieved. None were so devastating as to cause the jurors to so far lose their sense of duty and proportion as to be carried beyond the realm of reason by the caustic remarks of adversary counsel. The trial of cases should be conducted in an orderly manner and with due respect to opposing counsel, but where the infractions occur under circumstances such as could not have affected the judgment of reasonable men, a new trial will not be ordered.

[25-29] The jury returned its verdict of guilty on July 2nd. After some discussion as to the trial date, in which the court, counsel for both sides and the jurors took part, Mr. Howe, attorney for defendant, consented to setting the trial on the insanity issue to begin July 6th. He was agreeable to any date that would suit the jury. The court therefore ordered a recess until July 6th. Before court adjourned the district attorney took occasion to "thank the jury for bringing in a just and right verdict in this matter." Mr. French, attorney for the defendant, assigned the remarks as misconduct and prejudicial to the rights of the defendant. A short discussion followed as to the return of witnesses and the court was about to adjourn when attorney French reverted to the incident of the district attorney expressing to the jury his approval of their verdict. He asked that the jury be admonished to disregard the remarks of the district attorney in view of the probability that the same jury, perhaps, would try the next issue. The court thereupon admonished the jury in the following words: "Oh well, you will disregard those remarks of the district attorney, ladies and gentlemen of the jury." A recess was then taken to July 6th.

Upon the reconvening of court defendant's counsel moved the court to declare a mistrial and vacate the verdict which had been rendered before the alleged misconduct had occurred because of the remarks of the district attorney last above set forth and on the further ground that the jury was excused without the court having admonished it as provided by section 1122, Penal Code. The assigned misconduct was a proper matter to be presented on a motion for a new trial. Courts will not halt the trial of a cause to consider mere errors which may be presented in an orderly manner and in the time provided by law. The misconduct complained of could have had no possible bearing on the issue which had been disposed of. The only issue undisposed of was the issue of not guilty by reason of insanity which was triable by the same or before a new jury in the discretion of the court. This court will not, except under exceptional circumstances, consider questions which are not properly assigned as prejudicial error, nor presented in the briefs of counsel. We have, nevertheless, considered the contention that the jury was not admonished, as provided by section 1122, Penal Code, at the time the recess was taken for a period of four days by reason of intervening non-judicial days following the return of the verdict of guilty at the conclusion of the trial of the issue, not guilty. Granting as a fact that the omission to admonish the jury did actually occur on said occasion, as now claimed by appellant—a failure not countenanced by the statute—it was, in the light of the facts as found by the trial court, a "technical error" and "not of that importance to demand a reversal of the judgment and a new trial". People v. Coyne, 116 Cal. 295, 297, 48 P. 218, 219. Prejudice will not be presumed from an omission to give the admonition if no injury appears to have resulted from such omission. Article 6, section 4½, Const.; sec. 475, Code of Civil Procedure. The question of alleged prejudice by reason of the alleged omission was heard by the trial court on the motion for a new trial, and its implied finding on this issue finds ample support in the record.

[30, 31] The denial of appellant's motion that the issue of not guilty by reason of insanity be tried by a new jury was a matter resting in the discretion of the trial judge and we cannot say that the court abused its discretion. It is noteworthy that this request was not made until after Mr. R. A. Payne had, according to his affidavit, approached two of the jurors during the recess of court and undertook to engage them in a discussion of the case. Upon this circumstance the defense predicates a claim of prejudicial error.

Said R. A. Payne made an affidavit that on the morning of July 2nd after the jury had returned its verdict of guilty, at about 11:45 A. M., he was at the bar of a cafe in Alturas, known as "Slim's Place"; that also present at the bar were William Mayben, C. E. Atkinson, and E. C. McConnaughy, members of the jury which had on that morning returned the verdict of guilty against the defendant; that said Payne inquired of said E. C. McConnaughy, foreman of said jury, whether it was proper for McConnaughy to discuss the case and McConnaughy replied that they were at liberty to talk as far as the "last case was concerned; that none of them knew anything about the case that was coming"; that C. E. Atkinson, later and as a part of the same conversation, in substance said: "It is getting so now days that if anybody does anything they use the plea of insanity and get out of it;" that shortly thereafter at the same place in the presence of George Tierney, said Atkinson further said with respect to the trial ended: "They tried to inject a lot of dirty stuff into the testimony;" that in the same conversation Atkinson also said: "A fellow has got to be pretty careful what he says as the Frenches is a pretty prominent family."

The truth of the foregoing affidavit at the time the motion for a new trial was noticed to be heard, to-wit, July 19th, was by said McConnaughy and Atkinson in separate affidavits traversed as to every material averment of the purported conversations contained in the Payne affidavit, and specifically as to those portions which make reference to the defense of insanity being invoked where no other defense is available; that dirty stuff was injected into the case by the defense and that the French family was prominent and "a fellow" has to be careful as to what he says about them. Payne's affidavit was not traversed at the time appellant made his motion on July 6th to vacate the verdict previously returned but it was completely met by affidavits on the motion for a new trial.

[32, 33] Another of appellant's contentions is that the court committed reversible error by the admission of the proceeding had before the judge which arose out of the refusal of defendant's counsel, participated in by the defendant himself, to permit the alienists appointed by the court to examine the defendant under the authority of section 1027, Penal Code, which provides that "When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be selected from the medical staffs of the state hospitals, and may select and appoint three alienists, at least one of whom must be selected from such staffs, to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and

to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. * * *"

The three alienists selected by the court attempted to comply with the provisions of said section before the case came to trial but were met with refusal on the part of the defendant on the advice of counsel to submit to any examination or answer any questions propounded by said alienists or to co-operate with said alienists in any respect whatsoever on the grounds that the statute compelled the defendant to be a witness against himself and was in violation of article 1, section 13, of the state constitution. Said alienists separately visited the defendant and informed him of their purpose and also visited his attorneys in an attempt to perform the duty for which they were selected, in the presence of the defendant's attorneys and any other persons whom they might desire to have present at said examinations. All efforts having failed, the matter was brought before the trial judge by the district attorney with the defendant's attorneys, the defendant and the district attorney being present. After discussing the matter at some length with the court, counsel for the defense, with the approval of the defendant, definitely stated that they would ignore any order made by the court requiring the defendant to submit himself to a physical or mental test bearing upon his plea of not guilty by reason of insanity. During the trial of the issue of the defendant's sanity the district attorney offered in evidence the proceedings had before the trial judge in the presence of the defendant and his counsel as to whether the defendant would persist in refusing to submit to an examination by the alienists appointed by the court. Considerable argument was made by the defense in support of their refusal.

The court assured counsel that no questions would be asked the defendant bearing upon the commission of the homicide. The court said to the defendant, in the presence of his counsel, Mr. Baldwin, that Dr. Catton, one of the appointed alienists, had reported to him that the defendant had refused to talk with him at all. The court further explained that the alienists were appointed without suggestion of anyone and were presumed to be, and were, he believed, entirely unprejudiced in the matter; that he had instructed them not to refer in any manner to the homicide. He asked the defendant if he still refused to have any conversation with the alienists, and his attorney, Mr. Baldwin, replied that he would continue to refuse. The court then asked the defendant if that was his attitude and he replied that it was. Mr. Baldwin called the court's attention to the fact that the leading counsel in the case, Mr. Howe, was not in the city and intimated that he should have an opportunity to be present at the hearing as he did not deem himself authorized to consent to the defendant submitting himself for examination. On June 11th the court convened for the purpose of taking up the matter of the defendant's refusal to submit himself for investigation. Messrs. Howe, Baldwin, the defendant, and the district attorney were present. After considerable discussion of the matter the attorneys for the defense took the position that the defendant could not be compelled to permit the alienists to question or examine him as it would, in effect, compel him to be a witness against himself. The court attempted to point out the benefits the statute was intended to confer. Finally, after the court had offered to place any reasonable restrictions on the examination the defense might suggest, counsel made it absolutely definite that the defendant would not answer any questions bearing on his physical or mental health, which he had put in issue by his special plea, or submit to any kind of an examination under limitations or otherwise.

The court, after receiving refusals of suggestions made by it as to the conditions which should govern the examination, made the following comments which are set forth without setting out the context of which they are a part: "This seems to me to be a deliberate effort on the part of the attorneys to handicap the alienists in their efforts to determine the state of mind of the defendant at the time of the commission of the offense. * * *" Later: "It seems to me you are treading very close to the border line of contempt of court in instructing the defendant not to talk to the alienist."

Later the following occurred:

"The Court: Mr. French, do you still maintain the position heretofore taken, that you are not to talk to anyone outside of your attorneys, and to those alienists especially, in regard to anything?

"Defendant: Yes sir; I do.

"The Court: And you are doing that on the advice of your attorneys?

"Defendant: I am doing that because I want to. I believe that is right.

"The Court: Well, there is nothing further to be gained, I guess, by continuing this examination. We have the attitude of the defendant and his attorneys, that they will not permit him to have any conversation with the experts appointed by the Court."

Mr. Howe made a lengthy statement in which he disclaimed any intention to appear disrespectful to the court and that he opposed the examination of the defendant as a legal duty which he owed to his client.

At the conclusion the court said that it could not help believing that the attitude taken by defendant's counsel was done for the purpose of handicapping the experts as to the condition of the mind of the defendant at the time of the commission of the homicide.

The introduction in evidence of the transcript of the proceedings had upon the complaints of the alienists that they had been denied by defendant's counsel the privilege of examining into his mental condition was opposed by his counsel on all pertinent grounds and after its admission a motion to strike all reference to the proceedings was denied.

Appellant cites People v. Strong, 114 Cal.App. 522, 300 P. 84, to the point that section 1027, Penal Code, does not compel the defendant to submit himself to an examination and if he does so his action is purely voluntary. Granting this to be true, section 1027 was adopted, partly at least, to protect defendants, particularly those unable to pay for expert testimony. As pointed out by Mr. Wigmore in a quotation contained in the Strong case, the partizan selection and payment of experts by the prosecution and defense, and the partizan attitude of such experts, has caused a loss of faith by juries and the public in expert testimony. When their selection and compensation are provided for by statute this partizan feature is removed.

Whether a statute requiring that a person who enters a plea of confession and avoidance, such as insanity, shall submit to the examination provided by section 1027, Penal Code, under penalty, that if he refuses to do so, he places himself within the rule of the 1934 amendment of article 1, section 13, of the state constitution (which provides that if the defendant in a criminal case does not testify or fails to deny any evidence or facts in the case against him, that such facts may be commented upon by the court and counsel and considered by the court or jury) would, under the amendment of 1934, be held to be in conflict with another clause of the same section which provides that no person on trial in a criminal case shall be required to be a witness against himself, need not here be decided. This much is true. The defendant did not comply with section 1027, Penal Code, and the only question before us for decision is whether the introduction of said proceedings constituted reversible error. It cannot be questioned that anything done or said in the proceedings if relevant to his mental state would be admissible. The proceedings disclose that he was conscious that his mental responsibility was under investigation and that he was acting in concert with his counsel who were directing his defense and therefore constituted evidence as to his mental condition.

It will be noted that the court did not criticize the defendant, but it did feel that the defense attorneys were rendering inoperative a statute which was intended to inure to the benefit of the defendant as well as to the improved administration of criminal procedure. The defendant's refusal to give any history or information as to his alleged mental ailment had been testified to by the several alienists appointed by the court and his refusal and conduct and all that he said was evidence in the case. Moreover, the court gave numerous instructions to the jury that they were not to consider the court's action on any ruling as indicating its opinion for or against the defendant's guilt. The jury was repeatedly instructed that their verdict must rest solely on the independent conviction of each juror.

The criticism by the court of counsel's advice to defendant to refuse to submit to the examination was, in our view, improperly admitted. But those things that disclosed the defendant's conduct, and indicated that he may have opposed the examination because of his fear of the result, were clearly admissible, as indicating defendant's state of mind. The court's improper comments were directed not against defendant but against his counsel. Under no view of the facts could this have wrought a miscarriage of justice with respect to the insanity issue.

[34] Appellant has assigned as reversible error irregularity on the part of the jurors in their deliberation on this verdict. The grounds of this motion are that the two alternate jurors were permitted to remain in the jury room with the twelve regulars

after the cause had been submitted to said jury. There is no merit in this contention. After the reading of the instructions the court concluded that the courtroom would be the most comfortable and convenient place for their deliberations and made an order to that effect. The two alternate jurors remained in the courtroom with the jurors a few minutes while the room was being put in order but no deliberations or discussion of the case was had in their presence. Sheriff Sharp and his attendant in charge made affidavits which were not traversed showing beyond question that the matter assigned as error was without merit.

[35] The defendant further urges as grounds for a new trial that judgment was not pronounced within the time and according to the provisions of sections 1191, 1202, Penal Code. The jury returned its verdict of guilty on July 2, 1937, after a trial of six days. It returned its verdict that the defendant was sane, after a trial of eight days, on July 15th. Upon the return of its verdict on the issue of sanity the court set and fixed July 20th as the day for pronouncing judgment. On the same day, July 15th, counsel for the defendant made the request that at the expiration of said five days, which would occur on July 20th, that the defendant would and he did then request an additional ten days in which to file a motion for a new trial and prepare arguments in support of the motion. The court said it was his reading of the law that on the fifth day after the rendition of the verdict the court might extend the time for pronouncing judgment not more than ten additional days. He further was of the view, "that if, in the opinion of the court there is reasonable ground, upon the request of the defendant, such time may be extended not more than ninety days additional. Then, let it be understood that the time for pronouncing sentence will be fixed for the 20th of July, 1937, with the definite understanding that the record show that the hearing of the motion for a new trial be set for August 6th, 1937."

"Mr. Wylie (District Attorney): That will be satisfactory to us.

"Mr. Howe, (Attorney for defendant): Let the record show that it is done by stipulation, by consent of both sides, with the approval of the court.

"The Court: Very well; it is so ordered."

The defendant in person requested the extension. The court here expressed as its view of the statute that the court must, upon the return of the verdict, fix the time for pronouncing judgment not less than two nor more than five days from the return of the verdict. But for the purpose of hearing any motion for a new trial the court may extend the time not more than twenty days where probation is being considered. The court expressed the view that it was only upon the request of the defendant that the time may be extended. The defendant was asked again by the court if he requested that the time for pronouncing judgment and sentence be extended to August 6th and he replied that he did.

On July 20th the court met and announced that the time set for pronouncing judgment had arrived. Counsel for the defendant requested that in accordance with the stipulation and the request of the defendant and agreeable to the proceedings had in said matter as heretofore set forth, that the arguments on the motion for a new trial be set for August 6th. The court therefore fixed August 6th as the day for pronouncing judgment, sentence and hearing of the motion for a new trial.

No suggestions were made by the counsel for the defense during the proceedings to obtain an extension of time as to the proper construction of section 1191, Penal Code, with respect to the power of the court to grant extensions of time in cases where probation was or was not requested.

Upon the convening of court on August 6th, the court's announcement that the time had come for pronouncing judgment was met with motions to grant a new trial on the ground that the judgment had not been pronounced within the time prescribed by sections 1191 and 1202, Penal Code. Objection was made to the court considering the motion for a new trial on the ground that it had no jurisdiction to make any order. The defendant in person and all of counsel for the defense took part in the proceeding. The various objections were overruled and the motion on all grounds was denied. It is made clear from the proceedings had that counsel for the defendant took an active part in inducing the court to postpone judgment beyond a period which had enabled them to make the jurisdictional objection upon which they now rely in support of their motion for a new trial.

Section 1191, Penal Code, provides that the court must appoint a time for pronouncing judgment which must not be less than two nor more than five days after a verdict of guilty; provided, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment.

Section 1202, Penal Code, provides: "If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in section eleven hundred and ninety-one of this code, why judgment should not be pronounced, it must thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of section eleven hundred and ninety-one of this code, then the defendant shall be entitled to a new trial.

The time for pronouncing judgment was fixed, at the request of the defendant, on the last day within the time provided by statute, to-wit, July 20th. On that day the defendant, in propria persona, and by stipulation of counsel, induced the court to extend the time for pronouncing judgment, to and as of August 6th, exceeding by five days (as counsel now insist) the jurisdictional period within which the court could have acted. The court granted the joint and several requests of defendant and his counsel. When the time for pronouncing judgment arrived the objection that judgment had not been pronounced within the time provided by statute was raised by counsel who had procured the extension.

It cannot be contended that the court *failed* or refused, as those terms are used in the statute, sec. 1202, to pronounce judgment but upon request of defendant and counsel extended the matter for defendant's benefit.

It is true that a few decisions of our appellate courts may be cited which held as a matter of right that the defendant was entitled to a new trial in cases wherein judgment was not pronounced within five days after a plea or verdict of guilty. But as said in People v. Stroff, 134 Cal.App. 670, 26 P.2d 315, 316, "These cases, however, by reason of the later decisions hereafter referred to, can no longer be considered as authority. All of the cases cited by the appellant overlook the provisions of section 4½ of article 6 of the Constitution prohibiting the granting of a new trial for any error as to a matter of procedure unless such error had led to a miscarriage of justice." The provisions of the statute were enacted for the express benefit of the defendant. Having expressly waived the benefits which the statutes conferred upon him he is concluded by his action. People v. Manriquez, 188 Cal. 602-606, 206 P. 63, 20 A.L.R. 1441, is decisive of the question. In People v. Zuvela, 191 Cal. 223, 215 P. 907, judgment of the court was not pronounced within the time prescribed by section 1191. It was contended that the defendant was entitled to a new trial as a matter of right. In answer to this contention, this court said: "We are satisfied that section 4½ of article 6 of the Constitution operates to prevent the granting of a new trial for the [procedural] error, if any, specified."

We have not been cited to a decision holding to the contrary where the above section of the constitution was brought to the court's attention. Defendant suffered no possible prejudice by the extension of time and no miscarriage of justice resulted from the extension granted to him.

[36] Appellant's counsel have in their briefs charged the trial judge with bias against the defendant and his counsel. On many occasions during the trial counsel requested the court to reprove counsel for the prosecution for misconduct, which motions were usually passed unnoticed or denied. It was difficult in many instances to judge as to which side was the most at fault. The outstanding instance occurred when the prosecution charged the leading counsel for the defense with indicating to Mrs. French by movements of his head when he wished a "no" or "yes" answer. Counsel indignantly denied the accusation and the incident no doubt was forgotten after the forensic speech of counsel came to an end. The jury was in a better position to have observed such conduct than the court, who may not have observed it, if it actually happened.

It cannot be presumed that juries are induced to decide matters of great moment on the indiscreet remarks of opposing counsel moved by partisan zeal. The alleged charge of bias on the part of the judge is without sound foundation. The charge is refuted by the following instruction of which there were a number given of similar import, specifically charging the jury that, "If the judge of this court has at any time during this trial, used any language that has seemed to indicate the opinion of the judge as to any question of fact, or as to the credibility of a witness, you must not be influenced thereby but you must determine for yourselves all questions of fact without regard for the opinion of any one else." Reading the entire charge it was full, fair, and complete, and if it tended to favor either side, it was more favorable to the defendant than the law requires.

It should also be mentioned, that although both the constitution and statute permit the trial judge to comment on the evidence, and on the failure of the defendant to take the stand, this privilege was not exercised in this case, but on the contrary the court specifically instructed the jury that they should give the testimony of the defendant that same careful consideration that it must give to any or all other witnesses in the case.

[37-39] The defendant earnestly urges this court to reduce the punishment from the imposition of the extreme penalty to life imprisonment. The court has no power where the defendant is convicted of murder of the first degree, in cases where the jury has exercised the discretion imposed in it, to substitute its discretion for that of the jury as to the extent of punishment to be imposed. In cases where the evidence shows that the homicide was committed with deliberation, premeditation and malice aforethought, the crime is murder of the first degree, with absolute power in the jury to determine the penalty. That there is evidence to sustain the jury's finding cannot be questioned. That being so this court is powerless to interfere with the exercise of the jury's discretion. The case was tried in the county in which the defendant resided from infancy. He was active in public, social, and business affairs. He was ably and skillfully defended. As a matter of law, we are unable to excuse or minimize his offense on any legal grounds. The plea to reduce the punishment to life imprisonment is in effect asking this court to exercise the commutation power which is exclusively a prerogative of the chief executive of the state.

[40] The judgment and orders appealed from are, and each of them is, hereby affirmed.

We concur: WASTE, C. J.; CURTIS, J.

I concur in the judgment: EDMONDS, J.

SHENK, Justice (concurring).

I concur in the judgment. I see no escape from the conclusion that the homicide was murder of the first degree. I am convinced, however, that the defendant suffered provocation which would weigh greatly in his favor if the court, in the exercise of its power under section 1181 of the Penal Code, could properly modify the judgment. The "judicial commutation" authorized by that section does not comprehend the power to reduce the penalty within the first degree, from death to life imprisonment. That function is exclusively with the jury in the first instance and then with the governor in the exercise of his constitutional power of commutation.

I concur: LANGDON, J.

HOUSER, Justice (dissenting).

I dissent.

To my mind, it amounts to a denial of the application of the principle of "due process" to adjudicate in effect that, although the jury is required to fix the punishment that shall be imposed on an accused who has been found guilty of murder in the first degree, it must do so in utter ignorance of any facts which relate to the commission of the crime other than those which show "the circumstances connected with the offense".

Aside from generalities, in the instant case, the mental state of defendant at the time when the crime was committed was a most important element of his defense. Had he been even a normal individual, it is obvious that, during a period of several months that preceded the commission of the offense, the effect upon his mind of almost continuous insult, slander and libel, not only as it affected himself personally, but also the good reputation of his mother and his sisters, to say nothing of other relatives, must have been most provocative. The original adverse criticism of defendant which was made by the man who suffered death as the result of his temerity in that regard may not have been so harsh; but each subsequent similar attack carried with its own singular effect the certainty of increasing the sting of each and all of the former oral or printed castigations to which defendant theretofore had been subjected. In such circumstances, the final attack, although possibly not so severe as some of those which had preceded it, was like the "last straw on the back of the camel". The continuous insult and humiliation to which defendant had been subjected finally proved to be too great for his peculiar nature to further endure. As a matter of ordinary observation, and without regard to contrary judicial precedent with reference thereto,—considering the trial of the issue of "not guilty by reason of insanity" and the facts which were therein developed, especially that defendant's mental makeup was that known as "introvert"—the materiality of all evidence that bore either directly or indirectly upon his state of mind at the time when the offense was committed should be most apparent.

By statutory provision, one of several conditions, which, if existing at the time when a homicide is committed, in law will justify the commission of the offense is where it has been induced or prompted by "heat of passion" (sec. 195, Pen.Code). In addition thereto, one of the definitions of the crime of manslaughter is that it is the unlawful killing of a human being, without malice, in the "heat of passion". Although the weight of judicial authority may not countenance the fact, nevertheless, from the viewpoint of the layman, it must be obvious that in especially irritating or provoking circumstances such a condition in the mind of an average man might have been created by reason of an indignity which he had suffered and which might result from any one or more of many causes; for example, a slur upon his integrity, an insinuation or a direct charge of unchastity of his mother or his sister, a spit in his face, or a tweak of his nose, or even a slap on his cheek. No words of statute require that either a "sudden quarrel", or a physical encounter of any sort, precede the act or acts which induce the "heat of passion". For aught that may be indicated therein, "heat of passion" may be engendered by any untoward act on the part of the person whose life is subsequently taken by the accused. To the lay mind, so-called "laws" to the contrary are subject to the criticism that they are purely "judge made"; and it is indisputable that they are singularly lacking in sanction by legislative act. Likewise is it manifest, notwithstanding judicial precedent to the contrary, that the mind of a "high strung", red-blooded man, who has been subjected to insult in any form is more likely to become aroused to a "heat of passion" than is that of a placid and phlegmatic individual. To an introvert, or one who broods upon his troubles (such as was the defendant herein), it is not improbable that in the course of time a single insult would or might be provocative of a "heat of passion"; but it approaches a certainty that a long-continued course of oral or printed personal attack upon him inevitably would produce that result. Hence, on the "not guilty" issue, the importance to defendant of establishing the fact not only that on a limited number of occasions (regarding which evidence was admitted) he or some member of his family was subjected to vilification and abuse by the man whom he thereafter killed, but also that on dozens of other occasions, regarding which evidence was offered by defendant but which was denied admission by the trial court, the person who was killed continued in his oppressive and provoking course in that regard. In such circumstances, to my way of thinking, no limit should have been placed by the trial judge upon the introduction in evidence of newspaper articles which were prepared, published and circulated by the man whom defendant killed, which articles reflected upon defendant or his relatives in any way; and whether such evidence in its direct effect was great or trifling, or whatever its volume, or however numerous such newspaper articles may have been, was immaterial as far as the admissibility of such evidence was concerned. Also am I convinced that it was receivable either as tending to mitigate the offense and thus become useful to defendant for the purpose of forming some substantial base upon which the jury properly might act on the question of fixing the punishment that should be imposed on defendant if found guilty of murder in the first degree, or in determining whether the crime of which he was guilty constituted that of manslaughter only.

On the theory that on the "not guilty" issue defendant was entitled to establish the existence of "heat of passion" as a "defense", the case of People v. Hurtado, 63 Cal. 288, is instructive. In that case, in an attempt to legally justify the killing, the wife of the defendant testified "that she confessed to him prior to the killing, she had been guilty of adultery with deceased, and that the confession was followed by great anger, weeping, and mental depression on the part of defendant". The defendant was convicted; and on appeal from the ensuing judgment, he urged as prejudicial error on the part of the trial court its refusal to instruct the jury that:

"If the jury believe from the evidence that the defendant was not so insane, at the time of the homicide, as to be irresponsible for his acts, but at the time he was laboring under such a mental unsoundness as to cause him to be easily aroused to a sudden heat of passion, and that he committed the homicide without malice aforethought, but on a sudden heat of passion, aroused and caused by an act of injustice towards him, committed by the deceased, it will be their duty to find him guilty of manslaughter only." In ruling that the instruction was properly refused, in part it was declared by this court that: *"To reduce the offense to manslaughter the provocation must at least be such as would stir the resentment of a reasonable man.*

"It cannot be urged that the homicide is manslaughter because it was committed in an *unreasonable* fit of passion. In an abstract sense anger is never reasonable, *but the law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person; one of ordinary self-control."* (Italics added.)

Likewise, in the case of People v. Logan, 175 Cal. 45, 164 P. 1121, 1123, after reviewing the law respecting the same question presented therein, the court said that: "These cases serve to illustrate that it is not alone the fear of great bodily injury which will reduce a homicide to the grade of manslaughter. *The passion aroused may be one entirely disconnected with any fear of personal injury, the fundamental inquiry being, we repeat, whether it be sufficient to obscure reason and render the average man liable to act rashly.* (Citing cases). But upon this suffice it to say that, having in mind the facts as above outlined, the feelings naturally engendered in defendant's mind by the indignity previously put upon him, the physical superiority of the deceased, the aggressive manner in which he accosted him, the fear that he was about to be subjected to a second humiliating beating, *there was at least some evidence tending to reduce the crime from murder to manslaughter,* for the due consideration of which evidence defendant was of right *entitled that the jury should be correctly instructed.* For, as well said in Stevenson v. United States [162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980]: 'The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder and not manslaughter, or an act performed in self-defense, and yet, *so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.'"* (Italics added.) As a résumé, the syllabus is a correct indication of the ruling. It is as follows: "In the present condition of our law *it is left to the jurors* to say whether or not *the facts and circumstances in evidence* are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense *under a heat of passion;* and an instruction which defines the nature of the passion itself and *limits the exciting cause to a serious injury, or attempted injury, to the person of the defendant, is erroneous."* (Italics added.)

The jury has but one opportunity to render its verdict on the "not guilty" issue; and, as far as the jury is concerned, that verdict is *final.* If, in accord with the views expressed in the prevailing opinion herein, evidence of facts which may have constituted the inducing cause of "heat of passion" legally may be excluded from consideration by the jury, how is it possible for the jury to rightfully determine either the *kind* of crime that has been committed, or the *degree* thereof; or how may the jury justly solve the problem which involves the question of *what penalty* should be imposed on the defendant? Manifestly, an uninformed jury is not qualified to render justice.

Nor should reasons for my inability to agree with my associates in their conclusion herein be deemed limited by or confined to the foregoing observations. Several other reasons for my protest against the judgment herein might be pertinent, not only as applying to the points to which some attention has been devoted, but as well to others. See dissenting opinion in People v. Troche, 206 Cal. 35, 51, 273 P. 767, 774. However, I cannot refrain from at least expressing the fact that I seriously doubt the correctness of the basic assumption which, at least by inference, appears in the concurring opinion, to-wit, that in the premises the power or authority of this court either is or may be either increased or limited by the provisions of subdivision 6 of section 1181 of the Penal Code. Originally, the several provisions of the Constitution of this state expressed all the powers that were possessed by this court. As far as I am aware, with the possible exception of powers that relate to findings of fact, which are conferred by the provisions of section 4¾ of article vi of the Constitution, the legislature of this state has no authority either to increase or to decrease in any way any of the powers of this court. If, either originally or by the provisions of any subsequent amendment to the Constitution, this court has been granted authority to modify the judgment in any particular, it still has it; and if jurisdiction has not been thus conferred, by no unauthorized legislative act could such a power be created in it. Besides, if the "penalty" be considered as a part of the judgment, and if legislative authority is all that is lacking in the matter of authority in this court to alter such penalty,—although enacted prior to the date of the adoption of the present Constitution—section 1260 of the Penal Code is much broader in its scope, and in criminal appeals purports to authorize an appellate court to "reverse, affirm, or *modify* the judgment or order appealed from * * *." (Italics added.)

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13 Cal.2d 60

PACIFIC WESTERN OIL CO. v. BERN OIL CO., Limited, et al.

L. A. 16210.

Supreme Court of California.
March 3, 1939.

Rehearing Denied March 30, 1939.

1. Mines and minerals 🔑52

A plaintiff suing for injunction restraining defendants from removing oil under plaintiff's lands, and for damages for removal of oil prior to commencement of action, had two rights of action and was entitled to legal remedy of damages for past injuries and equitable remedy of injunction to prevent their recurrence.

2. Jury 🔑13(9)

In action for injunction restraining defendants from removing oil under plaintiff's lands and for damages for removal of oil prior to commencement of action, denial of defendants' demand for jury to try issue of damages was error.

3. Appeal and error 🔑232

A plaintiff suing for injunction and damages could not complain on appeal that defendants' demand for jury trial of claim for damages was insufficient as not specifically stating that jury trial of claim for damages was demanded, where plaintiff objected to jury trial on ground that legal relief sought was subordinate to main equitable features of action.

4. Appeal and error 🔑1035

In equitable action, refusal to submit issues of damages to jury was not reversible error, where facts disclosed by record indicated that plaintiff sustained damage by acts of defendants, and that correct measure of damages was applied.

5. Mines and minerals 🔑51(3)

Evidence warranted recovery of judgment against individual defendant for value of oil removed from oil pool located only under plaintiff's land through wells on adjoining land on ground that individual defendant participated with corporate defendant in intentionally drilling wells so that they would cross boundary line and be bottomed in and produce oil from such pool.

6. Mines and minerals 🔑51(5)

A statute fixing measure of damages for oil extracted without right as the value of the oil at time of extraction without interest after deducting cost of development, operation, and production, is not applicable where a well is intentionally diverted into the land of another. Code Civ.Proc. § 349¾, as added by St.1935, p. 2285.

7. Mines and minerals 🔑51(5)

Defendants who intentionally diverted oil well into oil pool which they knew was under plaintiff's land and was not under their land were chargeable with value of oil taken from pool without any deduction for expenses incurred in bringing oil to the surface.

8. Equity 🔑66

He who seeks equity must do equity.

9. Mines and minerals 🔑52

A plaintiff instituting action July 17, 1934, to restrain defendants from removing oil from oil pool located only under plaintiff's land through wells located on defendants' land was not guilty of laches, notwithstanding that drilling of wells was commenced on May 17, 1933, where plaintiff did not obtain knowledge that wells were intentionally drilled so as to penetrate oil pool until after March 20, 1934, when surveys and reports were secured through a grand jury investigation.

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Pacific Western Oil Company, a Delaware corporation, against Bern Oil Company, Limited, a California corporation, and others to restrain defendants from removing oil from strata underlying lands on which the plaintiffs had an oil and gas lease and for an accounting as to any oil or gas already removed. From the judgment, the Bern Oil Company, Limited, and Sam Bernstein appeal.

Affirmed.

Rehearing denied; LANGDON, J., dissenting.

Prior opinion, 81 P.2d 207.

Abe Richman and Sidney J. Unickel, both of Los Angeles, for appellants.

Borton, Petrini & Conron, of Bakersfield, and D. T. Staples, of Los Angeles, for respondents.

CURTIS, Justice.

The following statement of facts prepared by the Fourth District Court of Appeal at the time the cause was before that court for decision appears to be correct, and we, therefore, adopt the same for the purposes of this opinion, 81 P.2d 207:

"This is an appeal from a judgment restraining the defendants from taking oil from certain land controlled by the plaintiff and awarding compensation for oil already taken.

"Briefly stated, the general facts are as follows: The plaintiff, as lessee under an oil and gas lease covering a certain quarter section of land, drilled for oil and completed seven producing wells thereon. In the course of operations it was discovered that due to a 'fault' which ran across this quarter section oil could be produced on a part of this land but not on the remainder. Acting under a right given in its lease the plaintiff, on May 18, 1931, quitclaimed approximately 104 acres of this land to the owner and lessor, retaining a described tract of about 56 acres upon which oil had been developed, and specifically reserving all rights thereto as given by the original lease. For convenience, the 56 acres which were retained will be referred to as parcel A and the 104 acres which were reconveyed will be referred to as parcel B.

"On March 13, 1933, the defendant Brunwin procured a lease covering parcel B from the owner, to whom it had been reconveyed. Brunwin, with two associates, Abe Bernstein and Sam Bernstein, commenced the drilling of wells on parcel B and then organized a corporation, the defendant Bern Oil Company, through which the project was continued. The corporation was largely owned by these three individuals, who acted as its officers and remained in active charge and management of its affairs. Three wells were drilled on parcel B, one being 21½ feet; one 17 feet and one 39 feet east of the boundary line between parcel B and parcel A, a surveyor having been employed by the defendants to exactly locate that boundary. Each of these wells was intentionally diverted from the perpendicular in a westerly direction in order to bottom the well in the producing area underneath parcel A. In each instance the producing portion of the well was located from 290 feet to 480 feet west of the boundary line between the two tracts and within parcel A. This result was accomplished by the use of a mechanical device, commonly called a whipstock, capable of diverting a well from the vertical. To this end the defendants employed an expert in surveying and controlling directional drilling. The expert used an instrument and method commonly called a 'singleshot' in order that the course and extent of deviation of the wells might be known and charted as the work progressed, and from time to time furnished the defendants with reports showing the extent and direction to which the wells had been diverted, and finally furnished them with a plat or graph showing the point of completion of the wells under the surface of parcel A. There is evidence that in each instance the well had to be 'whipstocked' to the west, through the fault, and under parcel A in order to produce.

"The first of these wells was completed on June 20, 1933, the second on September 14, 1933, and the third on January 16, 1934, and oil was taken from all of them. In November, 1933, the plaintiff wrote a letter to the defendants demanding that they cease trespassing upon its lands. In March, 1934, a grand jury investigation of the defendants' activities was started, resulting in an indictment against the individuals for grand theft. See People v. Brunwin, 2 Cal.App.2d 287, 37 P.2d 1072. The defendants continued to produce oil and the present proceeding was begun on July 17, 1934, a preliminary injunction being issued on August 6, 1934. The injunction was disobeyed and after citation the individual defendants above named were adjudged guilty of contempt and fined. An attempt to review the contempt proceedings by writ of certiorari failed. Bern Oil Co. v. Superior Court, 5 Cal.App. 2d 21, 41 P.2d 939.

"In addition to alleging most of the facts above set forth the complaint herein alleged that the defendants Brunwin, Abe Bernstein and Sam Bernstein entered into a conspiracy with the object and purpose of obtaining the right to occupy the surface of parcel B in order to commence thereon the drilling of wells, to drill these wells in such a manner as to cause them to cross over the boundary line and under parcel A, thus penetrating the pool or deposit of oil under said land, and through such wells to remove such oil and bring it to the surface of parcel B; that in pursuance of such plan and conspiracy they obtained a lease from the owner of parcel B and started wells thereon which were intentionally diverted into parcel A and into the oil pool or deposit underlying that parcel at a distance of several hundred feet from the boundary line between the two parcels; that thereafter they commenced to remove oil from parcel A and continued such removal, bringing the same to the surface of parcel B; that they thus removed and converted to their own use oil of a value of $75,000 to the damage of the plaintiff in that amount; that after the organization of the Bern Oil Company these acts were performed by the individual defendants through the agency and instrumentality of that corporation; and that the defendants have installed upon parcel B a derrick and apparatus for the drilling of a fourth well in a similar manner across the boundary and into parcel A. The prayer is for a temporary injunction pending the trial and thereafter for a permanent injunction restraining the defendants from removing oil from strata underlying the lands of the plaintiff, from removing oil from any of the three wells which have been mentioned, from diverting or directing the drilling of any other well in such a manner as to cross the boundary line between the parcels A and B, for the sum of $75,000 damages, for an accounting as to any oil or gas already removed, and for such other relief as may be just and appropriate.

"While the answer does not deny that the defendants secured a lease covering parcel B, that they entered that land and installed machinery and equipment for drilling, that they employed mechanics skilled in the art of directional drilling or that they intentionally so controlled the direction of the drilling of these wells as to cross over under parcel A, it does deny that these things were done in pursuance of any conspiracy and it is further alleged that the defendants have no knowledge as to the penetration of the oil deposit underlying parcel A or as to the distance of such alleged penetration from the boundary line of parcel B, and on that ground it is denied that the three wells drilled upon parcel B penetrated the oil deposit under parcel A a distance of several hundred feet from the boundary line. It is admitted that oil has been produced from the three wells thus drilled by the defendants and it is alleged that it is impossible to ascertain definitely the actual location of the bottom of an oil well by any means now known. It is denied that any oil produced from these three wells is the property of the plaintiff, and denied that the plaintiff has been damaged in any amount. It is then alleged that any oil taken from these wells belonged to the defendants, that the plaintiff had surrendered and abandoned all its rights in and to any oil strata, and all its rights in and to any part of the land covered by the original lease, except that the plaintiff had retained the right to produce oil from the seven wells in operation when the quitclaim deed was given to the owner of the land, and that said wells were all located in a zone known as the 'Upper Vedder Zone' being approximately 1400 feet in depth, while the three wells drilled by the defendants were located at a depth of approximately 2000 feet in a zone known as the 'Lower Vedder Zone'. These last allegations disclose the main issue upon which the case was tried, the defendants having contended throughout that the rights of the plaintiff were limited to the operation of the seven wells existing at the time parcel B was reconveyed to the owner of the land and that the defendants had the right to remove oil from any strata on parcel A which was lower than the one which had been penetrated by those wells.

"The court found in all respects in favor of the plaintiff, substantially in accordance with the allegations of the complaint, finding the existence of such a conspiracy to drill wells upon parcel B in such a manner as to direct them over the boundary and into parcel A for the purpose of removing oil therefrom, and that in pursuance of this conspiracy and plan experts in the art of controlling the direction of drilling wells were employed for the purpose of diverting these wells, and they were so diverted, over the line and into parcel A. It was further found that oil was thus removed from parcel A, that the defendants well knew that there was a productive pool or deposit under parcel A, and no such production deposit under parcel B, and that the defendants 'intentionally, secretly and fraudulently employed the right to occupy the surface of parcel B for the purpose of accomplishing a clandestine and secret penetration of such productive oil pool' underneath parcel A and the removal therefrom of oil. It was then found that from the accounting which had been had of the production and sale of oil thus taken by the defendants from underneath parcel A and converted to their own use, it appeared that oil of the value of $107,371.93 had been so removed, and that the royalty thereon which had been paid to the owner of the land, and which otherwise would have been payable by the plaintiff, amounted to $17,737.26.

"Abe Bernstein died before judgment was entered and the action was dismissed as to him and the executors of his estate. Judgment was entered against the other defendants perpetually enjoining them from removing through the three wells referred to or through any other well any oil, gas, or other hydrocarbon substances from any point beneath the surface of parcel A, and awarding judgment against the defendants H. M. Brunwin, Sam Bernstein and Bern Oil Company, Ltd., jointly and severally, in the sum of $89,643.97. From this judgment two of the defendants have appealed."

[1] Appellants' first contention is that the court committed prejudicial error in denying their request for a jury to try certain issues of fact presented by the pleadings herein. The action against them, as we have seen, was one in which the respondent prayed for an injunction restraining appellants from operating, pumping or removing petroleum oil from strata underlying the lands of respondent, and for damages in the sum of $75,000 sustained by respondent by the pumping and removal of petroleum oil by appellants from said lands of the respondent prior to the commencement of this action. Respondent under its complaint had two rights of action and was entitled to two remedies, the legal remedy of damages for past injuries and the equitable remedy of injunction to prevent their recurrence in the future. Hughes v. Dunlap, 91 Cal. 385, 27 P. 642.

In that case, it was held (page 388, 27 P. page 643): "It has long since been held that under our system a legal and equitable remedy may be sought in the same action; but each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for. An action to recover damages for past trespasses is as clearly a legal remedy as any that could be named, and it is an action in which a party cannot be deprived of a jury trial. For this reason, therefore, the judgment and order must be reversed." In Hughes v. Dunlap, supra, the plaintiff sued to recover damages alleged to have been sustained by the plaintiff by the acts of the defendant in entering upon plaintiff's land and tearing down and removing a fence thereon and for an injunction to restrain defendant from continuing said acts. A jury was empaneled and certain issues of fact were submitted to them. Upon such issues the jury returned a verdict in favor of the defendant. Afterwards the court made findings in which it ignored the verdict of the jury and found in favor of plaintiff on the question of damages. Upon these findings the court rendered judgment for the plaintiff for damages and enjoined the defendant from opening and interfering with said fences. This judgment, as we have seen, was reversed by the Supreme Court for the reason that the defendant was entitled to a trial by jury upon the issues of damages, notwithstanding the action also embraced the equitable remedy for an injunction. This case was cited and followed by the court in the decision of Farrell v. City of Ontario, 39 Cal.App. 351, 178 P. 740, 742, in which action the judgment of the trial court was reversed, where the trial court disregarded the verdict of the jury upon the question of damages and attempted to make a contrary finding. In that action the plaintiff asked that the defendants be enjoined from diverting flood waters upon his lands and for an injunction restraining defendants from maintaining the ditch and flume through which said waters were diverted upon the plaintiff's said land, and for damages sustained by prior diversions of said flood waters upon plaintiff's land.

In that action, the opinion of the District Court of Appeal was written by Judge Myers, then a judge of the superior court of the county of Los Angeles, temporarily acting as a justice of the District Court of Appeal, and later chief justice of this court. In that decision, Judge Myers called attention to two lines of decisions in this state, the decisions in one group apparently ignoring those in the other group and no apparent attempt having been made to reconcile them. He then analyzes each group and concludes that the group in which the case of Hughes v. Dunlap, supra, belonged was based upon the sounder reasoning. He further traced the history of actions for injunctions to restrain a violation of a common-law right and cited a number of English authorities upon the subject. From the history of this type of actions as set forth in a long line of cases from the English courts, cited in the opinion in the Farrell case, it was shown that the following rule had been clearly established in the courts of England: "If a plaintiff applies for an injunction to restrain a violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, * * * unless there be something special in the case, he is entitled as of course to an injunction to prevent a recurrence." Following the citations from these cases from the English courts, the opinion in the case of Farrell v. City of Ontario, (page 358, 178 P. page 742) continues: "These decisions may be taken then as determinative of the proposition that, under the English common law as it stood in 1850, at the time it was adopted as the rule of decision in this state, 'if a plaintiff applies for an injunction to restrain the violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law'; or, in other words, by a jury, if one be demanded. We conclude, therefore, that the parties here were entitled to a jury trial upon the issues as to damages, and that the verdict of the jury thereon was binding. We do not regard the provision of section 731 of the Code of Civil Procedure as in any way affecting that right. If the jurisdictions in law and equity were here separately vested, it might well be held that the plaintiff, by filing in equity a complaint such as is here presented, had thereby elected to submit all the issues for determination by the court, and thereby waived his right to a jury trial on the legal issues; but where, as here, all such issues may be tried in the one action, no reason for such holding appears."

The decision in Farrell v. City of Ontario, supra, was followed and approved only a few weeks later by the case of Franklin v. Southern Pacific Company, 40 Cal.App. 31, 180 P. 76, in which likewise the judgment of the trial court was reversed. The decision in this later case was by the same court which rendered the decision in the case of Farrell v. City of Ontario, supra. A petition for a hearing after said decision was denied by the Supreme Court. It is interesting to note that the author of the opinion in the first of these two cases, was the trial judge in the later case.

Neither of these cases has been cited in any later decision of this court on the question as to whether a party is entitled to a jury trial in an action like the instant case except in the decision of Union Oil Company v. Reconstruction Oil Co., 20 Cal.App.2d 170, 190, 66 P.2d 1215, which case will be referred to later. Neither has there been any decision of this court or of the District Court of Appeal to which our attention has been called holding that a party to an action like the instant one is not entitled as a matter of right to a jury when the question of damages is put in issue by the pleadings until the decision of this court in the case of Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.2d 659. In that case no reference or citation was made to either the Farrell or the Franklin cases, and the only authority cited in support of its ruling was the case of McCarthy v. Gaston Ridge Mill & Mining Co., 144 Cal. 542, 78 P. 7, a case cited by Judge Myers in his opinion in the Farrell case and rejected by him as belonging to that group of cases which were not in accord with the earlier English decisions nor with Hughes v. Dunlap, supra, and other decisions of this court holding that in an action for an injunction to restrain a trespass upon real property and for damages for past trespass, the right of action for damages was a legal remedy to which the parties were entitled to a jury.

[2] In our opinion, the argument and presentation of authorities cited by Judge Myers in his opinion rendered in the Farrell case, are unanswerable and the rule therein announced should be followed by the courts of this state in actions wherein both legal and equitable remedies are the subject of the action. In so far as the case of Bettencourt v. Bank of Italy, etc., Ass'n, supra, is contrary to the rule thus announced, it is overruled. It follows, therefore, that the trial court in this action committed error in denying the demand of the appellants for a jury to try the question of damages which the respondent sought to recover from the appellants.

[3] The claim of the respondent that the demand of appellants for a jury was defective or insufficient because it was general in its terms and did not specifically state that a jury was demanded to try the issue of damages only is, we think, without merit. The authorities cited in support of this claim do not sustain it. They simply hold where issues at law are involved with equitable issues, the trial court did not commit error in refusing to submit to a jury both the equitable issues as well as the issues at law. In this action the record shows that a jury was regularly drawn to try this action and at the commencement of the trial was present in court for that purpose. They were temporarily excused at the request of respondent's counsel in order to permit him to make certain motions in the absence of the jury. Whereupon respondent's counsel objected to the empanelment of the jury, and moved for its dismissal upon the ground that the action was an action in equity; that the legal relief sought was subordinate to the main equitable features of the action, and the only legal relief sought was a claim for damages. This objection of respondent was sustained, and an order was made dismissing the jury. No objection was made to the jury on account of any defect in the demand for a trial by jury, but the objection to the jury was made and sustained and a motion was made and granted for the dismissal of the jury on the ground that the action was one in equity and that the legal relief was subordinate to the main equitable features of the action. The reason, therefore, for the denial of appellants' demand for a jury to try the action was not that the demand was insufficient or in any manner defective, but that the action although brought to enforce both legal and equitable remedies was triable by the court alone, and that the appellants had no right to have a jury pass upon respondent's claim for damages.

[4] Respondent further contends that even though the trial court may have committed error in denying appellants a jury trial upon the question of damages, nevertheless, the appellants were not prejudiced by this error for the reason that the facts disclosed by the record indicate not only that the respondent sustained damage by the acts of appellants and that the correct measure of damages was applied but no jury properly instructed could have returned a verdict in favor of appellants upon the question of damages. In the case of Union Oil Company v. Reconstruction Oil Company, 20 Cal.App.2d 170, page 190, 66 P.2d 1215, page 1225, it was held that, "In the instant action where the facts disclosed by the record indicate that the correct measure of damages was applied by the trial court and that in our opinion a jury properly instructed and properly performing its duty could have returned no other verdict than one favorable to respondent for the precise amount which was here awarded as damages, we are constrained to follow the rule announced in the former of the two above-noted groups of decisions and to declare that no error was committed by the trial court in refusing the demand of appellants for a jury trial on the issue of damages." We think this statement of the District Court of Appeal goes beyond the rule announced in the Farrell case in holding that no error was committed by the denial of the trial court of a jury to try the question of damages. We are of the opinion, however, that under the facts of the instant case this error was not prejudicial to the rights of the appellants. The facts of the case clearly show that appellants admittedly drilled their wells so that they passed beyond the boundary line of their land into and under the surface of the lands of respondent. In the first place the wells were located on the surface of appellants' land only a few feet from the boundary line of respondent's land. After the wells

were drilled a comparatively short distance they were deliberately diverted towards respondent's land, and when they were completed they were hundreds of feet beyond the boundary line of appellants' land and into and under respondent's land. After the wells were drilled, large quantities of oil were extracted from the lands of respondent by these wells and appropriated by the appellants. No jury properly instructed and properly performing its duty could have returned a verdict that the respondent was not damaged by these acts of the appellants. As to the amount of damages which the respondent sustained by these acts of the appellants, there is no contest whatever. The court took the figures given by the appellants as to the amount and value of the oil which had been removed, deducting the amount of the royalty paid to the landowner which would have been payable in any event, and the appellants stipulated to the correctness of these amounts, thus in effect stipulating that if they were liable at all on account of the oil already removed, the amount was that which was included in the judgment. In our opinion, no reversible error appears in connection with the refusal to submit the issues of this case to a jury.

[5] Another point raised is that the evidence was insufficient to justify the rendition of a money judgment against the appellant, Sam Bernstein. It is contended that there is no evidence showing that this appellant participated in the acts of which the respondent complains. This statement is not correct. One witness testified that he visited parcel B with Sam Bernstein and that Sam Bernstein explained to him the plan to drill wells on parcel B in such a manner that they could cross the boundary line and bottom in and produce oil from parcel A. With this evidence in the record we are of the opinion that no jury could have failed to find that the appellant, Sam Bernstein, was equally guilty of the illegal acts charged against him and his associates.

[6–8] We are in accord with the remainder of the opinion of the District Court of Appeal, and hereby adopt the same as a part of this opinion. It is as follows: "It is next urged that the court erred in not compelling the respondent as a prerequisite to injunctive relief to reimburse the appellants for all moneys expended by them in connection with the drilling of wells upon parcel B. This is based upon the contention that since the respondent was asking for equitable relief it should be ordered to do equity; that the wells on parcel B were drilled by the appellants with the knowledge and tacit consent of the respondent and, therefore, the respondent should be barred from equitable relief by the principles of estoppel and laches; and that the appellants were entitled to such reimbursement under the provisions of section 349¾ of the Code of Civil Procedure, which section was adopted after this action was begun.

"The act adopting section 349¾ (Stats. 1935, p. 2285) contained a declaration of policy declaring that there are many oil and gas wells in this state which are not wholly within the land owned or controlled by the owners or operators of the wells, that until recent years there was no way to determine even approximately the subsurface location of the well, and that in many cases such wells were drilled without any intent to invade the land of another. It fully appears that this section was not intended to have any application in a case where a well is intentionally diverted into the land of another. In the instant case it fully appears that the respondent retained all rights given by its original lease in so far as parcel A is concerned and it not only appears that the appellants' lease applied only to parcel B but the court found upon ample evidence that the appellants well knew that the productive pool of petroleum oil underlying parcel A did not extend to or underlie parcel B and that they intentionally, secretly and fraudulently employed the right to occupy the surface of parcel B for the purpose of accomplishing a clandestine and secret penetration of the oil pool underlying parcel A and the removal therefrom of oil, well knowing that this oil was the property of the respondent. Under such circumstances the appellants were chargeable with the value of the oil without any deduction for expenses incurred in bringing it to the surface. Lightner Min. Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas. 1913C, 1093. Under such circumstances the appellants had no equities and may not rely upon the equitable rule that he who seeks equity must do equity. Hibernia Sav. & L. Society v. Ordway, 38 Cal. 679; Richman v. Bank of Perris, 102 Cal.App. 71, 282 P. 801.

[9] "Nor is there any room here for the application of the principles of laches or estoppel as against the respondent. The appellants contend that the respondent knew what was being done and tacitly consented thereto because this proceeding was not begun for several months. Drilling was begun on the first of the three wells on May 17, 1933, and the well was completed on June 20, 1933. When a representative of the respondent inquired as to whether this well was being whipstocked he was told by the appellants they were trying to keep the well straight. After that well was completed the respondent was told that the bottom of the well was within parcel A but was not told that this had been intentionally done. The second well was started August 10, 1933, and completed September 14, 1933, and the third well was begun on November 24, 1933, and completed on January 16, 1934. No information as to the underground location of these wells came to the respondent until after the respective wells were completed and there is evidence that surveys and reports were intentionally kept from the respondent. The respondent had no information as to the underground location of the second and third wells until after March 20, 1934, when through a grand jury investigation surveys and reports were secured. There was no estoppel both because the respondent did not possess full information prior to or during the drilling of the wells and because the facts were fully known to the appellants, who were intentionally and secretly proceeding against the property of the respondent, and they were in no way or manner deceived or misled by anything done by the respondent. While the respondent learned after its completion that the first well penetrated their land it was not informed that this had been intentionally done or that there was any intention to do the same thing as the second and third wells were drilled. Since it was refused access to surveys and reports it became necessary for the respondent to ascertain the facts and to procure evidence in other ways. Not only would this take considerable time in view of the natural difficulties involved in obtaining such evidence, but the respondent was justified in taking steps to be very sure of the facts before proceeding with a charge of this nature. This action was begun on July 17, 1934, and it cannot be held as a matter of law that the trial court erred in failing to find that the respondent was guilty of laches which would bar relief."

For the reasons given, the judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; LANGDON, J.; HOUSER, J.; SHENK, J.; SEAWELL, J.

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13 Cal.2d 125

SOUTHERN PAC. CO. v. RAILROAD COMMISSION OF CALIFORNIA et al.

S. F. 16007.

Supreme Court of California.

March 3, 1939.

Rehearing Denied March 30, 1939.

1. Carriers 🔑18(2)

To justify upholding of order of Railroad Commission, there must be sufficient competent evidence to support every jurisdictional fact essentially involved, and where findings are made without any evidence to support them, they will be annulled.

2. Carriers 🔑18(2)

Where there was no evidence to support Railroad Commission's finding that rates proposed by railroad were unjustified, and all evidence supported railroad's contention that they were, commission's order denying proposed rates would be annulled.

In Bank.

Proceeding by the Southern Pacific Company against the Railroad Commission of the State of California, and Wallace L. Ware, Leon O. Whitsell, Frank R. Devlin, Ray C. Wakefield, and Ray L. Riley, as members of and constituting the Railroad Commission, to review an order of the Commission with respect to freight rates.

Order annulled.

James E. Lyons, of San Francisco, and R. E. Wedekind, of Los Angeles, for petitioner.

O'Melveny, Tuller & Myers and Homer I. Mitchell, all of Los Angeles, amici curiae for Los Angeles Chamber of Commerce.

Ira H. Rowell, Frank B. Austin, Mary J. Moran, and Hal F. Wiggins, all of San Francisco, for respondents.

PER CURIAM.

With the exception that with respect to one order that is involved herein, the subject of rates proposed to be charged for transportation of freight relates particularly to canned goods, and in a second order, that soap and other allied products represent the commodities that are affected by the several proposed rates,—no important factual differences are discernible when compared with the underlying facts that are narrated in the proceeding entitled Southern Pacific Company v. Railroad Commission, 87 P.2d 1055, wherein a decision by this court has this day been filed. In addition thereto, each of the several contentions of the respective parties that are therein decided by this court is likewise applicable in the instant matter. No useful purpose would be served herein by a repetition thereof. Suffice it to say that appositely each of the several rulings that was made in the proceeding to which reference just has been had is adopted as a ruling in the proceeding now under consideration.

Particularly with reference to the point, in substance that not only was there no evidence to support the so-called "finding" to the effect "that the rates under suspension * * * have not been shown to be justified * * *", the record herein not only sustains the petitioner in that regard, but goes further, in that it unmistakably appears that such finding is contrary to the evidence. In its brief herein, the respondent commission initially undertakes to show why, in rendering its decision in the proceeding then before it for consideration, the evidence that had been introduced by the petitioner at the hearing that took place before the respondent commission was disregarded. Nowhere in its ruling, which includes a commingling of argument, findings of fact and conclusions of law, did the respondent commission ever refer to either of the several postulates which it now advances as its reasons for refusing to give either full or any credence to such evidence. Indeed, other than the bare conclusion that the proposed rates were "not justified", the "findings" by the respondent commission contain no intimation but that the evidence that was received at the hearing on behalf of the petitioner did not deserve the weight to which on its face it was properly entitled. On the other hand, in its reply brief, the petitioner has effectively answered the asserted reasons for discrediting such evidence, which reasons, for the first time, are suggested by the respondent commission in its brief herein. But assuming, without conceding, that none of the reasons that are now urged as sufficient for the rejection of such evidence is sound, the respondent commission urges the point that "even though there be no conflict, the appraisal of the evidence presents a question of fact for the commission's determination; it does not raise a question of law for the determination of the courts".

[1] In that connection, in substance, the statutory requirements as to "findings" to be made by the Railroad Commission are practically identical with those that are contained in the provisions of the Workmen's Compensation Act (§ 67, Stats. 1917, p. 831) which relate to the industrial accident commission, and which declare that "findings and conclusions of the [industrial accident] commission on questions of fact shall be conclusive and final and shall not be subject to review"; and that "such questions of fact shall include ultimate facts and the findings and conclusions of the commission". Subdivision (c). With regard to such a situation, it is stated in 27 California Jurisprudence, page 575 (sec. 218), that "When the jurisdiction of the [Industrial Accident] commission to make any award depends upon the establishment of an ultimate fact, the reviewing court may examine the evidence upon which the finding of the commission to that effect is based," and that, "In such a case, to justify the upholding of an award *there must be sufficient competent evidence* to support every jurisdictional fact essentially involved in the application for compensation. And where such findings have been made *without any evidence to support them,* the award will, of course, be annulled." (Italics added.)

In the instant case there was no evidence to support the Railroad Commission's finding that the proposed rate was not justified, —all the evidence being to the contrary,— and as hereinbefore stated, such finding was contrary to the evidence adduced.

In the case entitled Coombs v. Industrial Acc. Com., 81 Cal.App. 137, 252 P. 1069, 253 P. 976, it was held that the portion of section 67 of the Workmen's Compensation

Act to the effect that "the findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review", means merely that the findings of the commission are conclusive where the commission has not exceeded its jurisdiction by making a finding *without the support of testimony.* See, also, vol. 12, Cal.Jur. [10 yr.] Suppl., pp. 120, 121, and notes. Again, in the case entitled National Auto. Ins. Co. v. Indus. Acc. Comm., 139 Cal.App. 414, 34 P.2d 163, with regard to findings of the industrial accident commission, it was said that the only question of law involved was whether there was *any evidence* in support of the finding that an award should be made. And in the case entitled Thoreau v. Industrial Acc. Com., 120 Cal.App. 67, 7 P.2d 767, it was held that even in cases where evidence is said to be conflicting, the conflict *must be substantial.* Although it was held in the case entitled Hufstetler v. Dept. of Indus. Relations, 107 Cal.App. 741, 290 P. 922, that notwithstanding the fact that evidence was uncontradicted, an order of the (Industrial Accident) commission which denied compensation would not be set aside where there were *circumstances in the case* which justified the commission in disbelieving the uncontradicted evidence,—it has been repeatedly held by the appellate courts of this state that an award of the industrial accident commission, based on findings not supported by the evidence, should not be allowed to stand. In Hubbert v. Industrial Acc. Com., 14 Cal.App.2d 171, 58 P.2d 171, 172, in annulling an award of the industrial accident commission, it is said, "* * * if there is *no evidence* to support a finding the proceeding becomes subject to the court's review. Market Street Ry. Co. v. Industrial Acc. Com., 193 Cal. 178, 224 P. 95. * * *"; and that "uncontradicted evidence, not inherently improbable, may not be arbitrarily rejected by the courts (Cowan v. Hill, 109 Cal.App. 656, 293 P. 871) and the Industrial Accident Commission is bound by the same rule, this court having specified that there must be a real and substantial conflict in the evidence to render the findings of the commission immune to inquiry by a reviewing court [citing cases]. In the instant case, *in the absence of any evidence to the contrary,* and with all the direct evidence supporting the claim of petitioner that her deceased husband was an employee of Miller, we are constrained to hold that *there is no evidence* to support the finding, that the deceased was Miller's partner". (Italics added.) (See, also, Winthrop v. Industrial Acc. Com., 213 Cal. 351, 2 P.2d 142; Modoc County v. Industrial Acc. Commission, 32 Cal.App. 548, 163 P. 685.) Again, this court said in Pacific Gas & Elec. Co. v. Industrial Accident Commission, 197 Cal. 164, 239 P. 1072, 1073, that "the findings of the * * * Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof. [Citing cases.] In short, if the facts show substantially without conflict that there is no evidence to support the finding, the Commission was without jurisdiction to make the same. There must be *some* evidence, upon which the finding of special employment is predicated * * *." (Italics added.) See, also, Nielsen v. Industrial Acc. Com., 125 Cal.App. 210, 13 P.2d 517. In Children's Hospital Soc. v. Industrial Acc. Com., 22 Cal.App.2d 365, 71 P.2d 83, 85, where there was a total lack of evidence to support the finding, it was said that "an award of compensation may not be based upon surmise, conjecture, or speculation".

In the case entitled American Toll Bridge Company v. Railroad Commission, Cal.Sup., 83 P.2d 1, 4, in reviewing the action of the Railroad Commission with regard to its powers affecting rate-making, this court said that an examination of the inquiry as to whether the rates so fixed are confiscatory necessarily entails a judicial determination of the question of whether the finding of such body is supported by the evidence; also, that the requirements of due process are met where there is accorded "a fair hearing" and the commission has acted "*upon evidence* and not arbitrarily"; furthermore, that where these requirements are met, "the judicial inquiry into the facts goes no further than to ascertain whether *there is evidence* to support the findings, and the question of the weight of the evidence in determining issues of fact lies within the legislative agency acting within its statutory authority". (Italics added.)

[2] Although in the instant matter, in effect, the commission contends that regardless of the strength of evidence presented by the petitioner, and even in the absence of any evidence introduced to the contrary, the commission has the right to disregard the evidence and decide the issue according to its own concepts,—as a conclusion from the foregoing authorities

it becomes apparent that the Railroad Commission has no greater authority than has the industrial accident commission on questions of fact; and where, as here, all the evidence supports the petitioner's contention, and none has been adduced in opposition thereto, the ruling of the commission amounts to the making of an order by the commission without any evidence in support thereof.

For the reasons herein indicated, it is ordered that the order here in review be, and it is, annulled.

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13 Cal.2d 89

SOUTHERN PAC. CO. v. RAILROAD COMMISSION OF CALIFORNIA et al.

S. F. 15930.

Supreme Court of California.

March 3, 1939.

Rehearing Denied March 30, 1939.

1. Carriers 🔑13(3)

Within meaning of section of Public Utilities Act providing that nothing therein should be construed to prohibit any common carrier from establishing and charging lower than maximum reasonable rates for transportation of property, when needs of commerce or "public interest" require, California, theoretically at least, is an inseparable entity, and if an integral portion thereof shall suffer a given loss, which may be fully compensated by gain of identical character in another portion, the "public interest" does not sustain any detriment. St.1935, p. 1897, § 13½.

[Ed. Note.—For other definitions of "Public Interest," see Words & Phrases.]

2. Carriers 🔑18(2)

Railroad, which sought to establish lower than maximum reasonable rates for transportation of beverages, failed to establish, as required by the Public Utilities Act, that lower rates were required by "needs of commerce or public interest," where manufacturer of beverages, and not the general public, would directly profit by the lower rates. St.1935, p. 1897, § 13½.

3. Statutes 🔑158

Repeals by implication are not favored.

4. Statutes 🔑159

Even though, in some particulars, provisions of statutes apparently are in conflict one with the other, nevertheless, if possible and practicable, such seeming inconsistencies should be reconciled to the end that the law as a whole may be given effect.

5. Carriers 🔑2

The powers of the Railroad Commission under section of Public Utilities Act authorizing Railroad Commission to fix rates less than maximum reasonable rate under certain conditions are not limited by statute providing that commission shall "fix as minimum rates * * * the lowest of the lawful rates" of the several types of carriers, so as to import an absolute right in any carrier, within zone of reasonableness, to lower freight rates, though that statute, standing alone, might import such absolute right. St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

6. Carriers 🔑1

Common carriers are considered as being "public utilities."

[Ed. Note.—For other definitions of "Public Utility," see Words & Phrases.]

7. Carriers 🔑12(1)

Public interest demands that one type of common carrier should not be permitted, by means of drastic reduction in rates for transportation below zone of reasonableness, to work business destruction of competitors. St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

8. Public service commissions 🔑6

Generally, such quasi judicial agencies as the Railroad Commission, should not exercise or attempt to exercise, in absence of legislative delegation, any authority with respect to policy respecting public business.

9. Carriers 🔑12(1)

In view of the constitutionally authorized delegation of authority to Railroad Commission by Legislature, commission has power to determine, not only status of transportation conditions, but also to conclude whether proposed charge or rate for specified freight will or may be justified thereby. St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½; St.1935, p. 878, as amended.

10. Automobiles 🔑121

The Highway Carriers' Act requires that only such rates may be established as shall tend to preserve to public, on reasonable basis, continuance of all types of transportation. St.1935, p. 878 as amended.

11. Carriers 🔑12(1)

A carrier is authorized to establish lower transportation rates than those lawfully charged by its competitors only after, by proper showing, it is able to secure finding from Railroad Commission to effect that proposed rates are justified by transportation conditions, and that rates are not "unreasonably low." St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

12. Carriers 🔑12(1)

A carrier may not be authorized by Railroad Commission to maintain rates lower than those of its competitors, unless rates will yield to it at least actual cost of transporting commodity on which new rates are proposed to act. St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

13. Carriers 🔑12(1)

Whether proposed or already established transportation rates are justified by transportation conditions is largely determinable by existence of preliminary fact whether rates will or do return to carrier the cost of transportation. St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

14. Carriers 🔑12(1)

The conclusion on controverted question whether proposed or already established transportation rates are justified by transportation conditions ordinarily rests with Railroad Commission. St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

15. Carriers 🔑18(2)

Railroad Commission's finding that proposed transportation rates which were lower than those of railroad's competitors were not "justified by transportation conditions" and were "unreasonably low" was not subject to railroad's objection that it did not constitute a finding of fact, but rather that it was a conclusion of law. St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

16. Carriers 🔑18(2)

Railroad Commission's finding that proposed transportation rates, which were lower than those of railroad's competitors, were "unreasonably low," was unsupported by evidence, and order based thereon was void, where there was nothing of an affirmative character to controvert railroad's evidence to effect that rate was more than sufficient to return to railroad its "out-of-pocket cost of transportation." St.1937, p. 2005, § 32(d); St.1935, p. 1897, § 13½.

17. Carriers 🔑2
Constitutional law 🔑298(2)

Section of Public Utilities Law giving Railroad Commission power to fix transportation rates does not violate due process clauses of State and Federal Constitutions. St.1935, p. 1897, § 13½.

18. Constitutional law 🔑81

In exercise of police power, individual's right must yield to superior demand of public welfare.

19. Carriers 🔑1

Common carriers hold their properties and exercise their respective privileges and franchises subject to legislative control, which includes not only regulation of manner and mode in which they may transact their business, but also price which may be charged for transportation of freight or passengers.

20. Constitutional law 🔑70(1)

Notwithstanding existence of presumption of validity attending enactment of legislation regulating common carriers, if legislation is unreasonable in effect, it may be judicially declared void.

21. Constitutional law 🔑70(1)

In enactment of statute, question of statute's reasonableness is one for prior legislative determination, and ordinarily legislative conclusion in that respect is final.

22. Constitutional law 🔑70(1)

Legislative conclusion that statute is reasonable will be disturbed by contrary judicial conclusions only when legislation is so manifestly unnecessary for promotion or preservation of public welfare that tribunal charged with duty of adjudicating matter may fittingly declare that no rational ground for enactment exists.

23. Carriers 🔑2
Constitutional law 🔑298(2)

Statute providing that no common carriers may establish a rate less than maximum reasonable rate for transportation of property except on some showing as may be required by Railroad Commission, and on finding by commission that rate is justified by transportation conditions, is not unreasonable. St.1935, p. 1897, § 13½.

24. Statutes 🔑141(1)

Statute providing that no common carriers may establish rate less than maximum reasonable rate for transportation of property except on some showing as may be required by Railroad Commission, and on finding by commission that rate is justified by transportation conditions, is not unconstitutional on ground that it violated constitutional requirements that no law shall be revised or amended by reference to its title, merely because section was added by title stating that section relating to public utilities was added to Public Utilities Act by way of amendment. St.1935, p. 1897, § 13½; Const. art. 4, § 24.

◆

In Bank.

Proceeding by the Southern Pacific Company against the Railroad Commission of the State of California and Wallace L. Ware, Leon O. Whitsell, Frank R. Devlin, Ray C. Wakefield, and Ray L. Riley, as members of and constituting the Railroad Commission, to review an order of the commission respecting certain freight rates.

Order annulled.

James E. Lyons, of San Francisco, and R. E. Wedekind, of Los Angeles, for petitioner.

I. H. Pfaffenberger, of Oakland, amicus curiae.

Elmer Westlake, Edwin G. Wilcox, and E. R. Hoerchner, all of San Francisco, amici curiae for California State Brewers' Institute.

Ira H. Rowell, Frank B. Austin, Mary J. Moran, and Hal F. Wiggins, all of San Francisco, for respondents.

Edward M. Berol and Reginald L. Vaughan, both of San Francisco, amici curiae.

HOUSER, Justice.

Pursuant to the provisions contained in Statutes 1935, page 878, as amended, in a proceeding which theretofore had been initiated by the respondent commission, an order was made by it by which minimum rates or charges for the transportation of various commodities by different types of highway common carriers, respectively, were fixed and determined. Thereafter, Southern Pacific Company, which was and is a common carrier by rail, that was relatively affected by such order, together with several other like carriers, filed with the respondent commission certain schedules or rates, wherein and whereby it was proposed that on a specified date the freight rates for the transportation of beverages (particularly beer) from San Francisco, and the adjacent area, to the city of Los Angeles and its immediate vicinity, be reduced from the flat rate of 25 cents per 100 pounds, in lots ranging from a minimum of 18,000 pounds to a maximum of 30,000 pounds (as theretofore had been established by the said order of the respondent commission for highway carriers), to a rate of 20 cents per 100 pounds in minimum lots of 50,000 pounds; furthermore, that on shipments of such beverages from San Francisco to the city of San Diego, the then-existing rate be reduced from 30 cents per 100 pounds to 25 cents per 100 pounds. Thereupon, in response to protests that had been filed with the respondent commission by various highway and water carriers, respectively, against the adoption of such proposed rates, an order was issued by the respondent commission by the terms of which, in effect, the putting in operation of such rates was suspended until further order might be made with respect thereto. With such objective in view, a reconsideration of that part of its former order, by which freight rates for highway common carriers had been established with reference to such beverages, was directed to be had at the same time and in connection with a hearing of the matter respecting the legality or desirability of the new rates for rail carriers that theretofore had been proposed by the said rail carriers relative to which such protests had been filed. As far as is here pertinent, and without reference to detail, the general result of such combined hearing was that the respondent commission made its order by which, in effect, leave to the rail carriers to reduce the freight rates from 25 cents to 20 cents per 100 pounds in minimum lots of 50,000 pounds for the transportation of beverages from the city of San Francisco and its vicinity to the area of and surrounding the city of Los Angeles was denied. But as far as such shipments from the city of San Francisco to the city of San Diego were involved, leave to establish the proposed rate therefor was granted. Within and by the same order, the highway carriers were directed to make a specified additional charge for such transportation in those instances where the highway carrier might perform the "accessorial" service to the shipper not only of "advertising" the shipper or its product on the truck by which the beer might be transported, but also of "pick-up" or loading and unloading such freight. However, on rehearing by the respondent commission as to the entire order, the said "accessorial" order was directed to be and it was rescinded; and in lieu thereof a different "accessorial" charge for "advertising" as well as for loading and unloading such freight was directed to be made. Otherwise, as far as the instant proceeding might be affected thereby, the order which theretofore had been made by the respondent commission in the matter was left practically undisturbed. Following the rendition of such final order, on the petition of the Southern Pacific Company to this court, wherein, by specific allegations therein contained, the unlawfulness of the aforesaid order was made to appear, a writ of review was caused to issue to the end that the legality of said order might be judicially investigated, and if, as a result of such investigation, the allegations that were contained within the petition were found to be substantially supported in fact and in law, the order theretofore made by the respondent commission might be annulled and vacated.

Concededly, the specific authority, if any, of the respondent commission to make the order of which complaint is made rests principally in the provisions of law that are contained in Sec. 13½ of the Public Utilities Act (Stats.1915, page 115, as amended by Stats.1935, page 1897) as follows: "Nothing herein contained shall be construed to prohibit any common carrier from establishing and charging a lower than a maximum reasonable rate for the transportation of property when the needs of commerce or public interest require. However, no common carrier subject to the jurisdiction of the California Railroad Commission may establish a rate less than a maximum reasonable rate for the transportation of property for the purpose of meeting the competitive charges of other carriers or the cost of other means of transportation which shall be less than the charges of competing carriers or the cost of transportation which might be incurred through other means of transportation, except upon such showing as may be required by the commission and a finding by it that said rate is justified by transportation conditions; but in determining the extent of said competition the commission shall make due and reasonable allowance for added or accessorial service performed by one carrier or agency of transportation which is not contemporaneously performed by the competing agency of transportation."

However, with respect to such authorization, petitioner asserts that its apparent effect is qualified and restricted by provisions of a later statute enacted in 1937, designated as section 32(d), Stats.1915, page 115, as amended by Stats.1937, page 2005. The following is a copy of that provision:

"It is hereby declared to be the policy of the State of California, in rate making to be pursued by the Railroad Commission of the State of California, to establish such rates as will promote the freedom of movement by carriers of agricultural commodities, including live stock, at the lowest lawful rates compatible with the maintenance of adequate transportation service.

"In any rate proceeding where more than one type or class of carrier, as defined in this act or in the Highway Carriers' Act, is involved, the commission shall consider all such types or classes of carriers, and, pursuant to the provisions of this act or the Highway Carriers' Act, fix as minimum rates applicable to all such types or classes of carriers the lowest of the lawful rates so determined for any such type or class of carrier. This provision shall not be construed to prevent the commission from granting to carriers by water such differentials in rates as may be permitted under other provisions of law."

In the course of much litigation that has engaged the attention of the many respective courts throughout the United States during the fifty or more years last past, great ability and energy have been devoted to a consideration of various problems of law that have arisen concerning the asserted right on the part of the state to regulate the dispatch of business of and various charges made or to be made by the several recognized public utilities. No useful purpose would be served either by a review of the historic cases wherein different phases of the general subject have been so ably discussed, or even by a passing reference to the controlling principles of law that have been therein enunciated. So well are they known and their application recognized by respective counsel in the instant proceeding that by mutual understanding in that regard many of the foundational questions which ordinarily might have occupied their attention, as well as that of the members of this court, have been assumed to exist as common knowledge. In that regard, in effect, the express or the implied stipulation of the parties includes the mutual concession that in the absence of controlling statutory authorization to the contrary, the respondent commission would possess no right to prevent the petitioner from establishing a freight rate in the premises that would lie within an elastic "zone of reasonableness",—which latter expression imports a rate which is confined in its maximum to a figure not so excessive as to be "greater than the particular traffic will bear", and in its minimum not so low that it will be destructive of the business of the common carrier, or that it will not return to the carrier at least the actual "cost of transportation". It also is apparent that, excepting for valuable reference to pertinent principles of law, none of the authorities cited by the respective contending parties is directly applicable to the particular situation here presented, for the reason that each of such cases was decided without reference either to the provisions that are contained either in section 13½ or in section 32(d) of the Public Utilities Act, or to any law of similar import; consequently a discussion of such cases appropriately may be omitted.

In such circumstances, as hereinbefore has been indicated, the important question that is presented to this court for its determination relates principally to an interpretation of the language that has been employed by the legislature in its enactment of section 13½, considered in connection with section 32 (d) of the Public Utilities Act.

Reverting to the language employed in section 13½ of the Public Utilities Act, to which attention hereinbefore has been directed, it may be noted that, in substance, it provides, *firstly,* that, should the "needs of commerce or public interest" so require, a common carrier shall not be deemed forbidden to establish a rate which may be less than a "maximum reasonable rate"; but, secondly, considered solely from the standpoint of the issues here involved, that if the purpose in so doing should be that "of meeting the competitive charges of other carriers", etc., it may do so only after it has been made to appear that the proposed rate will be "justified by transportation conditions * * * ".

Regarding such first precedent condition to a right of a common carrier to establish a rate which would be less than a "maximum reasonable rate",—to-wit, that it must appear that it is responsive to the "needs of commerce", or that it is impliedly demanded by "public interest",—in effect, it is contended by the respondent commission that the only showing of asserted merit consists of evidence from which inferences are or may be drawn, not that either "commerce or public interest" will either directly, or in anywise, benefit by the proposed reduction in rates, but rather that petitioner, in its private capacity and solely in its self-interest, will be rewarded. Specifically in that connection, the petitioner asserts:

> "First, that the *petitioner* had *lost* substantially *all* of its beverage business under present 'transportation conditions'; second, it was shown without substantial conflict in the record that the reduced rates would be productive of *increased rail traffic;* and third, that there is a tendency on the part of the brewing interests to reduce transportation charges *by the construction of branch breweries in southern California* * * *." (Italics added.)

[1, 2] From its viewpoint, the fact that the petitioner has lost to the truck carriers practically all its former business of transporting beverages may be most deplorable; but in the face of the additional fact that the general public does not appear to have sustained either any direct or any appreciable detriment on that account, it is not apparent in what respect the required condition has been shown to exist. It is obvious that the pecuniary advantage, if any, which would or might result to the general public from the proposed freight reduction would be impossible of estimation or realization; that is to say, a saving of 5 cents on the transportation of 100 pounds of beer from San Francisco to Los Angeles would represent a saving of perhaps not to exceed 1/20 of 1 cent on each glass of beer that might be drunk by the general public;—from which fact it would seem apparent that the manufacturer of the beverage, and not the general public, would directly profit by the proposed change in the freight rate. Nor is it clear that if, as proposed by the petitioner, the rate should be reduced and as a consequence thereof that it would be "productive of increased *rail* traffic", how that assumed situation could be considered as being responsive to the "needs of commerce", or that it was in compliance

with the demands of "public interest"; and a similar status prevails with reference to the possibility that, unless transportation rates should be reduced, the northern shippers of beer will construct branch breweries in southern California. Theoretically, at least, the state of California is a "one and inseparable" entity; and if an integral portion thereof shall suffer a given loss which may be fully compensated by a gain of identical character in another like portion of the state, it is not conceivable that, as a whole, the "public interest" will have sustained any detriment. It is obvious not only that any loss which might result in that regard would be confined entirely to the petitioner, or to the transportation business generally, but also that however much the general public as represented by the northern part of the state, might be damaged by such an untoward happening, such ensuing loss would be completely offset by the gain which might result to southern California by reason of the establishment in that locality of the anticipated branch breweries. As far as the record herein discloses, no thirsty private individual in the universe would directly benefit by reason of the proposed freight rate reduction of 5 cents on 100 pounds of beer. To the contrary, as hereinbefore has been indicated, it is not improbable that aside from a possible increase in revenue to the petitioner, the practical result of such reduction would inure solely to the private benefit of the manufacturers of the beverage. It therefore would seem manifest that the rate reduction which the petitioner has sought to establish at least was not required by the "needs of commerce or public interest", which condition is indicated in the statute as necessarily precedent to the right of petitioner to establish "a lower than a maximum reasonable rate".

However, as a secondary proposition, even assuming that either "commerce" actually was in dire need of action such as that which was proposed by the petitioner, or that "public interest" was insistently demanding, or that it even impliedly required, that the freight rate on beer from San Francisco to Los Angeles be substantially reduced, that is to say, from a rate of 25 cents per 100 pounds to that of 20 cents for such poundage, not yet would it appear that by the terms of the statute, the petitioner possessed the absolute and unqualified right to establish a rate lower than that charged by its competitors for the transportation of the commodity in question. Precedent thereto, other conditions remained to be satisfied; that is to say, that if the reduction be sought "for the purpose of meeting the competitive charges of other carriers * * *", a "showing" must be made "that said rate is justified by transportation conditions", et cetera, which fact must be evidenced by a "finding" by the Railroad Commission to that effect. And in the latter connection, from the record herein it is clear that, as written, whatever appropriately may be said in criticism of either the form or the substance of the so-called "finding" that was made by the respondent commission, in no sense, nor in any conceivable construction or interpretation of such "finding" may the necessary fact of justification, measured by "transportation conditions" be discovered or deduced. It thus results that, "presumptively", both the facts and the law, as provided by section 13½ of the Public Utilities Act, present a legal indication of the correctness and the legality of the order of which complaint is here made. But in that connection, the additional question is suggested for determination by this court of whether the broad powers that apparently are conferred on the respondent commission by the provisions of section 13½ are limited or restricted by the provisions of section 32(d) of the act to such an extent, if at all, as to re-create or revive in the petitioner an alleged, unqualified right, which assertedly was formerly possessed by it of establishing any freight rate within the "zone of reasonableness", without regard to the or any possible adverse effect which a drastic reduction by it in such rates might have upon the continuation in business of the competitors of the petitioner.

[3-5] Again directing attention to the provisions of section 32(d) (hereinbefore set forth) it will be noted that, in substance, the pertinent portion thereof requires that the respondent commission shall "fix as minimum rates * * * the *lowest* of the *lawful* rates" of the several types of carriers that may be engaged in the same line of business as that which may be affected by the rate proceeding then under consideration by the commission. It is not improbable that that language, standing alone, might import an absolute right in any carrier, within the "zone of reasonableness" to lower the freight rate on any commodity to a point that would return

to it the exact cost to it of transporting such commodity between any specified designations,—which practical result, considered from a business standpoint, might require that all other carriers of the same commodity lower their respective rates to the same level. But nowhere within the provisions of the statute may language be discovered by which properly it may be inferred that other statutes in *pari materia* are to be repealed. Besides, repeals by implication are not favored. To the contrary, even though, in some particular or particulars, the provisions of two or more statutes apparently are in conflict one with the other, nevertheless, if possible and practicable, such seeming inconsistencies should be reconciled to the end that the law as a whole may be given effect. And so in the instant matter. An explanation of the two apparently conflicting statutes produces a harmonious result. Assuming the legality of section 13½, although by its provisions, as one of its basic propositions, a carrier may be permitted to establish a rate which may lie anywhere within the "zone of reasonableness", nevertheless when such proposed rate is less than "a maximum reasonable rate" and its purpose is that of "meeting the competitive charges of other carriers", such apparently absolute right is subject to regulatory precedent conditions,—with the result that, within the meaning of section 32(d), no newly proposed rate can become a "*lawful* rate" until after it has received the "approval" of the commission. The proposed rate here under consideration was sought to be established *after* section 13½ became the assumed law; and if its pertinent provisions are not inimical to organic law, no legal cause for either a neglect or a refusal to make its provisions applicable is readily discernible. And since in premises such as here are under consideration, both by other special and general provisions of the act, as well as by the express provisions of said section 13½, the commission is authorized to make an order of the kind and to the extent here in question, it must follow that, in order that the provisions of section 32(d) might become operative, the newly proposed rate by the petitioner must have been controlled by the condition that it was a "*lawful*" rate. In other words, in effect, within the meaning of the language employed in the particular statute, it was demanded that the new rate be a "lawful" rate before its other provisions would apply; and the new or "lowest" rate could be a "lawful" rate only after it had been so established in accordance with the provisions of section 13½.

[6-8] In connection with the order that here is the subject of complaint, the intended fairness of the respondent commission in attempting to equalize the rates of the respective carriers is made to appear by the terms of such order regarding accessorial services in its compliance with the additional provision of the latter section to the effect that in its consideration of the question of proposed rate reductions, it should "make due and reasonable allowance for added or accessorial service performed by one carrier or agency of transportation which is not contemporaneously performed by the competing agency of transportation". With reference to the uniformity of such established rates and the pecuniary and other probable effects thereof upon the respective classes of carriers affected thereby, a consideration of the evidence adduced at the hearing discloses the fact and impels the conclusion that the order by which the several charges that were directed to be imposed for the performance of such services was adequately based upon substantial and pertinent evidence; and although in practice such rates and charges may not prove to be perfect in operation with the object of securing the desired uniformity to the respective carriers, nevertheless by the express terms of the original order, as well as by those of its amendment, the intention on the part of the respondent commission to comply with statutory requirements in that regard is fairly apparent. For the service of transportation only, a flat and uniform charge is required to be made by each of the several types of carriers; and where service additional thereto, such as "pick-up" or loading, or unloading, of freight is furnished, an "accessorial" charge must be made therefor. Likewise, additional charges are imposed when means or methods may be employed for advertising the business or the product of the shipper on the transportation equipment. Apparently, at least, in all respects reasonable effort has been put forth to equalize compensation to the respective carriers. As hereinbefore has been indicated, common carriers are considered as being among public utilities. The discontinuance of the service of any one of such types necessarily would be a detriment to the needs of commerce and to public interest. In order that because of lack of

reasonable compensation for its service to the public none of such existing agencies may be forced to retire from the field of its usefulness thereto, ordinarily it is regarded as incumbent upon the administrative forces of the government to make available to it proper and timely opportunity to assure its continuance in the public service. Expressly disclaiming any intention on the part of this court either directly to declare or insinuate that the petitioner herein either has endeavored or, if possible, intends in the future to "run its competitors out of business", it is manifest that public interest demands that neither by "cut-throat" nor by any other means or method should one type of common carrier be now permitted, by means of a drastic reduction in rates for transportation below the "zone of reasonableness", to work the business destruction of a competitor or competitors. Those agencies are all needed for the public good. Each has or should have and be accorded its proper place and influence in the welfare of the state. It is not to be expected that a pecuniary net profit in the conduct of the business of any individual or corporation of any one or more of the several types of transportation should be insured by the government, but that with proper facilities and under efficient management, in the absence of too great business risks and hazards, the enterprise may be reasonably protected to the extent that an opportunity may be afforded for the transaction of its business, to the end that a fair return on the investment may be anticipated as the result of its operations. Rail carriers, truck carriers and water carriers now dominate and control the field of such business activity. Possibly within the comparatively near future another or other means of transportation may be evolved and developed, and in their respective operations the existence of the several agencies that represent present means of transportation may be seriously threatened or their destruction actually accomplished. They may be outmoded and become obsolete. The future undoubtedly will present its own difficult problems. The duty of this day does not necessarily include their solution. Nevertheless, the paternalistic effort of the present generation, "solely with an eye to public good", to protect or to "regiment" public utilities, as well as the hitherto-considered private affairs of the individual member of society, hereafter may be considered either as an indispensable element in the restoration of public confidence and business prosperity, or, to the contrary, as an unmeasurable menace to constitutional liberty. But in this connection, the petitioner earnestly contends that if, in the economical and more efficient administration of its business, it be able to reduce the present rates, and in the operation thereof not only secure to itself a return of the cost of transportation, but also a profit on its investment, those other common carriers which, by reason of faulty or less efficient management, or because of inadequate equipment with which to properly handle the business, may be unable either to earn a profit or to pay the actual cost of transportation, should not be singled out and favored by having the present rate maintained. In other words, when the fact has been clearly established that by practical, efficient and satisfactory methods a financially reliable common carrier is not only ready, willing and able to lower the prevailing rate for freight transportation to a rate that is shown by the evidence to be not only within the limits of the "zone of reasonableness", but also that the proposed rate will yield a net profit,—in its zeal to perform its conceived duty in the premises, the concern of the commission should not extend to the limit of "holding an umbrella" over either present or possibly future competitors, and thereupon, and by reason of its anxiety in the interest of such competitors deny the application to reduce the existing rate, lest by reason of their inability to meet such rate the said competitors be eliminated from the field of transportation, to the seeming detriment of the public interest. In that regard, viewed from a standpoint of consideration of the proper constitutional powers of the different departments of government, ordinarily it should be beyond fair question that, especially in the absence of legislative delegation so to do, neither the Railroad Commission nor other quasi-judicial agency should exercise or attempt to exercise any authority with respect to the or any policy respecting public business. In the dispatch of such business as properly may fall within either the constitutional or the conferred legislative functions of such a body, generally speaking, the law, and that only, should measure its acts. Neither the theoretical nor the practical effect of proper adherence thereto should be of concern either to a judicial tribunal or to an administrative arm of the government acting in a quasi-judicial capacity. Its plain and proper duty in that regard should end with its declaration of its conception or interpretation, or construction, of the law as applied to the facts at hand. In the estimation of those expert in knowledge of basic principles of civil government, to go beyond that amounts to a usurpation of functions not contemplated either by constitutional guaranties or limitations.

[9, 10] But, as an exception thereto, herein it would appear that, by constitutionally authorized delegation of authority, at least impliedly, the legislature has waived its natural prerogative, in that it has conferred power upon its agent, the Railroad Commission, to determine not only the status of "transportation conditions", but also to conclude whether a proposed charge or rate for specified freight will or may be "justified" thereby. In the language of the statute, the Railroad Commission is charged with the particular duty of "finding" whether a proposed rate "is justified by transportation conditions"; that is to say, among other things, it is charged with the duty of weighing and considering each and all of the several and various pertinent facts and elements that should furnish a foundation for a "finding" or conclusion as to whether the effect of the proposed rate will redound to the ultimate best interests of the general public. But that specific legislative fiat, complete as it may be both in its direct and in its implied expression, does not constitute the law in that regard in its entirety. The Highway Carriers' Act (Stats. 1935, p. 878) presents further indication of the public will with respect to the legal establishment of an equality or uniformity of rates (the particular service rendered being given consideration) for transportation of freight as among all the several types of common carriers and contract common carriers throughout the state. And not only does that act require that a uniformity, as far as may be quasi-judicially determined, may be caused to exist, but also (efficient and economical management assumed) that only such rates may be established as shall tend to preserve to the public, on a reasonable basis, a continuance of each of the several types of transportation. In that connection, especially, should be noted the inclusive language of the preamble to that act, as well as that employed in section 10 thereof, as amended by St.1937, p. 2010, § 8, to which reference readily may be had. It thus becomes apparent that public interest has been accorded official recognition of its paramount importance, with the result that as far as individual or corporate rights, marked by private ownership of so-called public utilities, are concerned, they must yield especially whenever either the question of prospective gain or profit derived or derivable from such agencies, or that of discretion with relation to the management thereof, may come in conflict with the progress or the maintenance of the public good.

As hereinbefore has been indicated, the respective litigants in this controversy are in harmony one with the other with respect to the legal conclusion that a "zone of reasonableness" exists in the matter of fixing freight rates, within which, ordinarily, and in the absence of either express controlling statutory provision, or judicial construction thereof to the contrary, a common carrier has the right, in the exercise of its managerial discretion, to establish and maintain any desired rate. In addition thereto, it is conceded by the petitioner that since the business of a common carrier is affected by and with "public interest", the basic right of the carrier to manage its business in its own way and in accordance with the dictates of its own managerial judgment, at least at this day, is subject to the right of the public, acting through its authorized agency or agencies, to *regulate* the business of the common carrier. Primarily, the difference in opinion as between the respective parties hereto relates to the extent of "regulation" which may be legally recognized as being within the constitutional powers of the regulatory body.

Otherwise, and concretely stated, the question is,—conceding that section 13½ provides specific statutory authority for the making of the order of which complaint is here registered,—whether the substance of such order is regulatory, or, to the contrary, whether it constitutes a taking of property, or the use thereof, without rendering either adequate or any compensation therefor.

[11, 12] As hereinbefore has been made to appear, the carrier is authorized to establish a rate lower than that which is "lawfully" charged by its competitors, only after, by a proper showing, it is able to secure from the commission a "finding" to the effect that the proposed rate is "jus-

tified by transportation conditions". But even then, as is conceded by the respective litigants herein, the common carrier is limited to the extent that it may not establish a rate that is "unreasonably low"; —that is to say, that in no event may the carrier be authorized to maintain a rate that will not yield to it at least the actual cost to it of transporting the commodity upon which the new rate is proposed to act. It is well-settled that a given rate properly may be adjudged to be too low, as well as that another rate likewise may be determined by the commission to be too high. United States v. Illinois Cent. R. R. Co., 263 U.S. 515, 525, 44 S.Ct. 189, 68 L. Ed. 417; Anchor Coal Co. v. United States, D.C., 25 F.2d 462, 471; Jefferson Island Salt Mining Co. v. United States, D.C., 6 F.2d 315.

[13, 14] Whether a proposed or an already established and maintained rate is "justified by transportation conditions" is largely determinable by the existence of the preliminary fact of whether it will or does return to the carrier its cost of transportation. But the answer to such question is not necessarily susceptible of the exactitude that ordinarily might be desired or anticipated. So many different factors combine to produce the ultimate result, each of which is, or at least many of which are, or may be, dependent upon individual opinion respecting the relative value, or the percentage, or the proportion to the whole, to which it is, or they are, or may be, entitled, that when the answer is completed, in the nature of things, its correctness may not be demonstrated, and in all probability may properly be subject to much doubt and criticism. But as usually is the case with reference to a controverted question of fact, the conclusion thereon ordinarily must rest with the tribunal to which such question has been submitted for decision. Accordingly, if in the instant proceeding the ultimate "finding" of the respondent commission to the effect that the rate which was proposed to be established and maintained by the petitioner was not "justified by transportation conditions" is properly based upon the express finding that such rate was "unreasonably low", in that impliedly it would not return to the petitioner its cost of transportation, it would follow that (again assuming the legality of the enabling statute), the specific complaint which has been registered herein by the petitioner regarding the sufficiency of the "finding" in question is unavailing to it, and that no legal consequence in favor of the petitioner may be predicated upon the form of such "finding". However, when questioned, the correctness of that conclusion must finally rest on a determination of whether the evidence is sufficient to support it. In that connection, it may be remembered that by the provisions of section 13½, before reaching a conclusion as to whether a proposed rate properly may be authorized by the Railroad Commission, a "finding" must be made by it to the effect "that said rate *is* justified by transportation conditions". The record herein shows that no such "finding", either in direct terms, or by implication, was affirmatively made. To the contrary, the "finding" by the respondent commission not only negatived the necessary precedent statutory condition in favor of the petitioner, but also expressly declared that such proposed rate was *"unreasonably low* and *not* justified by transportation conditions". In that regard, the complaint of the petitioner is based upon each of two fundamental points, to-wit (1), that a "purported finding that the rate is not justified by transportation conditions" does not constitute a finding of fact at all, but rather that it is a conclusion of law that, to be valid or of binding effect, should rest upon designated or specified facts; and (2), assuming the necessary and indispensable fact upon which such conclusion of law should be based was that if the petitioner were permitted to operate at its proposed rate, its cost of transportation would not be returned it,—not only was the evidence that was adduced at the hearing insufficient to support such an assumed or implied finding, but, to the contrary, it was clear that such evidence was against and contrary to the effect of any such finding. In considering such objections, it is deemed unnecessary to devote attention either to the origin or the history of the phrase "findings of fact", so commonly used in the procedure of a trial that takes place before a court sitting without a jury.

It first may be useful to ascertain, if possible, in what sense the word "finding" was used, as it is expressed in the statute. In that regard, attention is directed to the fact that section 67 of the Public Utilities Act (Stats.1915, p. 115, as amended by Stats.1933, p. 1157) provides in part: that "* * * The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as hereinafter provided; such questions of fact *shall include ultimate facts* and the findings and conclusions of the commission on reasonableness and discrimination. * * *" (Italics added.)

As repeatedly hereinbefore has been indicated, the commission made the finding "that the reduced railroad rate * * * is *unreasonably low and not justified by transportation conditions.*" (Italics added.) And with respect thereto, specifically it is urged by the petitioner that, standing alone, without the presence of specific or essential findings upon which it must be made to rest, such "finding" is insufficient. It is important to note that by the quoted language of section 67, the commission is authorized to include *"ultimate"* facts in its findings and conclusions on *reasonableness* and discrimination. In the case entitled American Toll Bridge Co. v. R. R. Commission, Cal. Sup., 83 P.2d 1, 4, this court quoted from the case of St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, wherein it was said: "'* * * Exercising its rate-making authority, the Legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. * * * When the Legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. * * *'"

The petitioner has cited several recent cases (Wichita R. & Light Co. v. Pub. Util. Comm., 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124; Beaumont, S. L. & W. Ry. v. United States, 282 U.S. 74, 51 S.Ct. 1, 75 L.Ed. 221; Florida v. United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291; Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446; Atchison, T. & S. F. Ry. v. United States, 295 U.S. 193, 55 S.Ct. 748, 79 L.Ed. 1382; Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023; Norwegian Nitrogen Co. v. U. S., 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796; Great Northern Ry. Co. v. Department of Public Works, 161 Wash. 29, 296 P. 142; People's Fruit & Vegetable S. Assn. v. Illinois Com. Comn., 351 Ill. 329, 184 N.E. 615; Baltimore & O. R. Co. v. United States, D.C., 22 F.Supp. 533; Saginaw Broadcasting Co. v. Federal C. Comn., 68 App.D.C. 282, 96 F.2d 554; United States v. B. & O. R. Co., 293 U.S. 454, 55 S.Ct. 268, 79 L.Ed. 587) which it is urged enunciate the rule that an "ultimate" finding of fact by an administrative tribunal must be supported by essential underlying findings of fact. However, it is to be observed that none of those cases presented a situation where the requirements of the particular act under review were expressed in language similar to that employed in section 67; and that although the decisions to which petitioner has referred might be most persuasive were the language of section 67 not so authoritative and inclusive, it is apparent that in the light of the legislative pronouncements set forth in that section, the several rulings indicated in the cited cases are not controlling. In the case entitled Valley & Siletz R. Co. v. Thomas, 151 Or. 80, 48 P.2d 358, 359, some of the cases above cited relied upon by petitioner as announcing the rule that "ultimate" findings must be supported by specific findings, are discussed and distinguished. In that case the court said:

"It is first insisted that the order of the commissioner is void, on the ground that he did not make detailed and specific findings of fact relating to the matter before him, and that the failure to make such findings of fact invalidates his entire order. This contention is based on the wording of sections 62-125 and 62-134, Oregon Code 1930. The first of these sections, with reference to investigation of rates, provides that 'if upon such investigation the rate or rates, fares, charges * * * or any joint rate or rates * * * or service complained of *shall be found to be unreasonable,*' the public utilities commissioner 'shall have power to fix and order substituted therefor such rate or rates' as he 'shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future.'

"Section 62-134, as far as material here, is as follows: 'Whenever, upon an investigation made under the provisions of this act,' the public utilities commissioner *'shall* *find* any existing rate or rates, fares, charges, or classifications, or any joint rate or rates * * * affecting the transportation of * * * property * * * *are unreasonable,'* he 'shall determine and by order fix a reasonable rate, fare * * * or joint rate to be imposed, observed, and followed in the future in lieu of that found to be unreasonable'.

"The commissioner is granted power to change existing rates only in the event that *he finds such rates unreasonable.* The law does not confer upon him legislative authority to require the substitution of other and different rates as in his discretion he may from time to time deem desirable. He is given authority to prescribe other and different rates only in such instances *as he finds existing charges unreasonable.*

"The sections of the Code above referred to *do not require the commissioner to make what commonly are considered findings of fact.* They merely provide that in the event he *finds* certain rates to be *unreasonable,* it then becomes his duty to prescribe what are reasonable rates. In the order above mentioned *he found definitely that certain rates were unreasonable* and specified what would be reasonable rates.

"In United States v. Baltimore & O. R. Company, 293 U.S. 454, 55 S.Ct. 268, 273, 79 L.Ed. 587, the court pointed out that an order of the Interstate Commerce Commission could not be supported where there was complete absence of the basic or essential findings required to give the commission jurisdiction of the matter. With further reference to this subject, the court there said: 'In the Florida Case [Florida v. U. S., 282 U.S. 194, 51 S.Ct. 119, 75 L. Ed. 291] the legal distinction was pointed out between what may be termed quasijurisdictional findings, there held to be indispensable, and the "complete statement of the grounds of the Commission's determination" which was declared in Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74, 86, 51 S.Ct. 1, 75 L.Ed. 221 [229], to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court (compare Virginian R. Co. v. United States, 272 U.S. 658, 675, 47 S.Ct. 222, 71 L.Ed. 463, 472), is not fatal to the validity of the order. It is true that formal and precise findings are not required, under section 14(1) of the Interstate Commerce Act (49 U.S.C.A. § 14 (1), which declares that the report "shall state the conclusions of the commission, together with its decision." Compare Manufacturers' R. Co. v. United States, 246 U. S. 457, 487, 38 S.Ct. 383, 62 L.Ed. 831 [846]. Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 428, 35 S.Ct. 328, 59 L.Ed. 644 [656], Ann.Cas.1916B, 691, P.U.R.1915D, 1072. That provision relieves the commission from making comprehensive findings of fact similar to those required by Equity Rule 70½ (28 U.S.C.A. following section 723). But section 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity.'

"In Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124, relied upon by the appellant herein, it was held that the order of the commission failed to find the existing rates to be unjust and unreasonable, and that the commission under the Kansas law had no power to substitute other rates unless it did so find. In support of this conclusion, the court cited State Public Utilities Commission v. Springfield Gas Company, 291 Ill. 209, 125 N.E. 891, 902. In the Illinois case, with reference to the duty of the regulatory body of that state, the court quoted from the Public Utilities Act as follows: 'At the conclusion of such hearing the commission shall make and render findings concerning the subject-matter and facts inquired into, and enter its order based thereon.'

"It will readily be seen that the requirements of the Illinois act are more exacting, as to what the findings shall consist of, than those of the Oregon statute. Although the Illinois case was cited by the United States Supreme Court in Wichita R. & Light Co. v. Public Utilities Commission, supra, there is nothing in the opinion in the latter case from which it can be inferred that anything more is necessary than the quasi jurisdictional findings, that is, of the unreasonableness of existing rates.

"Following the Illinois decision is the case of Northern Pacific Railway Company v. Baker (D.C.) 3 F.Supp. 1, 6, which is based upon a statutory provision closely similar to, if not identical with, the Illinois act, requiring the department of public works of the state of Washington to 'make and render findings concerning the subject-matter and facts inquired into.'

"In State of Florida v. United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291, it was held that before the Interstate Commerce Commission could fix intrastate rates, it was necessary for that body to make a finding as to the effect of such rates on interstate rates, and without such a finding it had no legislative authority to act. * * *

"As said in the case of United States v. Baltimore & O. R. Company, supra, it would be 'desirable for a proper consideration of the case in the courts' that a complete statement of the grounds of the commissioner's determination be given, and the lack of such a complete statement is always regrettable. The failure, however, in a case of this nature, to make comprehensive findings of fact does not invalidate the order prescribing new rates. A 'basic or essential' finding that the existing rates are unreasonable is all that the statute demands.

"See, also, in this connection, Mills v. Lehigh Valley Railroad Company, 238 U. S. 473, 35 S.Ct. 888, 59 L.Ed. 1414." (Italics added.)

[15] In reliance upon the reasoning and the authorities that thus are cited in the Oregon case, together with a consideration of the language used by the legislature of this state in its enactment of section 67, it is concluded that the finding here under discussion is not properly subject to the objections made by the petitioner, provided, of course, that it has sufficient support in the evidence.

In that connection, the petitioner urges the additional point that the provisions of law that are contained within section 13½ of the Public Utilities Act are violative of its constitutional rights in that, in effect, the statute deprives petitioner of its property without rendering to it either adequate or any compensation therefor.

Preliminarily, in accordance with authorities hereinbefore cited, it should be remembered that if a proposed rate is "unreasonably low", it is not within the "zone of reasonableness", in that, impliedly, it will not return to the petitioner the cost of transportation. However, as hereinbefore has been suggested, as to whether in fact, at the time of the hearing, such foundational condition existed is also a subject of controversy between the interested parties. It is obvious that if, in actual operation of the proposed rate, the petitioner would not receive its cost of transportation, —instead of being damaged by the denial of its asserted right to reduce freight charges, in truth, eventually, as far as might concern the particular commodity proposed to be transported, the petitioner would be the recipient of a benefit. In that connection, one of the minor reply arguments that is made by the respondent commission is that if the proposed rate were put in operation, before the petitioner would even receive as much gross revenue as theretofore it had received from the transportation of beverages from the city of San Francisco to the city of Los Angeles, necessarily, in volume, it would have to transport 29 per cent more of such freightage than it had been transporting prior to the effective date of the establishment of the new rate. On first thought, in existing conditions of competition, such a percentage requirement would seem almost prohibitive of success. But when the total number of cars of transported beverage, as compared with the quantity thereof that at present is handled by the petitioner is taken into consideration, the barrier does not seem insurmountable. To illustrate: Out of a total of 216 carloads of beer that is transported per month, petitioner has been transporting but two carloads. The requirement is not that, in order that the proposed rate may be financially successful, the petitioner must secure 29 per cent of the total of all such freightage, but that it must increase *its* present business in such transportation by that percentage. The evidence shows that under the new rate petitioner would have at least a fair chance of obtaining additional business; and if it were able to secure but a single car of new business, instead of an increase of only 29 per cent, the result would show an increase of 50 per cent. In addition thereto, but from another and separate consideration, it is apparent that at the present rate, that is, 25¢ per 100 pounds, on carload lots of a minimum of 30,000 pounds, the return to the petitioner would amount to $75.00 per car; whereas under the proposed rate of 20¢ per 100 pounds, in carloads of a minimum of 50,000 pounds, the return would be $100 per car; which result would indicate an increased income to petitioner, rather than that which is expressed in the "finding" by the respondent commission that the proposed rate is "unreasonably low". Moreover, on its face, by inference the record shows that the "out-of-pocket cost of transportation" from San Francisco to Long Beach is approximately 8.52 cents per 100 pounds for a 50,000 pound load; consequently that if the proposed rate were in operation from San Francisco to Los Angeles, which latter city is nearer to San Francisco than is Long Beach, the profit would be at least 11.48 cents per 100 pounds, or $57.40 per car. But in that connection, the correctness of such figures is subject to serious doubt. However, the more important question of whether any substantial evidence justifies the implied finding that the proposed rate *would not* return to the petitioner its cost of transportation, remains for consideration. In that regard, within not only the single original document that was filed by the respondent commission as its finding and order in the premises, but also in its decision on rehearing, which purportedly contains its argument, commingled with its "findings of fact", its conclusions of law and its order, *inter alia,* it is noted that, as a part thereof the respondent commission made use of the following language: "Clarence E. Day, Engineer of the Bureau of Transportation Research of the Southern Pacific Company, introduced an exhibit (No. 21) showing the estimated costs of transporting beverages and tonics in lots of 50,000 pounds between San Francisco, Oakland and Sacramento on the one hand and Long Beach (used as a representative point beyond Los Angeles) on the other hand. This study indicates that the proposed rates *are more than sufficient to return the out-of-pocket cost of transportation* by Southern Pacific Company." Also, that thereafter, on rehearing and in response to petitioner's criticism with respect to its lack of specific findings of fact, the respondent commission declared that: *"Assuming* but *not conceding* that the reduced rail rates *would be compensatory,* it does not follow that a reduction of the volume proposed would accomplish the desired purpose." (Italics added.)

[16] If either of such statements properly may be said to indicate a direct conclusion, it is manifest that neither nor both of them combined respectively is or are supportive of the so-called "finding" that the proposed rate is "unreasonably low". To the contrary, to ordinary understanding, such declarations would carry the significance either that the proposed rate *would* return to the petitioner its "out-of-pocket cost of transportation", or, failing in that regard, that the respondent commission had reached no conclusion with reference thereto. Aside from the assertion in its brief that the evidence is "ample * * * to support this finding", the respondent commission has referred this court to nothing of an affirmative character that properly may be regarded as evidence in support of its conclusion. Its statement in that regard appears to be founded upon an asserted inference which, it is contended, may be deducible from two exhibits that were filed in the matter, one of which is said to show that in 1930 the rate was 35½ cents per 100 pounds, and that "The 35½ cent rate was progressively reduced for competitive reasons until it reached the present level of 25 cents". The contents of the other exhibit merely disclose the fact that as compared with then-existing rates between San Francisco and some other cities, as well as between Los Angeles and some other cities, the proposed rate would be considerably lower. But nowhere in either of such exhibits, or elsewhere, is the attention of this court directed to any statement or any positive evidence regarding the precise point here in dispute, to-wit, whether the proposed rate would be *below* out-of-pocket cost of transportation, as hereinbefore has been declared. The record herein reveals no affirmative evidence that could properly have been considered as negativing or controverting the evidence to which the respondent commission referred, which, in effect, was that the proposed rates were "more than sufficient to return the out-of-pocket cost of transportation". It follows that in whatever light the "finding" that the proposed rate was "unreasonably low" be viewed, it clearly was not supported by the evidence, but was contrary to it. The inevitable result it that the order in question is void. However, although in such circumstances, as far as concerns the present controversy, the issue that has been presented by the petitioner as to whether the order of which complaint is made is violative of its constitutional rights in that, if put in operation, the order would deprive the petitioner of the use of its property without rendering adequate or any compensation therefor, is not necessary of determination,—nevertheless it is deemed advisable that some consideration of the point be given by this court.

As hereinbefore has been indicated, in substance, the statute provides that for the purpose of meeting competition,—without first having obtained the consent of the commission—a common carrier may not establish a rate which will be less than the maximum reasonable rate. And petitioner contends that if, within the "zone of reasonableness", by reason of its superior equipment, facilities and efficient management of its business, it is able to transport freight at a rate that is less than that at which its competitors can afford to transact the business, a conferred statutory power which purportedly prevents it from doing so amounts to a taking of property, or the use thereof, in violation of the several "due-process" clauses of both the state and the federal Constitutions.

In 3 Words and Phrases, First Series, page 2229, it is said: "The definitions of 'due process of law' are so various that it is unsatisfactory to attempt an accurate definition. It is sufficient to say that it was intended to protect property from confiscation by legislative enactments, and from seizure, forfeiture, and destruction without trial and conviction by the ordinary modes of judicial proceedings. Davis v. State, 68 Ala. 58, 62, 63, 44 Am.Rep. 128." To the same effect see: Chambers v. Gilbert, 17 Tex.Civ.App. 106, 42 S.W. 630, 631; Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718, 721, 79 A.L.R. 1380. In the case of Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 664, 137 P. 1119, 1127, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822, in part it is said: "Another principle, quite as important and quite as fundamental, is that 'taking' of property within the meaning of the constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use. The principle is thus stated by Lewis on Eminent Domain as follows: 'If property then consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property, and hence that his property may be taken in the constitutional sense though his title and possession remain undisturbed, and that it may be laid down as a general proposition, based upon the nature of property itself, that whenever the lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the power of eminent domain, his property is *pro tanto* taken, and he is entitled to compensation.' 2d Ed. § 56; 3d Ed. § 65. 'It is also clear that to take the use of property is to take property within the meaning of the constitution. * * *'"

Having in mind such principles, we pass to a consideration of the contention of the petitioner that the order, viewed in the light of the provisions of section 13½, deprives it of its property without due process of law. In the course of its argument to the effect that the provisions of that section as applied by the commission denies it the right, theretofore enjoyed by it, to fix it own rates within a so-called "zone of reasonableness", the petitioner relies in part upon certain rulings which appear to have been made in the following cases:

Lang v. Railroad Commission, 2 Cal.2d 550, 42 P.2d 639; Interstate Commerce Com. v. Alabama Midland R'y, 168 U.S. 144, 18 S.Ct. 45, 42 L.Ed. 414; Interstate Commerce Comm. v. Chicago G. W. Ry., 209 U.S. 108, 118, 119, 28 S.Ct. 493, 52 L.Ed. 705; Texas & Pacific Ry. Co. v. U. S. 289 U.S. 627, 53 S.Ct. 768, 77 L.Ed. 1410.

In Lang v. Railroad Commission, 2 Cal.2d 550, 42 P.2d 639, 644, (decided prior to the enactment of section 13½), the fact was recognized that under the provisions of the act as it then stood, there existed a "zone of reasonableness" wherein the carriers might "adjust their rates so as to obtain or retain the desired traffic for their own lines". Also, in the case entitled Interstate Commerce Com. v. Alabama Midland R'y, 168 U.S. 144, 172, 173, 18 S.Ct. 45, 51, 42 L.Ed. 414, it was said: "'* * * within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to traffic or persons similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted, in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting [of] dissimilar circumstances and conditions to their business.'" And in the case entitled Interstate Commerce Comm. v. Chicago G. W. Ry., 209 U.S. 108, 118, 119, 28 S.Ct. 493, 496, 52 L.Ed. 705 the court said that: "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. * * * It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the Interstate Commerce Act [49 U.S.C.A. § 1 et seq.] (Armour Packing Co. v. United States, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. [681]), and also that, in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. [Citing cases.]" To the same effect, see the case entitled Texas & Pacific Ry. Co. v. U. S., 289 U.S. 627, 53 S.Ct. 768, 77 L.Ed. 1410.

[17] Although it might be argued that the language set forth in the foregoing quotations, considered alone, would support the contention of the petitioner that there exists a zone of reasonableness within which a rail carrier may lawfully fix its rates, nevertheless it would seem well-settled law that such asserted right on the part of a public utility to do so is limited by the terms of any particular act to the contrary thereof under which the carrier may assume to operate. With respect to such a situation, the commission concedes that prior to the enactment of section 13½ there existed a zone of reasonableness within which a carrier might fix its rates, subject to any other limitations prescribed by law; however, it contends that by the enactment of section 13½ the legislature has limited the preexisting right, to the extent indicated by that section; that the authority conferred by that section is a "regulatory" power, referable to the police power of the state, and therefore lawful;—and that it necessarily follows that the power conferred upon the commission by the provisions of that section is not violative of the due process provisions of either the federal or the state constitution. In that connection, the commission asserts that there has been a gradual legislative encroachment upon the right of a public utility to fix its own rates within the limits theretofore prescribed, pointing out particularly the enactment of the Transportation Act of 1920, 49 U.S.C.A. § 15 (1), wherein power was conferred upon the Interstate Commerce Commission to fix minimum as well as maximum rates; and that the delegation to a commission or administrative agency of legislative power to fix rates of a public utility is a valid delegation of the rate-making power of the legislature. In volume 22, California Jurisprudence, page 65, it is said: "A power *to regulate* the rates which may be demanded by public service corporations is inherent in the state. * * * A general power over rates is now lodged, however, in the Railroad Commission; and this power extends to the *regulation* of rates of every character of utility, including the transportation of passengers and goods, * * *" (Italics added.) See, also, Corpus Juris, volume 51, pp. 32, 33, where it is said: "The constitutionality of statutes creating or empowering public utility commissions is governed by the rules applicable to statutes generally. Thus, except when otherwise provided by the constitution, the legislature, in pursuance of its general power to regulate public utilities, may by statute delegate to a commission the administration of laws and regulations, enacted in the proper exercise of the police power, governing utilities, subject to such limitations or restrictions as it may see fit to impose, * * *"

In a foot-note on page 33 it is said: "In California (1) under Const. art. 12, sec. 22, 23, providing that the commission shall have such power to supervise and regulate utilities as shall be conferred upon it by the legislature, and that the legislature may confer any additional powers not inconsistent with those granted by the constitution, the legislature may delegate to the commission whatsoever authority it may see fit in the matter of management and control of utilities, the making of its orders and decrees, and the punishment for the violation thereof, all of such subject matters being germane to, and not inconsistent with, the constitutional powers conferred. East Bay Municipal Utility Dist. v. State R. Comn., 194 Cal. 603, 229 P. 949; Pacific Tel. & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822. * * *"

Additionally, the recent case entitled American Toll Bridge Company v. Railroad Commission et al., Cal.Sup., 83 P.2d 1, would seem to be a conclusive answer to the contention that the provisions of section 13½ are a valid delegation of legislative power of a regulatory nature, permitted under the exercise of the police power of this state. In that case it was held that the conferred power of fixing rates for a toll bridge was a valid legislative enactment and that the legislature had the power to exercise such authority directly or through an agency which it might create or appoint to act for that purpose.

[18, 19] Although it is fundamental that whatever personal benefits to the individual may result from the exercise of the sovereign of the power of eminent domain, with its usual accompaniment of necessity of adequate compensation to be rendered to any person who might sustain a compensable injury with its consequent damage, nevertheless in the enjoyment of any private right, especially when it is affected by a public use or interest, it is a well-established rule that in the exercise of police power, the right of the individual must yield to the superior demand of public welfare. And so with the business of common carriers. They hold their several properties and exercise their respective privileges and franchises subject to legislative control which includes not only the regulation of the manner and the mode in which they may transact their business, but also the price which may be charged for the transportation of freight or passengers. And it has been ruled that legislation of that character is in violation of no contractual rights; that it "takes away no property"; nor interferes with any vested right (9 Am.Jur., p. 449 et seq.; 11 Am. Jur., p. 1060, and authorities there respectively cited).

[20-23] However, notwithstanding the existence of a presumption of validity that attends the enactment of such legislation, if unreasonable in their effect, laws of the kind here in question may be judicially declared void. In that respect, since the necessary element of unreasonableness of the questioned statute is not capable of certain or definite measurement, it is manifest that before a determination of that condition properly may be adjudged, the quality of unreasonableness must be made clearly to appear. Primarily, in the enactment of a statute the question of its reasonableness is one for prior legislative determination, and ordinarily the legislative conclusion in that respect is regarded as final. It will be disturbed by a contrary judicial conclusion in that regard only when the questioned legislation is so manifestly unnecessary for the promotion or the preservation of the public welfare that the tribunal charged with the duty of adjudicating the matter may fittingly declare that no rational ground existed as a reason for its enactment (5 Cal. Jur., p. 714 et seq., and authorities there cited). In the instant matter, it is obvious that no unreasonableness in the provisions of the statute has been shown. To the contrary, as hereinbefore has been indicated, its reasonableness is most apparent. It follows that the point that has been urged by the petitioner in that behalf cannot be sustained.

With reference to a further and separate contention of the petitioner, it may be noted that section 24 of article 4 of the constitution of this state provides that: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such Act shall be void only as to so much thereof as shall not be expressed in its title. No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be reenacted and published at length as revised or amended; and all laws of the State of California, and all official writings, and the executive, legislative, and judicial proceedings shall be conducted, preserved, and published in no other than the English language."

In adding section 13½ to the Public Utilities Act, the legislature made use of the following title: "An act to amend the public utilities act by adding two new sections numbered sections 13½ and 32½, relating to public utilities." St.1935, p. 1897.

In that regard, it is contended by the petitioner that the said title is insufficient in that it purports to amend the Public Utilities Act by "adding two new sections * * * relating to public utilities"; whereas without a reenactment and publication at length, as amended, the effect of the provisions of section 13½ is to completely revise the existing statutory powers and duties of the respondent commission, contrary to the express mandate of the constitutional provisions to which reference has been had.

It is obvious that the foundation upon which the asserted unconstitutionality of the act must rest is a precedent determination of the fact that by the provisions of the act, the powers and duties of the respondent commission with respect to the fixing of freight rates have been so amended as to work a complete revision of such powers and duties. In that regard, an examination of sections 13 and 32 (c) of the Public Utilities Act, which were in force at the time when section 13½ was added to said act, discloses the situation that by the terms of the former section it was provided that: "All charges made * * * by any public utility * * * shall be just and reasonable. Every unjust or unreasonable charge * * * is hereby prohibited and declared unlawful." (Gen.L.1937, pp. 3129, 3139.) And by the terms of section 32 (c) it was provided that: "The commission shall have power * * * to fix and determine the just, reasonable and sufficient rates * * * and whenever two or more common carriers are furnishing service in competition with each other the commission shall have power * * * to prescribe uniform rates * * * to be charged * * * by all such common carriers." Stats.1915, p. 115, as amended by Stats.1937, p. 2005.

Broadly speaking, an examination of the several provisions of section 13½ discloses the pertinent facts, first that "when the needs of commerce or public interest require", a common carrier is not "prohibited" from establishing a "*lower* than a *maximum* reasonable rate". It is clear that under all then-existing statutes a *lower* than a maximum rate would be the only kind of rate that a common carrier might legally establish. Unquestionably a rate that would be *higher* than a maximum reasonable rate would be unlawful. In that respect section 13½ made no change in the law. In substance, as far as here is practically applicable, the second provision of section 13½ merely gives a common carrier a contingent right to establish a rate *less* than a maximum reasonable rate, to meet the competitive charges of other carriers, dependent upon a precedent "showing" by such common carrier and a subsequent "finding" by the commission that the proposed rate "is justified by transportation conditions". It thus becomes apparent that the only purported additional statutory requirement or condition which is expressed in section 13½ is that the proposed rate shall be "justified by transportation conditions". But as hereinbefore has been indicated, it is clear that such a requirement or condition was impliedly contained within the statutory provisions that were in force prior to the enactment of section 13½. By virtue of such former statutes, in order that a proposed rate might be established, it was necessary that it be "just, reasonable and sufficient"; and in addition thereto, by judicial construction, the "zone of reasonableness" determined its limits. In a determination of the justness, the reasonableness and the sufficiency of any proposed rate, necessarily the question of whether it was or would be "justified by transportation conditions" had not only to be considered by the commission, but also decided in the affirmative before, in the performance of its legal duty, the commission would be authorized to make its order by which a common carrier might establish a rate that was less than a maximum reasonable rate within the "zone of reasonableness". In other words, to be "just, reasonable and sufficient", a proposed rate at least had to be "justified by transportation conditions". With regard to substance, the provisions of section 13½ did nothing more than to clarify the existing law. That within the intent of the constitutional provision, which is relied upon by the petitioner, the effect of the statute was neither to revise nor to amend the existing law with reference thereto, is attested by the decision of this court in the case of Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 916, 45 P. 1057. In that case (similarly to the title of the act herein), the title of the act indicated that its purpose was to amend an act "* * * by adding thereto * * * relative to a system of street improvement bonds". In part, it was therein held that: "An act is not revised, nor a section amended, within the purview of the above inhibition, by an act which adds new sections which leave in full operation all the language of the statute which it purports to amend. * * * It is evident that, if this amends the Vrooman act at all, it does so only by implication. It does not purport to amend any section of that act. It simply adds new sections as a whole, relating to a subject which is stated. As already said, every word and sentence of the prior act is left in full operation and effect, * * *."

The case of People v. Oates, 142 Cal. 12, 75 P. 337, is fully as persuasive in favor of respondent's position as is the case just cited. In deciding the pertinent issue, the language employed by the court was in part as follows: "It is claimed that the act approved April 9, 1880, is unconstitutional and void. It is entitled 'An act to amend sections (then follow 108 sections of the Penal Code, numbered consecutively as they there occur) and to repeal sections 969 and 1025 of the Penal Code, and to add a new section thereto, to be known as section 809, to provide for prosecutions by information, and to adapt the provisions of said Code thereto.' * * * The contention is, first, that the act is a *revision* of the Penal Code, and hence required a republication of the entire Code. * * * *We do not think the act before us is anything more than what its title declares it to be, viz., 'An act to amend'* the sections named and 'to repeal' certain sections named and 'to add a new section' to the Penal Code. It is in no sense a revision of the entire code." (Italics supplied.)

See, also, In re Byers, 219 Cal. 446, 27 P.2d 641; Los Angeles City School Dist. v. Odell, 200 Cal. 637, 254 P. 570, and authorities there cited.

[24] It thus becomes apparent that the contention of the petitioner to the effect that the title to the act by which section 13½ was added to the Public Utilities Act was defective, in that it was violative of the provisions of section 24 of article 4 of the constitution, cannot be sustained.

It becomes unnecessary to devote attention to other points that have been suggested by the respective parties herein for determination by this court.

As hereinbefore has been indicated, for the reason that the "finding" by the respondent commission to the effect that the rate proposed by the petitioner "was unreasonably low and not justified by transportation conditions" was not supported by the evidence, but in fact that the evidence was contrary to such "finding", it is ordered that the order here in review be and it is annulled.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.

I concur in the judgment: EDMONDS, J.

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13 Cal.2d 139

WRIGHT et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

L. A. 16681.

Supreme Court of California.
March 14, 1939.

1. Attorney and client ⚷75(1)

Supreme Court was proper forum in which to seek substitution of attorneys where appeal was then pending in such court.

2. Attorney and client ⚷148(2)

Contract of employment providing, in substance, that attorneys were to receive for services 50 per cent. of amount recovered, assigning to attorneys 50 per cent. of clients' recovery, if any, and providing attorneys were not to be paid in case of failure to recover, conferred only a right to share in proceeds of litigation and did not create a "power coupled with an interest."

[Ed. Note.—For other definitions of "Power Coupled with an Interest," see Words & Phrases.]

3. Attorney and client ⚷75(1), 134(2)

Where contract of employment did not confer a power coupled with an interest but merely a right to share in proceeds of litigation, client could discharge attorney and substitute new one in his place on appeal; the attorney being entitled to reimbursement for services and outlays on behalf of client if discharge was improper. Code Civ.Proc. § 284.

4. Attorney and client ⚷76(1)

Action of ejectment to recover possession of real property was not an action for the "recovery of money" within meaning of amendment to statute providing for exceptions as to right of client to discharge attorney; and hence, in absence of existence of a power coupled with an interest, attorney could be discharged although contract of employment contemplated possible recovery of money. Code Civ.Proc. § 284, subd. 2.

[Ed. Note.—For other definitions of "Recovery of Money," see Words & Phrases.]

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In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by S. B. Wright and another against the Security-First National Bank of Los Angeles, a national banking association, wherein plaintiffs appeal from an unsatisfactory judgment. On appellants' motion for substitution of attorneys.

Judgment in accordance with opinion.

Franklin P. Bull, Homer C. Compton, C. C. Thompson, and Morris Lavine, all of Los Angeles, for appellants.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

WASTE, Chief Justice.

[1] The plaintiffs and appellants have moved this court for a substitution of Morris Lavine as attorney in the place and stead of their present attorney, Homer C. Compton, who opposes such substitution. Franklin P. Bull, who appeared as co-counsel in the trial court for plaintiffs and appellants, joined in a stipulation that substitutes Lavine as attorney for appellants in his place and stead. As the cause in which the substitution is sought is now pending on appeal in this court, this is the proper forum in which to seek such relief. Jacobus v. Jacobus, 208 Cal. 562, 563, 282 P. 796; In re Estate of Cazaurang, 1 Cal.2d 712, 717, 36 P.2d 1069.

[2, 3] The action in which the substitution is sought is one in ejectment to recover the possession of real property. Attorney Compton, whom it is here sought to oust, instituted the same on behalf of the plaintiffs under a written contract of employment by the terms of which he and his former associate herein (Franklin P. Bull who, as stated, voluntarily stepped aside) were to receive "as a consideration * * * for their services as attorneys * * * fifty per cent (50%) of whatever amount is recovered either by suit, judgment or compromise either of money, rent or property which may be recovered" and the plaintiffs "do by these presents assign and set over * * * fifty per cent (50%) of any interests which they may have or which they may recover in said litigation" and any advancements by said attorneys for costs and expenses of the litigation "shall be chargeable and deductible from whatever interest is recovered" by the plaintiffs and "in the failure to recover any valuable thing from the claims as above set forth, the said [attorneys] should not be entitled to compensation for their services and the [plaintiffs] shall not be obligated to pay for such services."

Even the most cursory examination of the provisions of the contract of employment between plaintiffs and attorneys Compton and Bull discloses that such contract merely granted or assigned to the attorneys for any and all legal services performed an interest in and to the fruits or proceeds derived from such services. In other words, the contract represents nothing more than the ordinary contingent contract and does not give rise to or create a power coupled with an interest within the meaning of the authorities. In the language of Scott v. Superior Court, 205 Cal. 525, 532, 271 P. 906, 909, attorney Compton's "interest was only a right to share the proceeds which might result from the execution of his power. He did not have a power coupled with an interest." Hence, under well-established principles, plaintiffs and appellants are free to discharge him and to substitute new counsel in his place and stead. Sec. 284, Code Civ.Proc.; Todd v. Superior Court, 181 Cal. 406, 413–420, 184 P. 684, 7 A.L.R. 938; Kirk v. Culley, 202 Cal. 501, 505, 261 P. 994; Scott v. Superior Court, supra; In re Estate of Cazaurang, 1 Cal.2d 712, 714, 36 P.2d 1069; O'Connell v. Superior Court, 2 Cal.2d 418, 421, 41 P.2d 334, 335, 97 A.L.R. 918. In the case last cited the subject is briefly summarized in the following manner:

> "Section 284 of the Code of Civil Procedure provides that the attorney in an action or special proceeding may be changed at any time upon consent of both client and attorney or upon the order of the court upon the application of either client or attorney, after notice from one to the other. By virtue of this Code section, it is now settled in this state that in the absence of any relation of the attorney to the subject-matter of the action, other than that arising from his employment, the client has the absolute right to change his attorney at any stage in the action, and the fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right. Gage v. Atwater, 136 Cal. 170, 68 P. 581. In the event his discharge is improper or without just cause, adequate remedies are available to the attorney by which he may seek reimbursement for such services and outlays on behalf of the client. Kirk v. Culley, 202 Cal. 501, 506, 261 P. 994."

The last sentence of the foregoing quotation presents the solution to attorney Compton's argument herein that he should not be removed from the case until he has been reimbursed for the services and outlays on behalf of the plaintiffs and appellants. As stated in the quotation, if his discharge by his clients is improper and without just cause, "adequate remedies are available to [him] by which he may seek reimbursement for such services and outlays".

[4] Nor do we find it presently necessary to consider or pass upon the validity of the 1935 amendment to section 284, supra, or its effect in certain instances upon the settled principles herein stated as to the right of a client to discharge his attorney, for the very good reason that said amendment is without application to a case of this character. As indicated above, section 284 had long recognized that in the absence of the existence of a power coupled with an interest, an attorney "may be changed at any time: * * * 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." In 1935, St.1935, p. 1647, however, said subdivision was amended by adding thereto an exception in the following language: "except that in all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of payment of the fee or compensation to be paid by the party". As stated earlier in this opinion, the action which is now in this court on appeal and in which the substitution is sought, is one in ejectment for the recovery of the possession of real property and it is not, therefore, one for the "recovery of money" within the meaning of the amendment to the code section. Upon the oral argument of this motion, attorney Compton admitted, and the transcript on appeal shows, that the action is one in ejectment. In fact, upon such oral argument, attorney Compton conceded, in response to a query of one of the members of this court, that he was not relying on the exception provided by the 1935 amendment to the code section but, in effect, was relying on other considerations of law and equity to reimburse him for his services and outlays prior to his removal as attorney for plaintiffs and appellants herein. But, as stated above, other remedies are available to him in the event his discharge herein by his clients

is improper and without cause. Nor do we think it material that his contract of employment contemplated a possible recovery of money for and on behalf of plaintiffs and appellants. We cannot here concern ourselves with litigation that attorney Compton may have been authorized to but did not institute on behalf of his clients. Our inquiry is limited to the litigation that he has actually instituted under his contract of employment with the plaintiffs and appellants. The litigation actually commenced by him and in which he is to be replaced by another, as already shown, is an action in ejectment for the recovery of the possession of real property and is not an action for the "recovery of money" within the exception provided in section 284, supra, upon which exception we need not further dwell.

It is, therefore, ordered that Morris Lavine be substituted as attorney of record for the appellants herein in the place and stead of the attorneys now appearing of record for said appellants.

We concur: CURTIS, J.; LANGDON, J.; HOUSER, J.; SEAWELL, J.; EDMONDS, J.; SHENK, J.

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13 Cal.2d 151

SIGNER v. STATE BAR OF CALIFORNIA.

L. A. 16971.

Supreme Court of California.

March 16, 1939.

Rehearing Denied April 13, 1939.

Attorney and client 🔑58

Attorney who was left in charge of office by partner for eight months during partner's absence without adequate provision for living expenses, or for office maintenance, and who misappropriated partnership and estate funds in the sum of $900.65, but thereafter voluntarily withdrew from practice for fifteen months, was subject to suspension for six months. Code Civ.Proc. § 287, subd. 5.

EDMONDS, J., dissenting.

In Bank.

Proceeding by Albert J. Signer, petitioner, against the State Bar of California for review of suspension proceedings wherein Board of Governors recommended that petitioner be suspended from practice of law for a period of three years.

Petitioner suspended from practice of law for period of six months.

Albert J. Signer, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

Petitioner was cited to appear before local administrative committee No. 4, of the State Bar of California, at the city of Los Angeles, on June 13, 1938, to then and there show cause why he should not be disciplined for professional misconduct by reason of certain acts committed by him during his membership of a copartnership with Thomas L. Nair, attorney at law. Said acts were designated by said citation as involving moral turpitude within the meaning of subdivision 5, section 287, Code of Civil Procedure. He appeared in obedience to said citation and the local committee recommended his suspension for a period of six months. The board of governors on a review of the record recommended to this court that petitioner be suspended from the practice of the law for a period of three years, and the matter has come to this court in due course.

Said acts were set forth in an affidavit verified by petitioner, Albert J. Signer, on the behest of Thomas L. Nair, his former law partner, on June 5, 1936, approximately two years prior to the issuance of said citation. Said affidavit upon which the suspension proceedings were instituted was prepared by and acknowledged before Thomas L. Nair as a notary public. The last paragraph of the affidavit contains an averment that affiant, of his own free will, and without coercion or duress, declared that during his association with Thomas L. Nair, under the firm name of Nair and Signer, he appropriated to his use, without the knowledge of said Thomas L. Nair, funds of said office of Nair and Signer, as well as funds of various estates, aggregating $910.65, all of which is specifically set forth in said affidavit, in words and figures, to-wit:

"I appropriated to my own use without the knowledge of Thomas L. Nair, funds of said office of Nair and Signer, as well as funds of various estates, as hereinafter set forth." The recital of items follows: "Two hundred twenty-five dollars ($225) withdrawn from the Union Bank & Trust Company of Los Angeles, which sum was in said account as against outstanding checks in the sum of $179.50." (The above item included two small estate accounts.) "I further drew from the clients' account of Thomas L. Nair, during the time I had authority to draw upon same, the sum of $419.10 belonging to the Estate of Marron; the sum of $100 received by me in the case of Hinton v. Walker from the office of William H. Moore, Jr., trustee; the sum of $154.55, rebate on taxes paid by Nair in the Estate of Eisenstock, prior to Nair's departure from the state; the sum of $12 withdrawn from the clients' account being moneys belonging to clients of said office." The above sums aggregate $910.65. For some reason not described the amount was reduced to $900.

The period of time covered by the transactions as listed was approximately eight months. The misappropriations as set forth in the affidavit occurred more than two years before the matter was brought to the attention of the State Bar. The concluding paragraph of said affidavit recites that petitioner freely and voluntarily, in consideration of his release from the partnership agreement with Nair, made June 27, 1935, waived any right, title, claim or interest that he then had, or might acquire in the future or be entitled to by reason of said partnership agreement, or otherwise, in or to any moneys whatsoever that might be received by said Thomas L. Nair on and after the 28th day of May, 1936, by reason of his being an attorney practicing law in the state of California. Affiant also waived any interest in any fees that might be received by said Nair arising out of any matters that might have been instituted during the life of said partnership agreement, or while said Signer was conducting the business under the name of Nair and Signer. It was also agreed by way of averment that the former partnership agreement was null and void "as if never entered into". By the last paragraph of the affidavit, affiant agreed to repay to said Thomas L. Nair the sum of $900, instead of $910.65, and he executed his promissory note to Mr. Nair, payable on demand, with interest at the rate of six per cent per annum, payable at maturity.

At the time the affidavit taken by Mr. Nair was laid before the local committee in the form of a complaint, petitioner had paid on account of said promissory note the sum of $524.39, leaving due and unpaid $375.61. The above sum of $900, which, it is charged, petitioner diverted from its proper channels, was made good by Mr. Nair.

The local administrative committee made exhaustive findings of fact, from which it concluded that the respondent was guilty of acts which involved moral turpitude, within the meaning of subdivision 5, section 287, Code of Civil Procedure. In making its recommendation that petitioner be suspended from the practice of the law for a period of six months, the committee considered the age of petitioner, his previous good record and his subsequent good conduct. In its findings it took occasion to say that it felt that the "unfortunate contract [this contract does not appear in the record] entered into between respondent and Mr. Nair was responsible in part for the desperate financial situation in which respondent found himself", in that it had placed a very strong temptation before him to exceed his authority in his undertaking to keep the law office of Nair and Signer a going concern. It also felt that the voluntary withdrawal of Signer from the practice of the law for a period of fifteen months upon the demand of Mr. Nair was a matter which should be taken in consideration in meting out punishment. Its recommendation was, as heretofore stated, that petitioner be suspended from the practice of the law for a period of six months.

The matter came before the board of governors of the State Bar for review on the findings and recommendations of the local committee on August 19, 1938. The findings of fact made by the local administrative committee were approved and adopted as the findings of fact of the board of governors. The board, having adopted said findings as its own, passed a resolution by which it recommended this court, by a vote of eight yeas as against three noes, that petitioner be suspended from the practice of the law in this state for a period of three years. Five of the eight members voting for said resolution stated that it was their desire that the record show that they "so voted although they believed the degree of discipline insufficient"

As to the opposing three, the record shows simply that they voted against the resolution suspending petitioner for a period of three years.

Petitioner appeared before the committee in propria persona, and filed an answer in which he admitted each and every matter as set out in the aforesaid affidavit, verified by him on June 6, 1936. Said affidavit, in haec verba, furnished the grounds on which the charges of professional misconduct were prosecuted.

In his answer petitioner alleged that all the moneys which he had used were used to sustain himself and maintain the office, including the $900 evidenced by his promissory note, which sum had been paid by Mr. Nair to the persons and for the uses for which they were held; that he had since returned to the practice of the law, and had transacted matters involving considerable sums of money, and that his course of conduct both before and since the matters under investigation arose, was without blemish. The local committee found this to be the fact.

He further alleges that he has substantial business contacts and reasonable prospects which insure his wife and himself a comfortable living. He also sets out the bitter humiliation and mental suffering he has endured, and the serious added consequences which would follow a suspension of three years.

The case is quite unusual in its factual structure. Petitioner, now about 32 years of age, started his business career as a messenger in the First National Bank of Los Angeles, and ended his banking career as chief teller. He attended a southern California law school and was admitted to the State Bar at the age of 25 years. He had several hundred dollars at the time he left the bank and began to practice law. He married one year after he entered the practice at Los Angeles. His wife was a stenographer and worked for a short time after marriage, but her health became impaired by a heart ailment, and she became incapacitated for office work.

Petitioner estimated that his monthly earnings in the practice of the law in 1932 were $125 per month; in 1933, about the same as in 1932; in 1934, about $200 per month; and in 1935, not better than $100 per month. Mr. Thomas L. Nair appears to be an experienced lawyer practicing at the city of Los Angeles. The volume of business which his office transacted was evidently not large. He testified that he knew Mr. Signer a good many years before he passed the bar examination. He was a fraternity friend of his, and was employed by his brother-in-law before entering his office. He suggested to Signer that he come into his office. Nair was then contemplating opening a law office at Shanghai, and also making a tour around the world. He had petitioner come into his office early in June for the purpose of familiarizing himself with his business as he was preparing to and did leave on a long trip on the following October 5th.

The findings upon which the recommendation is made are, in substance, that petitioner entered into a copartnership with Thomas L. Nair, who was contemplating engaging in the practice of the law at Shanghai; that the terms of the partnership were not clearly disclosed in the evidence, but it appears that petitioner was to pay Nair $50 per month and carry on the practice in the office occupied by said Thomas L. Nair as then equipped. Nair departed from Los Angeles in October, 1935, there then being in the bank to the credit of Nair and Signer approximately $200. The bills due October 1 for the operation of the office had been paid by Nair and said sum of $200 was to be applied to the payment of the bills which would fall due November 1. It was thought by the partners that during the month of October and each month thereafter sufficient moneys would be earned by the copartnership through the efforts of Mr. Signer to pay the overhead of the office, which was slightly more than $200 per month, and likewise to pay Mr. Nair $50 per month and also to provide Mr. Signer sufficient money for living expenses. No new business had come to the office within ninety days prior to Nair's departure.

The committee found that "Thomas L. Nair must have realized that the earnings which the office had made from June to October did not justify his thinking that sufficient money would be made to pay the items of expense heretofore set forth."

The first misappropriation, in the sum of $100, occurred some week or ten days after Nair departed, which sum petitioner used for living expenses. During Nair's absence abroad, Signer, at Nair's request, sent him not less than $350, and most likely $400. Nair returned in May, 1936, sooner than he had anticipated. During his eight months' absence the earnings of the law business were approximately $800. The overhead of the office was in excess of $200 per month. The committee found the testimony conflicting as to the use made by petitioner of the money misappropriated by him. He testified that he used a part of it to pay office overhead. Nair disputed this testimony, but the committee found that it would appear from the evidence that it would have been impossible to operate the office unless some of the money misappropriated was spent to pay office expenses. The committee found that petitioner had no money of his own and the only means by which the overhead and living expenses could have been met was by the use of the $200 left by Nair, the $800 earnings, and the $900 used as above set forth.

The committee found that upon the return of Mr. Nair petitioner became very much excited and afraid, and he drew $225 and left for St. Louis. At the request of friends he left St. Louis for Los Angeles the second day following his arrival in St. Louis, and upon arriving at Los Angeles signed the Nair affidavit. Nair demanded that he resign as a member of the State Bar. This he declined to do. He consented to and did withdraw from active practice of the law on the demand of Nair. This occurred in May, 1936. He sought and obtained precarious employment as a salesman for a clothing manufacturer, and also was occasionally employed as a bookkeeper.

During the fifteen months that petitioner refrained from the practice of the law upon the demand of Mr. Nair he was unable to earn sufficient wages as a salesman or in any other obtainable employment to furnish himself and wife with the common necessities of life. He lived alternately with his parents and with his wife's parents. At all times he lived cheaply, and notwithstanding his impoverished condition he paid for a time a dollar a week on account of said promissory note. In August, 1937, he entered the practice of the law without notifying Mr. Nair of his intention to do so. Upon learning that he had entered the practice of the law, Mr. Nair sent for him and demanded that he withdraw from the practice. Mr. Nair said when petitioner entered the practice of the law without consulting him it caused him to feel that he was not being treated right. He felt that petitioner should have come first to him before doing so. Petitioner said to Nair that it was hard to make a living selling dress goods, and he thought he had been punished enough. Mr. Nair thereafter sent petitioner a prepared resignation from the State Bar, with a request to sign the same. Receiving no reply, the proceedings herein were instituted.

Neither the local committee, which was in close personal touch with petitioner and the subject-matter of the proceeding, nor the board of governors, recommended disbarment. Mr. Nair also expressed a personal desire that petitioner be not disbarred. The local committee in an extended review of the matter closed its findings and conclusions with the following recommendation:

"In making the recommendation hereinafter set forth, the committee has considered the age of respondent, his previous good record and his subsequent good conduct. The committee feels that the unfortunate contract between respondent and Mr. Nair was responsible in part for the desperate financial situation in which respondent found himself, which constituted a very strong temptation. The committee further feels that the voluntarily inflicted suspension from the practice of law for fifteen months should be considered, and it has taken these facts into consideration in arriving at its decision. The committee therefore recommends that respondent be suspended as an attorney and member of The State Bar of California for a period of six months."

We are of the opinion that a period of six months, added to the fifteen months which were imposed in the manner set forth in the findings, aggregating twenty-one months, will serve as adequate punishment for the transgressions committed by petitioner in the light of the facts and circumstances shown by the findings herein.

It is therefore ordered that petitioner be and he hereby is suspended from the practice of the law in this state for a period of six months, effective thirty days from the filing of this order.

EDMONDS, Justice (dissenting).

I can see no reason why this court should reduce the punishment fixed by the Board of Governors of the State Bar. The only point urged by the petitioner is that suspension for three years is "excessive punishment" for the offense with which he was charged. However, as stated in the opinion, five of eight members of the Board of Governors are on record as believing that suspension for that period of time is insufficient discipline for the conduct admitted by the petitioner. In my opinion the Board erred, if at all, on the side of leniency and that its recommendation should be followed.

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13 Cal.2d 134

SIMON NEWMAN CO. v. TULLY.

Sac. 5227.

Supreme Court of California.

March 14, 1939.

1. Mortgages 🔑25(6)

Where suit to quiet title to land taken in satisfaction of trust deed was defended on ground of payment of debt before giving of trust deed for benefit of defendant's brother, evidence supported finding that it had been agreed between plaintiff and brother that, if brother would procure note and deed of trust from defendant and convey to plaintiff other land, his indebtedness would be canceled and property covered by chattel mortgage released. Civ.Code, §§ 2819, 2840.

2. Guaranty 🔑20
Principal and surety 🔑41

Fraud of the principal debtor will not relieve from liability the guarantor or surety who acted at the request of the debtor, if the creditor did not have notice of the fraud and did not participate therein. Civ. Code, §§ 2819, 2840.

3. Mortgages 🔑86(3)

Where suit to quiet title to land taken in satisfaction of trust deed was defended on ground of payment of debt before giving of trust deed for benefit of defendant's brother, evidence *held* to show that plaintiff was entitled to believe that brother had fully explained to defendant the arrangement with plaintiff for releasing of brother upon obtaining note and trust deed from sister. Civ.Code, §§ 2819, 2840.

4. Mortgages 🔑78

Where suit to quiet title to land taken in satisfaction of trust deed was defended on ground of payment of debt before giving of trust deed for benefit of defendant's brother, action could not be defeated on ground that defendant had been deceived by her brother where plaintiff was not a party to such deception. Civ.Code, §§ 2819, 2840.

5. Cancellation of instruments 🔑34(1)

Where suit to quiet title to land taken in satisfaction of trust deed was defended on ground of payment of debt before giving of trust deed for benefit of defendant's brother, defendant could not, in effect, claim a rescission in respect of transactions taking place some 15 years previously. Civ. Code, §§ 2819, 2840.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Simon Newman Company, a corporation, against Alice Tully, a single woman, to quiet title. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Edward Bickmore, of Merced, and Thomas W. Firby, of San Francisco, for appellant.

Richard S. Goldman, of San Francisco, for respondent.

SEAWELL, Justice.

Defendant appeals from a judgment quieting plaintiff's title to land in Merced county. Said land, and other property in San Luis Obispo and Alameda counties, was transferred to plaintiff corporation in satisfaction of a promissory note and deed of trust theretofore executed in its favor.

Defendant contends that by reason of certain facts which she learned for the first time shortly after plaintiff corporation brought the present action, the indebtedness for which said promissory note and deed of trust were given had been discharged before execution of said instruments, with the result that they were without consideration. Since plaintiff has sold and transferred the San Luis Obispo and Alameda county lands deeded to it in satisfaction of the note and deed of trust, and has contracted to sell the Merced county land, which is the subject of the present action, defendant contends that as a condition to quieting its title to the Merced county land, plaintiff should pay her the proceeds realized by it from the lands theretofore sold and conveyed by it, and also the amounts realized from its contract to sell the Merced county lands.

In September, 1919, defendant Alice Tully was the owner of the lands above referred to. Her brother, Ernest Tully, was indebted to plaintiff corporation in the sum of $86,736.90 on account of advances to him in connection with his farming operations. This indebtedness was secured by deed of trust on 160 acres of land near Los Banos, Merced county, owned by him, and by a chattel mortgage on livestock and farm equipment. On September 13, 1919, defendant executed a promissory note for $30,000 and a deed of trust to plaintiff corporation upon the Merced, San Luis Obispo and Alameda county property, as further security, according to her testimony, for the indebtedness of her brother to plaintiff, to the end that plaintiff would not "close out" her brother.

Thereafter, defendant paid $3,000 on the principal of said note. On December 27, 1924, a renewal note and deed of trust were executed by Mary A. Tully, mother of Alice Tully, in whom record title was vested by virtue of a quit-claim deed from Alice Tully. Said property with the exception of a parcel in Alameda county upon which the mother and daughter resided, was, on February 17, 1927, conveyed by Mary A. Tully to plaintiff corporation, which had filed a notice of election to sell under the deed of trust, and accepted by it in satisfaction of the indebtedness. Prior to execution of the renewal note and deed of trust, Mary Tully had executed deeds retransferring to her daughter the property covered by the deed of trust, but said deeds were not recorded until after the conveyance to plaintiff in satisfaction of the debt, and it is conceded that plaintiff did not have notice.

It appears that on September 16, 1919, three days after execution of the $30,000 note and deed of trust by Alice Tully, her brother, Ernest Tully, deeded the 160 acres owned by him to plaintiff corporation, which thereupon canceled his indebtedness to it, and released the livestock and farming equipment covered by his chattel mortgage. Defendant contends that she was a surety for the debt of her brother to the plaintiff corporation, and that as she was not informed that her brother was to be released, the effect of canceling his indebtedness was to discharge her upon the $30,000 note. Civ.Code, §§ 2819, 2840.

[1] The evidence supports the finding of the trial court that it had been agreed between plaintiff and Ernest Tully, that if he would procure the note and deed of trust of his sister, and convey to plaintiff the 160 acres near Los Banos, his indebtedness should be canceled and the livestock and farming equipment covered by chattel mortgage released to him. Conflicting testimony of Ernest Tully that plaintiff demanded the conveyance from him of the 160 acres for the first time after receipt of his sister's note was rejected by the trial court. Mr. Wagenheim, vice-president and manager of plaintiff, testified that plaintiff wished to terminate all business relations with Tully, partly for the reason that a judgment had been entered against him in a suit for alienation of affections.

[2] If defendant Alice Tully had knowledge of said agreement, and executed her note and deed of trust pursuant thereto, she would, obviously, be without right to claim that the release of her brother discharged her. By her testimony she denied all knowledge of such an agreement, and contended that her understanding was that her note and deed of trust were to constitute additional security for a continuing indebtedness of her brother. But defendant executed the note and deed of trust at the request of, and for the accommodation of, her brother, who, if full credence is given to her testimony, failed to reveal to her the true nature of the agreement between him and plaintiff. The rule is well settled and generally followed that fraud of the principal debtor will not relieve the guarantor or surety who acted at the request of the debtor from liability, if the creditor did not have notice of the fraud and did not participate therein. California Standard Finance Corp. v. C. Cole, Ltd., 9 Cal.App.2d 573, 50 P.2d 1054; note, 71 A.L.R. 1278.

[3] Before defendant executed the note and deed of trust she, together with her attorney, John W. Gwilt, since deceased, called upon Mr. Wagenheim. The trial court rejected her testimony that Wagenheim represented to her that her note and deed of trust were to constitute further security for a continuing debt of her brother to plaintiff. It cannot be said that in the circumstances shown Wagenheim was not

entitled to believe that Ernest Tully had fully explained to his sister the arrangement with plaintiff.

In considering defendant's claim that she did not know her brother was to be released, it is significant that the deed by which Ernest Tully conveyed his 160 acres to plaintiff corporation, as well as the note and deed of trust executed by Alice Tully, were prepared on stationery of Mr. Gwilt, attorney for Alice Tully, and notarized before him. On September 16, 1919, the date of the deed from Ernest Tully to plaintiff, attorney Gwilt also notarized a bill of sale by which Ernest Tully transferred to his sister the livestock and farming equipment covered by the chattel mortgage theretofore held by plaintiff, and an assignment to her of a lease which he held upon 1700 acres of farming land. The bill of sale and assignment were recorded on May 7, 1920, at the request of Gwilt. Defendant claims that she did not learn of these two instruments until the fall of 1920. Then she took possession, and thereafter borrowed $10,000 from plaintiff, secured by chattel mortgage on the property assigned to her by the bill of sale. She testified from 1920 to 1934 she was estranged from her brother.

[4, 5] The trial court did not expressly find that defendant Alice Tully had knowledge of the arrangement between plaintiff and her brother for cancellation of his indebtedness, although its findings inferentially have that effect. If she was, as she contends, deceived as to the agreement between plaintiff and her brother, plaintiff was in no way a party to this deception, and she cannot by reason thereof avoid liability to plaintiff. California Standard Finance Corp. v. C. Cole, Ltd., supra. Furthermore, defendant's claim to an accounting of the proceeds of the lands transferred in satisfaction of the deed of trust, and thereafter sold by plaintiff to purchasers, is, in effect, for rescission of the deed of trust of 1919 and transactions subsequent thereto. The present action was brought in 1934. The evidence fails to show sufficient reason for failure to discover at a much earlier date the deception alleged to have been practiced upon her.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; HOUSER, J.; EDMONDS, J.

LOS ANGELES COUNTY v. JONES, County Surveyor.*

S. F. 16187.

Supreme Court of California.
March 15, 1939.
Rehearing Granted April 14, 1939.

1. Municipal corporations 🔑514(11)

Under statute authorizing refunding in one proceeding of indebtedness of two or more special improvement districts by levy of one specific lien reassessment and issuance of one issue of refunding bonds, which provided that reassessment should be based on "estimated benefits," such benefits were restricted to those determined in original proceeding to have been received and did not include benefits derived from all public improvements in the multiple district refunding proceeding. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31.

2. Municipal corporations 🔑514(1)

The statute authorizing multiple special improvement district refunding proceedings must be strictly construed. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31.

3. Statutes 🔑245

Taxing laws must be strictly construed in favor of taxpayer and a tax will not be extended by construction to things not named or described in statute.

4. Constitutional law 🔑93(1), 137, 284(1)
Municipal corporations 🔑514(4)

The statute authorizing refunding in one proceeding, of indebtedness of two or more special improvement districts by levy of one specific lien reassessment and issuance of one issue of refunding bonds, which was construable as requiring reassessment to be based on benefits which were determined to have been received in original proceeding, is not unconstitutional as impairing contract or vested property rights of individual property owners or taking property without due process of law. St.1933, p. 1915, as amended; St.1937, p. 2381, § 31; Const.Cal. art. 1, §§ 13, 16; U.S.C.A.Const. art. 1, § 10, cl. 1; Amend. 14, § 1.

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In Bank.

Original proceeding for writ of mandamus by the County of Los Angeles against Alfred Jones, County Surveyor of the County of Los Angeles, to compel the respondent to spread a reassessment upon realty in certain special improvement districts.

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*For subsequent opinion see 90 P.2d 802.

Peremptory writ issued.

J. H. O'Connor, Co. Counsel of Los Angeles County, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, for petitioner.

O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, for respondent.

SHENK, Justice.

The County of Los Angeles seeks the issuance of the writ of mandamus to compel the respondent, as its county surveyor, to spread a reassessment upon the real property in districts Nos. 32, 40 and 240 in said county pursuant to the Assessment Bond Refunding Act of 1933 (Stats. 1933, p. 1915, as amended).

The petition shows that Acquisition and Improvement District No. 32 was organized under the Acquisition and Improvement Act of 1925 (St.1925, p. 849). Bonds were issued on April 4, 1937, in the sum of $48,151.94, bearing interest at seven per cent annually. The bonds represented the cost of installation of an ornamental street lighting system. District No. 40 is a special improvement district organized also under the act of 1925, for the same class of improvements. Bonds of that district were issued on the same date in the sum of $34,864.06, bearing interest at seven per cent. Similarly under the 1925 act, district No. 240 was organized for the purpose of installing a sanitary sewage system and to meet the cost thereof. Bonds of that district were issued on February 3, 1930, in the sum of $170,086.83, with an interest rate of six per cent.

The board of supervisors of the county of Los Angeles instituted the original proceedings in each instance. On January 18, 1938, the board of supervisors determined that the public interest, convenience and necessity required the refunding of the bonds of all three districts in one proceeding pursuant to the provisions of section 31 of the 1933 refunding act as amended by Statutes of 1937, page 2370, at page 2381.

The proceeding progressed to the point where, after due demand by the board, the respondent county surveyor refused to make a diagram of the property upon which the reassessment was proposed to be levied and to prepare one reassessment on the various parcels for the proportion of the refunded unpaid balance of the cost of all improvements in proportion to the benefits received.

The regularity of the proceedings thus far is not questioned. The demurrer filed by the respondent raises the question of the constitutionality of the 1937 amendment to section 31, which provides for so-called "multiple district refunding" in one proceeding. The portions of the amended section which are pertinent to the present discussion are:

"When all or any part of the lands in any district, the indebtedness of which could be refunded under the provisions of this act, lie in any other district or districts, the indebtedness of which could be refunded under the provisions of this act, all or any number of such districts which wholly or partially overlap may be included in one refunding proceeding and the total indebtedness of all of the districts so included in one proceeding may be refunded in such proceeding and one issue of refunding bonds issued and one reassessment levied therefor. It is the intent of this section to permit, but not to require, the refunding in one proceeding of the indebtedness of all districts which wholly or partially overlap, and to authorize the refunding in one proceeding of the indebtedness of any number of districts where some part of the area of each of the districts lies wholly or partially within the boundaries of one or more of the other districts included in the same refunding proceedings, and such refunding in one proceeding of the indebtedness of two or more districts may be called 'multiple district refunding.' * * * The provisions of this section are to be liberally construed, to the end that jurisdiction to refund in one proceeding the indebtedness of any and every combination of districts now existing shall be full and complete."

It is further provided by the section that the resolution of intention and all the required notices shall state "that the refunding shall not be authorized unless the consent of the owners of a majority in area of the lands included within each of the districts, who shall likewise be the owners of a majority in area of the lands included within the exterior boundaries of the total area which comprises the districts, is filed with the clerk of the legislative body conducting the proceeding. * * *

If, at the hearing provided in section 3 hereof, the legislative body determines that the written consent of the owners of a majority in area of the lands in each of the districts, who are likewise the owners of a majority in area of the lands included within the exterior boundaries of the total area comprising the districts, has been filed, it shall be authorized to proceed with such multiple district refunding and to make a reassessment and issue refunding bonds therefor as in this act provided. The reassessment shall be spread over all of the lands in the total area comprising the districts and subject to tax or assessment for the payment of principal and interest of any of the bonds of the districts to be refunded in the proceeding." The total reassessment is provided to be spread "against all of the lands subject to reassessment hereunder within the total area comprised by the districts and benefited by the acquisitions or improvements or acquisitions and improvements, and upon each lot, piece or parcel thereof in proportion to the estimated benefits received by each such lot, piece or parcel of land from the acquisitions or improvements or acquisitions and improvements to pay for which the indebtedness proposed to be refunded was incurred". The section also contains the following provisions: "In the event that the holders of one or more of the outstanding bonds of any of the districts included in the multiple district refunding proceeding do not enter [into] any contract with the legislative body to refund the same, nevertheless, if the holders of 75% or more of the total amount of the outstanding bonds of all of said districts do contract with the legislative body which conducts the refunding proceedings for the refunding of the bonds owned or held by them, said legislative body shall have authority to refund all of the indebtedness of the districts included in such multiple district refunding proceeding under the provisions of this act, but, in such event, prior to recording the reassessment levied under this act, sufficient moneys to adequately provide for the retirement or payment of the bonds of the nonconsenting holders must be provided and set aside in the proper fund or funds for that purpose."

The petition herein also discloses that districts Nos. 32 and 40 do not overlap each other, but that district No. 240 partially overlaps district No. 32 and wholly overlaps district No. 40. The outstanding indebtedness of district No. 32 is $16,815.43; of district No. 40, $16,878.85; and of district No. 240, $190,901; a total for all three districts of $224,595.28. The proposed total maximum reassessment for all three districts is $139,980.29, payable over a nine-year period, with the interest rate reduced to five and one-half per cent annually. It also appears that a hearing was duly noticed and held at which protests of property owners were considered; that written consents were on file of the owners of a majority in each of the districts who likewise are owners of a majority in area of the land within the exterior boundaries of all three districts. In the pending reassessment proceeding it is contemplated that the ad valorem method of assessment under the 1925 act shall be replaced by a specific lien assessment against the lands included within the exterior boundaries of all three districts in proportion to the benefits received by each parcel from the improvements to pay which the indebtedness proposed to be refunded was incurred. No contention is made that at least 75 per cent of the bondholders have not consented, or that sufficient moneys are not provided for the retirement of the bonds of any nonconsenting bondholders.

The question posed by the respondent is: "Do the provisions of the Assessment Bond Refunding Act of 1933, authorizing the refunding in one proceeding of the indebtedness of two or more ad valorem assessment districts by the levy of one specific lien reassessment and the issuance of one issue of refunding bonds, when the owners of a majority in area of the land in each of said districts constituting the owners of a majority in area of the land in all of said districts, have consented thereto, impair contract rights or vested rights of property owners in the respective districts?"

The respondent concedes the practical necessity for multiple district refunding proceedings, that is, the impossibility, practically, to refund or adjust the indebtedness of one of several overlapping districts without at the same time adjusting the indebtedness of the others. He contends, however, that to spread the multiple district refunding reassessment upon all the lands in the total area comprised of the three original districts in proportion to benefits from all of the acquisitions and improvements of the several districts violates the contract clause of the state and federal constitutions, impairs vested rights, and takes property without due process of law. Const.Cal. art. 1, §§ 13, 16; U.S.C.A.Const. art. 1, § 10, cl. 1; Amend. 14, § 1.

The validity of the refunding statute of 1933 as amended has been considered and determined in the recent cases of County of Los Angeles v. Jones, 6 Cal. 2d 695, 59 P.2d 489; City of Los Angeles v. Aldrich, 8 Cal.2d 541, 66 P.2d 647, and City of Culver City v. Reese, 11 Cal.2d 441, 80 P.2d 992. Each of those cases involved the refunding of the indebtedness of but one improvement district.

The petitioner relies on cases such as Ferry v. O'Brien, 188 Cal. 629, 206 P. 449; Palo Verde Irrigation District v. Seeley, 198 Cal. 477, 245 P. 1092; Cowart v. Union Paving Co., 216 Cal. 375, 14 P.2d 764, 83 A.L.R. 1185, and others, which upheld legislation providing for reassessment for public improvements under special circumstances not here involved.

If the plan of reassessment proposed by the petitioner contemplates that land in one of the overlapping districts may bear a proportion of the assessment for improvements in another district, although such land was not included in the latter district originally and, inferentially, at least, found not to have been benefited by the improvement, difficulties might be encountered giving rise to questions which are not here necessary to decide. The petitioner emphasizes, however, that the additional assessment will not be levied unless such land in one district is shown actually to have benefited by the improvements in the other district. Both the petitioner and the respondent seem to assume that the language of section 31 as amended directs or authorizes the reassessment on lands not originally found to have been benefited by the improvements. We find no expression in section 31 which would warrant this court in concluding that the legislature intended the authorization thus apparently assumed. The pertinent language of the section which bears upon the extent of the area to be affected by the reassesment is the following:

"The reassessment shall be spread over all of the lands in the total area comprising the districts and subject to tax or assessment for the payment of principal and interest of any of the bonds of the districts to be refunded in the proceeding. * * * The total amount * * * shall be assessed upon and against all of the lands subject to reassessment hereunder within the total area comprised by the districts and benefited by the acquisitions or improvements or acquisitions and improvements, and upon each lot, piece or parcel thereof in proportion to the estimated benefits received by each such lot, piece or parcel of land from the acquisitions or improvements or acquisitions and improvements to pay for which the indebtedness proposed to be refunded was incurred."

[1] Does the foregoing language indicate a legislative intent that the "estimated benefits" shall include benefits derived from all public improvements involved in the multiple district refunding proceeding, even though such land was not determined originally to have been benefited thereby? Or does the language import an intent that the "estimated benefits" are restricted to benefits which were determined to have been received in the original proceeding? It might be argued that the use of the conjunctive and disjunctive in referring to the acquisitions and improvements of all districts indicated the interpretation suggested by the first question. But that interpretation would contemplate that by the refunding an additional assessment could be levied upon lands for an improvement on account of which they were not theretofore assessable. We take it that if the alternative construction indicates the proper intent and meaning of the statute, no possible objection could be presented against reassessing upon each parcel of land in one sum the proportionate amounts which would be due for each of the improvements from which originally it was determined to have derived a benefit. This conclusion might not permit the petitioner to go the full length intended by the present refunding proceeding; but in our opinion it accomplishes the object of the statute within its express terms.

[2, 3] The language presented for interpretation by this proceeding is subject to the rule of strict construction. East Bay Municipal Utility Dist. v. Garrison, 191 Cal. 680, 688, 218 P. 43; Mulville v. City of San Diego, 183 Cal. 734, 192 P. 702; Merced County v. Helm, 102 Cal. 159, 36 P. 399; Creighton v. Manson, 27 Cal. 613, 614, 629; 23 Cal.Jur., p. 805, 806; 24 Cal.Jur., pp. 22, 28, and cases cited.

The rule of interpretation is stated in Merced County v. Helm, supra, page 165, 36 P. page 400, as follows: "Any attempt on the part of the state, or of the county as one of the political subdivisions of the state, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state. * * * The proceeding is in invitum, and no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly expressed in the statute under which it is sought to be taken. [Citing cases.] A tax can never be extended by construction to things not named or described in the statute as the subject of taxation."

The application of the foregoing rule would result in confining the "estimated benefits" intended as the measure of the reassessment, to those benefits determined in the original proceeding or proceedings to have been received by each parcel of land. If the legislature intended to authorize the extension of the assessment for the improvement to lands not originally determined to have been benefited thereby, it could have said so in unmistakable terms, in which event other objections not now necessary for determination could be presented.

[4] It therefore becomes unnecessary to decide in this proceeding the question of the constitutionality of the section had it authorized such additional assessment on lands outside of the district originally determined to include all the lands benefited by the improvement. No contention is made, nor could a contention successfully be made, that the section as amended does not otherwise conform in all respects to the requirements of the Constitution as expounded in the cases hereinabove cited bearing upon the validity of refunding assessment acts. The fact that the outstanding obligations of three improvement districts are permitted to be refunded in one proceeding and by the imposition of an assessment in one sum on each parcel of land affected thereby, may not alone be the basis of any meritorious objection on constitutional grounds, so long as thereby the land is not burdened to any greater extent than it would have been had the refunding of the outstanding indebtedness of each district been conducted separately. The section as amended therefore does not authorize any greater or additional burden upon any of the lands to be affected by the multiple district refunding proceeding.

The petitioner is entitled to the issuance of the writ directing the respondent, as surveyor of the County of Los Angeles, to prepare a diagram and make the reassessment upon the lands involved in the pending proceeding in conformity with the views herein expressed.

Let a peremptory writ issue accordingly.

We concur: CURTIS, J.; EDMONDS, J.; SEAWELL, J.; HOUSER, J.

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13 Cal.2d 144

GRUBER v. PACIFIC STATES SAVINGS & LOAN CO.

S. F. 16103.

Supreme Court of California.

March 16, 1939.

1. Landlord and tenant 🔑274(2)

Lessee was not required to resort to physical violence to remove his property from leased premises over lessor's opposition thereto, as respects lessee's right of action for conversion.

2. Landlord and tenant 🔑265(1)

That lessee was in arrears in payment of rent did not warrant lessor's exercise of dominion over lessee's personal property located on leased premises.

3. Landlord and tenant 🔑242

A landlord has no lien on the tenant's property for unpaid rent.

4. Trover and conversion 🔑5, 12

A manual taking or destruction is not essential to a "conversion."

[Ed. Note.—For other definitions of "Conversion," see Words & Phrases.]

5. Trover and conversion 🔑4

"Conversion" is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.

6. Landlord and tenant ⚷274(2)

Acts of lessor in writing letter notifying lessee that unless delinquent rentals were paid within two days lessee's personal property on leased premises would be sold to discharge debt together with acts of lessor's watchman refusing to permit lessee to remove property from premises constituted a "conversion" rendering lessor liable to lessee for resulting damages.

7. Bailment ⚷1

Evidence that lessee of premises consisting of a lot, barn and corral went into possession by storing certain personal property in barn and nailed and secured all doors and windows thereto with exception of one door to which lessee retained only key *held* to establish a landlord and tenant relationship rather than bailor-bailee relationship.

8. Landlord and tenant ⚷274(7)

In lessee's action against lessor for conversion of personal property stored on leased premises, evidence sustained verdict of $1,500 for lessee.

9. Estoppel ⚷83(1)

In lessee's action against lessor for conversion of property stored on leased premises, lessee was not precluded from giving opinion as to actual market value of equipment at time of conversion by the fact that prior to commencement of action he had stated, in effort to persuade lessor not to sell equipment, that such equipment represented "near one thousand dollars worth."

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by John K. Gruber against the Pacific State Savings and Loan Company for the alleged conversion of personal property. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 80 P.2d 153.

John L. Mace, of Los Angeles, Roy D. Reese, of San Francisco, and Lewis E. Lercara, of Oakland, for appellant.

Milo Ayer and Pierce & Sherwin, all of Oakland, for respondent.

WASTE, Chief Justice.

In this action for the conversion of personal property the jury returned a verdict for the plaintiff in the sum of $1,500, together with interest in the amount of $420. From the judgment entered thereon in the aggregate of said sums the defendant prosecutes this appeal.

The facts are not in serious dispute. However, a divergence of opinion does exist between the parties as to the application of legal principles to such facts. Briefly, it appears that in April, 1932, the plaintiff rented from the defendant a portion of certain premises known as the Bilger Quarry property located in Oakland and consisting, in the main, of a lot, barn and corral. The agreed rental was $15 a month. Plaintiff paid the first month's rental and went into possession of the demised premises by storing certain road grading equipment in the corral and certain halters, harness, collars and other horse fittings in the barn. In order to insure the safekeeping of the equipment last above mentioned plaintiff nailed and otherwise secured all doors and windows to the barn with the exception of one door to which he retained the only key. Plaintiff failed to pay any rental for the second, third and fourth months of his tenancy, aggregating $45, whereupon the assistant cashier of the defendant lessor addressed a letter to the plaintiff on July 25, 1932, notifying him that unless the delinquent rentals were paid in full within two days thereafter all of plaintiff's equipment located in the demised premises would be advertised and sold to discharge such indebtedness. The letter also stated that "the only way in which you can have your equipment released is by the payment of your rental in full. * * *" On July 29, 1932 two days after the dead line specified in the letter for the advertising of such threatened sale the plaintiff called at the defendant's Oakland office and requested of the author of the letter further time for the payment of the rent and objected to the threatened sale of his equipment. The request was refused and plaintiff was again informed that only the payment of the rent would obviate the sale of his personalty.

It appears from the plaintiff's testimony upon the trial, that some time later he called at the quarry and requested the watchman or overseer maintained there by the defendant lessor (apparently to protect the entire property only a portion of which was leased by the plaintiff) to allow him to remove a portion of his equipment. This request was refused with the statement that plaintiff would have to see the defendant's assistant cashier who had written the letter referred to above. The denial or contradiction of this portion of plaintiff's testimony by the defendant's watchman was resolved against the defendant by the jury. Plaintiff thereupon telephoned to the defendant's Oakland office and renewed his request for permission to remove a portion of his property. Again, he received an adverse reply. The ultimate fate of plaintiff's equipment is not definitely disclosed by the record, but it does appear that the defendant lessor thereafter sold the real property to a third person, that the barn was torn down and that whether then lost or destroyed or at some other time, no part of plaintiff's equipment ever again reached his hands or possession. Plaintiff and experts called by either side testified as to the market value of the equipment at the conclusion of which a verdict in the amount above mentioned was returned for the plaintiff.

Throughout the trial and upon this appeal the defendant has maintained, in effect, that the equipment at all times remained in the plaintiff's exclusive possession, that it did not through its agents seize or take said personalty to the exclusion of its owner and that, at best, the evidence merely discloses a threat to convert which is insufficient to support the jury's implied finding of an actual conversion. The contention lacks merit.

[1] The evidence discloses not only a written threat to convert plaintiff's property but also repeated refusals of the agents of the defendant lessor, in the immediate proximity of the equipment and elsewhere, to permit the plaintiff to remove his equipment from the premises, a right which, as the owner thereof, he was entitled to enjoy without interference from the defendant or its agents. Plaintiff was not required to resort to physical violence to remove his property over the defendant's opposition thereto. In a somewhat analogous situation, it was held in Donoghue v. Kremmel, 121 Cal.App. 208, 8 P.2d 918, 919, that where a lessor told the lessee to keep out of the demised premises and refused him permission to enter, a constructive eviction resulted and that there was no real difference between physically removing the lessee and preventing his entry. It was further declared that the lessee was "not obliged, nor is he encouraged by law, to wage a deadly conflict to obtain entry to the demised premises". The defendant's refusal in the instant case to permit the plaintiff to have access to his equipment or to remove the same while an arrearage in rent existed constituted an improper and wrongful exercise of dominion over the plaintiff's property in violation of his rights as owner and, as shall presently be shown, amounted to a conversion rendering defendant liable for whatever damage resulted therefrom—here, the market value of such equipment all of which, as indicated, was ultimately lost to the plaintiff.

[2-4] As stated, the fact that plaintiff was in arrears in his payment of the rent of the demised real property did not warrant defendant's exercise of dominion over plaintiff's personal property located on the premises. Adequate remedies exist to protect a lessor in such a situation. But, it is definitely settled in this state that a landlord has no lien on the tenant's property for unpaid rent. Citizens' Securities Co. v. Hammel, 14 Cal.App. 564, 568, 112 P. 731; Hitchcock v. Hassett, 71 Cal. 331, 333, 12 P. 228. It is not claimed that any was here reserved. Nor do we think that a manual taking or destruction is essential to a conversion. In 2 Tiffany, Landlord and Tenant, page 1673, the following appears: "The landlord is, it has been held, guilty of conversion if he refuses to allow the tenant to remove his goods during the tenancy, or at a subsequent time when the latter has a legal right to do so. * * *"

[5] It is settled that conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815, 51 L.R.A.,N.S., 925; Byer v. Canadian Bank of Commerce, 8 Cal.2d 297, 300, 65 P.2d 67; Aronson v. Bank of America, etc., 9 Cal.2d 640, 72 P.2d 548; Lindsey v. Commercial Discount Co., 12 Cal.App.2d 345, 349, 55 P.2d 896; Hull v. Laugharn, 3 Cal. App.2d 310, 315, 39 P.2d 478, 480. In the case last above cited, the rule is thus stated: "Conversion consists in the unwarranted interference by defendant with the dominion over the property of plaintiff, from which injury to the latter results. * * * Dominion is defined in law lexicons as 'perfect or complete property or ownership in a thing' (Bouvier's Law Dict.); 'complete ownership; absolute property' (Anderson's Dict. of Law); and 'ownership or right to property' (Black's Law Dict.)." The acts of the defendants watchman and assistant cashier, in the immediate proximity of the

equipment and elsewhere, in refusing to permit plaintiff to remove any portion thereof in furtherance of the written threat to sell all of the equipment, obviously precluded the plaintiff from using and enjoying his "complete property or ownership" of such equipment and definitely constituted an "interference" with plaintiff's "dominion over the property" within the meaning of the authorities.

As stated above, it is not necessary that there be an actual manual taking of the property. In McCaffey Canning Co. v. Bank of America, 109 Cal.App. 415, 424, 294 P. 45, 48, it is stated, among other things, that "Any wrongful assumption of authority over chattels, inconsistent with another's right of possession or subversive of his vested interest therein, amounts to conversion. * * * An unjustified claim of title may amount to conversion * * *."

In Dodge v. Meyer, 61 Cal. 405, 420, the rule is stated in the following form: " 'The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, this is in law a conversion.' * * * It is contended that Meyer never had possession of the wheat, never handled it, and therefore did not convert it. Some of the cases just above cited expressly held that this is not necessary. To these we add Connah v. Hale, 23 Wend. [N.Y.], 462, where it was held that to constitute a tortious taking it was not necessary that there should be an actual manucaption of the goods. A mere claim of dominion, an intention intimated to interfere with goods under a pretense of right or authority, amounts to a constructive trespass, and no demand is necessary before bringing an action of trover."

[6] Lowe v. Ozmun, 3 Cal.App. 387, 394, 86 P. 729, quotes the foregoing as the rule in this state. We repeat that the acts and conduct of the defendant, operating through its agents, improperly and wrongfully interfered with plaintiff's absolute ownership of and dominion over his equipment and constituted a conversion thereof which ultimately reacted to plaintiff's financial detriment.

[7] In our treatment of the case we have regarded the relationship between the defendant and plaintiff as one of landlord and tenant. The record indubitably points to such a relationship and not to one of bailor and bailee. The complaint was framed on the theory that the relationship was that of landlord and tenant and the answer of defendant "admits that * * * plaintiff entered into an agreement with the defendant for the rental of a certain portion of that certain property known and designated as the Bilger Quarry". The evidence, the statements of counsel throughout the trial, the instructions of the trial court, and the briefs on appeal were addressed exclusively to the theory of a landlord—tenant relationship between the parties. Among others, the trial court gave the following instruction: "You are instructed that a landlord who rents vacant land or a vacant building, has no lien or right to hold the personal property of his tenant as security for unpaid rent. If he does so, he is guilty of a conversion of that property. Any wrongful assumption of authority over another's personal property inconsistent with the owner's right of possession amounts to conversion." No objection is here voiced against such instruction and none inconsistent therewith was requested by the defendant. Nor did the defendant ask that an instruction be given on the theory of a bailor—bailee relationship. The agreement between the parties, as disclosed by the record, was not one of storage for hire which establishes the relationship of bailor and bailee but rather was one for the rental of real property which establishes the relationship of landlord and tenant even though, as here, it may be contemplated that the property will be used by the tenant solely for storage purposes.

[8, 9] In conclusion, it should be stated that there is ample evidence relating to value to sustain the verdict in the amount awarded. Any conflicts therein have been resolved against defendant by the jury. That plaintiff in his recital of the facts giving rise to this action disclosed that prior to the commencement thereof, he had stated, in an effort to persuade defendant not to sell his equipment to satisfy a $45 debt for rental, that said equipment represented "near one thousand dollars worth", did not preclude him upon the trial from giving

his opinion as to the actual market value of such equipment at the time of conversion. Moreover, there is other evidence on the subject.

The judgment is affirmed.

We concur: LANGDON, J.; EDMONDS, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; HOUSER, J.

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31 Cal.App.2d 553

CANTLAY & TANZOLA, Inc., v. INGELS, Director of Motor Vehicles.

Civ. 12159.

District Court of Appeal, Second District, Division 2, California.

March 20, 1939.

Hearing Denied by Supreme Court May 18, 1939.

1. Automobiles 🔑48
Taxation 🔑527

Payment of taxes or registration fees by check are conditional payments, but when the checks are honored the payments relate back to the date of receipt of the checks. St.1921, p. 369, § 3.

2. Forfeitures 🔑1
Penalties 🔑1

"Forfeiture" and "penalty" seem to mean the same thing when spoken of money, in which sense they import a requirement to pay a sum mentioned as a mulct for a default or wrong.

[Ed. Note.—For other definitions of "Forfeit; Forfeiture" and "Penalty," see Words & Phrases.]

3. Contracts 🔑318
Statutes 🔑240

Forfeitures and penalties imposed by contract or statutes are not favored, and provisions imposing them must be strictly construed.

4. Automobiles 🔑57

The facts and law applicable thereto were not to be so construed as to bring about harsh result of enforcing penalty of double the amount of registration fee for failure to pay delinquency within 30 days, unless no other reasonable construction could be placed thereon. St.1923, p. 538, § 81.

5. Automobiles 🔑57

Owner of fleet of automobile trucks and trailers was not liable for penalty for failure to pay registration fee within time provided by statute, as result of delay in presentment of check by department, and failure of bank official to notify bank's bookkeeper in accordance with owner's instructions to pay check from savings account if checking account was insufficient. St.1923, p. 538, § 81.

6. Appeal and error 🔑173(9)

Where motion to strike allegation setting forth defense of res judicata was granted, and amended answer was filed omitting such defense, and it appeared that counsel did not consider that defense of res judicata was being urged before trial court, such defense was waived and was not before District Court of Appeal.

7. Automobiles 🔑55, 57

In action by owner of fleet of automobile trucks and trailers to restrain director of motor vehicles from cancelling license plates, and from seizing and selling its vehicles to enforce payment of penalty for failure to pay registration fee within time limited by statute, evidence *held* not to establish agreement to pay amount of penalties. St.1923, p. 538, § 81.

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Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Cantlay & Tanzola, Incorporated, against Ray Ingels, Director of Motor Vehicles of the State of California, to restrain defendant from canceling license plates issued for vehicles of plaintiff, and from seizing and selling vehicles to enforce payment of a penalty. Judgment for defendant, and plaintiff appeals.

Reversed.

Clock, McWhinney & Clock and R. A. Waestman, all of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Plaintiff, the owner of a fleet of automobile trucks and trailers, commenced this action to restrain the Director of Motor

Vehicles from canceling license plates which had been issued for its vehicles and from seizing and selling the vehicles to enforce payment of a penalty in the sum of $4,823. The trial court gave judgment refusing relief, from which plaintiff appeals.

The facts are established by stipulation of the parties and by uncontradicted evidence. The last day for the payment of the registration fees without incurring a penalty for the year 1935 was February 14th of that year. On that date plaintiff mailed to the department at Sacramento three checks for the total sum of $4,823, drawn upon the Hollywood State Bank. At that time there was a great rush of business in the office of the department, causing a delay in the presentment of the checks. Two of the checks were deposited in a Sacramento bank and were presented to the Hollywood State Bank on February 27. The checks were returned to the department on March 1 with slips attached thereto marked "Returned unpaid. Refer to maker". Plaintiff was notified by the department that the checks had been returned and at once communicated with officials of the Hollywood State Bank, who in turn immediately communicated with the Department of Motor Vehicles by telephone and letter, advising the department that there was an error on the part of the bank in failing to make payment on the checks and requesting that the checks be returned. At the time the checks were drawn plaintiff had in his checking account at the Hollywood State Bank a sum sufficient to pay the checks and also had in his savings account at the same bank the sum of approximately $7,000. He had arranged with the vice president of the bank to pay the checks on presentation out of the savings account if necessary, but the vice president had overlooked informing the bookkeeper of this arrangement. Before the checks were presented the checking account had been diminished, and in the absence of instructions to the bookkeeper to pay the checks from the savings account the checks were returned to the department.

Plaintiff was first notified that the checks were unpaid on March 4. Within two hours from the time of receiving the notification plaintiff procured cashier's checks for the amount of the original checks and presented the cashier's checks to the department, which retained both the original checks and the cashier's checks. The facts concerning the two checks above referred to are similar to the facts concerning the third check which was mailed on February 14, except that there was a longer delay in presenting the third check to the bank, plaintiff being under the erroneous impression that this particular check had been paid when he secured the first two cashier's checks. Upon being notified of the facts concerning the third check a cashier's check was immediately supplied for the amount of the third check.

Defendant contends that it was necessary for him to collect the penalty under the terms of section 81 of the California Vehicle Act, as in force in February 1935, St.1923, p. 538. Subdivision (a) of section 81 provides: "Whenever any vehicle shall be operated upon the public highways of this state without there having been paid therefor the registration or transfer fee required by this act, such fee shall be deemed delinquent, and if such fee shall not be paid within thirty days after the same becomes delinquent a penalty equal to such fee shall be added thereto and collected." Subdivision (b) contains provisions for the seizure and sale of the vehicle to enforce payment of the penalty. The stipulation between the parties contains the following provision: "That it is the custom of the Department of Motor Vehicles to accept for collection checks tendered in payment of registration fees, and that the three checks issued and delivered to the Department as aforesaid were received by the Department in accordance with the above custom. That had said three checks been paid when presented for payment, the Department would have considered the registration fees paid within the time prescribed by law, but, due to the fact that the checks were not paid, the Department considered that the fees had not been paid as of February 14, 1935, and the registration fees on the vehicles set forth in paragraph III of plaintiff's complaint were therefore declared delinquent and subject to 100 per cent penalty."

[1] Payment by bank check is not only the custom followed by the Department of Motor Vehicles but it is expressly authorized in tax matters by legislative enactment. In Chapter 267, p. 369, Statutes of 1921, it is provided that tax collectors may in their discretion accept bank checks which shall constitute payment when they have been duly honored and paid. In section 3 of this act it is provided that tax

collectors accepting checks "shall deposit the same daily with a bank or banks for collection * * *." Payments of taxes or registration fees by check are conditional payments, but upon the checks being honored the payments relate back to the date of the receipt of the checks. Hubbard et al. v. Auditor General, 120 Mich. 505, 79 N.W. 979. Authorities on the subject are collected in Eggleston v. Plowman, 49 S.D. 609, 207 N.W. 981, 44 A.L.R. 1234.

[2, 3] The question is presented whether the checks were in effect honored and paid. This question must be considered in the light of the general rule that the law does not favor forfeitures and penalties. In People ex rel. Attorney General v. Reis, 76 Cal. 269, 277, 18 P. 309, 312, Mr. Justice Thornton, speaking for the court, said that the two words, forfeiture and penalty, "seem to mean the same thing, when said of money, in which sense it imports a requirement to pay the sum mentioned, as a mulct for a default or wrong". "Provisions for forfeiture of vested rights, whether in statutes or contracts, are not favored, and are, as they ought to be, construed as strictly or as liberally as possible against the forfeiture." People ex rel. Davidson v. Perry, 79 Cal. 105, 112, 21 P. 423, 425. "Penalties are never favored by courts of law or equity, and statutes imposing penalties or creating forfeitures must be strictly construed." Savings & Loan Society v. McKoon, 120 Cal. 177, 179, 52 P. 305, 306.

[4, 5] Plaintiff has paid the full amount of its registration fees. The checks were promptly made good by plaintiff upon receiving notice of the mistake on the part of the bank and the state has not suffered any damage by reason of the slight postponement which was caused by the delay in the presentment of the checks and the oversight on the part of the bank official in notifying the bank's bookkeeper. The facts and the law applicable thereto should not be so construed as to bring about the harsh result of enforcing a penalty of $4,823, double the amount of the registration fees, a result not favored by the law, unless no other reasonable construction can be placed thereon. Such a construction is not necessary since plaintiff made the checks good immediately upon receiving information that the mistake had been made. The checks drawn on February 14 were in effect honored and paid by the substitution of the cashier's checks.

[6] Defendant contends that the matter involved in the present action is res judicata. Before the commencement of the present action plaintiff had filed an action in which it asked for an alternative writ of mandate directed to defendant commanding him to issue license plates for the vehicles under discussion or to show cause why he had not done so. The license plates had in fact already been issued. Final judgment was entered in favor of defendant in that action after a demurrer had been sustained without leave to amend. When the present action was filed defendant answered setting forth, in addition to the matter hereinabove discussed, the plea of res judicata and a third defense predicated upon an alleged agreement between the parties made upon the termination of the first action. The trial court sustained plaintiff's demurrer to the answer and granted a motion to strike the allegations setting forth the defense of res judicata. Thereafter an amended answer was filed in which the defense of res judicata was not set forth, although certain allegations were made as a basis for the statement of the third defense. The record discloses discussions between counsel before the trial court from which it appears that counsel did not then consider that the defense of res judicata was being urged. The trial court properly found that "the defendant waived any defense he may have had based upon the plea of res judicata". The matter is not now before us.

[7] There is no merit in defendant's contention, as alleged, that plaintiff agreed to pay the amount of the penalties. Defendant's contention is based upon certain conversations between defendant's attorney and the attorney who represented plaintiff in the prior action, the conversations taking place at the time of the termination of the prior action. It is claimed that plaintiff agreed to pay the amount of the penalty upon an executed agreement on the part of defendant to refrain from seizing the vehicles for the period of 60 days. Among the findings of the trial court on this point the following appears: "It is not true, however, that said stipulation and agreement was made by and with the consent of said petitioner, nor was it made in writing and signed by the parties and filed in the records in said prior action, nor was it made in open court in said prior action." We find in the record no definite agreement by either plaintiff or his attorney to pay the

amount of the penalty. Mr. Tapper, the attorney, testified that he had told Mr. Palstine, representing defendant, that Mr. Tanzola had told him that the claim might be paid if a reasonable extension of time for making the payment would be granted. Concerning a conversation with Mr. Tanzola, Mr. Tapper testified: "Mr. Tanzola said that he thought if I could get thirty, sixty or ninety days extension with respect to the payment of the claim, that they might pay it, but he wanted to talk to his associate, Cantlay, and I don't recall having heard anything further from him on it."

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, J.

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31 Cal.App.2d 543

SUTTER v. ASSOCIATED SEED GROWERS, Inc., et al.

Civ. 12058.

District Court of Appeal, Second District, Division 2, California.

March 20, 1939.

Hearing Denied by Supreme Court May 18, 1939.

1. Sales 🔑441(2)

In seller's action against buyer for price of crop of seed beans, evidence showed that buyer did not rely upon skill or judgment of seller so as to raise implied warranty as to quality or fitness for the purpose. Civ.Code, § 1735, subd. 1.

2. Sales 🔑267

In seller's action against buyer for price of crop of seed beans, where seller had stated that no percentage of germination would be guaranteed, whereupon buyer struck from contract provision for minimum germination, buyer could not defend on ground of breach of implied warranty as to quality or fitness for purpose annexed by usage of trade. Civ. Code, § 1735, subd. 5.

3. Sales 🔑58

The written part of a contract of sale controlled printed part. Civ.Code, § 1651.

4. Sales 🔑267

The statutory implied warranty of fitness does not apply to a sale where seller expressly disclaims liability for quality of thing sold. Civ.Code, § 1735, subds. 1, 5.

5. Appeal and error 🔑1064(2)

That some instructions given by court submitted questions of law to jury did not necessarily mean that appellant was thereby prejudiced.

6. Appeal and error 🔑883

Appellant who consented to submission of questions to jury which determined questions adversely to appellant was not entitled to reversal on appeal because of their submission to jury.

7. Appeal and error 🔑1061(3)

Any error of trial court in refusing motion for nonsuit as to first cause of action was immaterial where judgment could be upheld upon second cause of action.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Ed Sutter against the Associated Seed Growers, Inc., and J. L. Talbott, to recover the balance of the purchase price of a crop of Lima seed beans. A nonsuit was granted as to the first named defendant, and from a judgment for plaintiff as against the last-named defendant, the last-named defendant appeals.

Affirmed.

E. J. Talbott, of San Francisco (Burton B. Crane, of Los Angeles, of counsel), for appellant.

C. Kelley Hardenbrook, of Lompoc, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover of defendants Associated Seed Growers, Inc., and J. L. Talbott the sum alleged to be due as the balance of the purchase price of a crop of Lima seed beans. The first cause of action sets forth the execution of a contract between plaintiff and the two defendants wherein it was agreed that plaintiff would grow the beans and defendants purchase them at a price of five and one-half cents per pound, the total purchase price being $6,649.72. The second cause of action is based upon a common count for merchandise sold and delivered at defendants' special instance and request of the agreed value of $6,649.72. A nonsuit was granted as to defendant Associated Seed Growers, Inc., the plaintiff having failed to establish that defendant Talbott was acting as agent for the other defendant as undisclosed principal. A jury returned a verdict for the amount alleged to be due and defendant Talbott prosecutes this appeal from the resulting judgment.

Respondent and appellant entered into a contract on February 3, 1937, whereby respondent agreed to grow, sell and deliver to appellant a crop of Henderson Bush Lima beans for seed purposes. The contract was made upon a printed form which was filled in and signed by one Dreyfus, appellant's employee. In its original form the printed blank contained this provision: "Seller further agrees to deliver an article not containing in excess of 5 per cent cylinder cracks and with a germination of 90 per cent or better." Respondent objected to the provision calling for 90 per cent germination, saying to Dreyfus: "There is no germination test to go into the contract. I can contract with the McCrea people without a germination clause." Dreyfus thereupon struck from the contract the provision above quoted and wrote in ink upon the face of the contract the words, "to be recleaned beans choice recleaned same as commercial beans No. 18 screen". The contract was then completed and signed. Mr. Dreyfus was not called as a witness and the testimony of respondent concerning the making of the contract was uncontradicted. The contract further provided that respondent was to sell the entire crop of the Sutter ranch and that appellant would furnish the seed. Respondent would also have the privilege to "rogue" the field (pick out beans of other varieties).

From time to time during the growing and harvesting of the beans they were inspected by a representative of appellant. Early in the threshing of the beans appellant's representative objected to the manner in which the work was being done by one Dominguez, who had been employed with his machine to do the threshing. Respondent thereupon employed two others who completed the work under the inspection and to the satisfaction of appellant's representative. When the beans were placed in the warehouse they were recleaned by the warehouse company with its equipment and crew and this work was inspected and approved by appellant's representative. The beans were placed in the name of appellant at his request on November 27, 1937, while they were in the warehouse.

Appellant made several advances upon the purchase price, the sum of $1,000 being paid in September, 1937, during the growing period, the sum of $600 on November 27, when the beans were in the warehouse, the sum of $150 on December 24, and the further sum of $400 on December 28. On December 2, 1937, defendant Associated Seed Growers, Inc., with whom appellant had a contract for the purchase of the beans, sent samples of the Sutter beans to Sacramento for analysis and reports of the analysis were received about December 20, disclosing a germination of less than 80 per cent. On December 27, 1937, respondent was informed that the germination percentage was so low that the beans were not acceptable to defendant Associated Seed Growers, Inc. Appellant notified respondent by letter dated January 31, 1938, that he would not accept or pay for the beans. At the time of trial the beans were still in the possession of appellant.

It is conceded by appellant that respondent delivered the beans to the warehouse "in choice recleaned condition as interpreted by the California Lima Bean Growers Association". But he claims that the contract contained a warranty as to the quality and fitness of the beans "for seed purposes", and that respondent has not complied with the terms of the alleged warranty. He bases this claim upon testimony that beans with a germination percentage of less than 80 per cent were not satisfactory to seed dealers. The statute applicable to the present situation is section 1735 of the Civil Code, which in part is as follows: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * * (5) An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade."

[1-4] It is clear that appellant may not rely upon the first subdivision of the sec-

tion just quoted for the evidence establishes beyond question that appellant did not rely upon the skill or judgment of respondent, the grower of the beans. Appellant furnished the seed in the first place and inspected the growing, harvesting and cleaning of the beans at various periods up to the moment when he received title to them in the warehouse. Appellant, however, stresses the fifth subdivision of section 1735 and argues that there was an implied warranty of the quality of the beans for seed purposes which was "annexed by the usage of trade". This contention is refuted by the undisputed circumstances under which the contract was made. Respondent stated positively that no percentage of germination would be guaranteed and thereupon appellant struck from the contract the printed part which provided for a minimum germination and wrote upon the contract that the beans were to be "choice recleaned same as commercial beans". The written part of the contract must control the printed part. Section 1651, Civ.Code. It is apparent that the parties intended by the deletion of the requirement for a percentage of germination and the substitution of the written matter to exclude from the contract a warranty of the productivity of the beans. The statutory implied warranty of fitness does not apply to a sale where the seller expressly disclaims liability for the quality of the thing sold. 22 Cal.Jur. 968. In Couts v. Sperry Flour Co., 85 Cal.App. 156, 259 P. 108, 109, a case involving the alleged warranty of barley sold for seed purposes, the trial court found that the seller expressly refused to warrant the seed and the reviewing court said that there was "no room for any question of an implied warranty in connection with the sale". The court further said: "As above indicated, in order to recover upon a warranty there must be two factors present, first, an affirmation of fact by the seller with reference to the thing sold, and, second, an intention on the part of the seller that his affirmation shall constitute a warranty". Moreover, it was established beyond question that under the "usage of trade", sellers of seed do not warrant the quality or productivity of the seed. In Miller v. Germain Seed, etc., Co., 193 Cal. 62, 222 P. 817, 818, 32 A.L.R. 1215, it was shown that there was and for many years had been a general custom in the seed trade to refuse to warrant the quality of seed sold. The Supreme Court held that the seller was entitled to an instruction that when the usage was so shown the jury should be instructed that the custom of the trade was "part of the contract unless excluded by an express agreement to the contrary".

Our disposition of the point just covered makes it unnecessary to pass upon the further contention made by respondent that appellant waived the alleged defects in the beans by making two payments on the purchase price after notice of the germination percentage of the beans and by delaying the notification of his rejection of the beans for more than a month after making the last payment.

[5, 6] Appellant complains of several instructions given by the court and argues that the court submitted to the jury questions of law which should have been determined by the court. Although some of the instructions are open to this criticism it does not follow that appellant thereby suffered any prejudice. The questions submitted must necessarily have been determined adversely to the contentions of appellant, who is not now in position to ask a reversal because of their submission to the jury. Stewart v. Erskine-Bolst, 66 Cal. App. 461, 226 P. 644. Appellant was not in position to ask for instructions more favorable to him than those actually given.

[7] Appellant further contends that the trial court erred in not granting his motion for a nonsuit as to the first cause of action, his argument being that since the court granted the motion for a nonsuit made by the alleged undisclosed principal, no judgment could be rendered against appellant. To this contention respondent replies that upon the determination of the court that the codefendant was not an undisclosed principal he had a right to elect to proceed against appellant as the maker of the contract. It is unnecessary to pass upon the contention of the parties on this point for the reason that the judgment may be upheld upon the second cause of action.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

31 Cal.App.2d 387

WINKLEMEN v. SIDES et al.

Civ. 2221.

District Court of Appeal, Fourth District,
California.

March 9, 1939.

Hearing Denied by Supreme Court
May 8, 1939.

1. Appeal and error 🔑1083
Trial 🔑143

Conflicts in evidence are addressed to jury and are settled by its verdict.

2. Banks and banking 🔑116(1)

Where defendants' personal banker, who had conferred with one of them concerning that defendant's financial difficulties, was an executive officer of assignor bank, and was such an officer or agent of trustee named in deed of trust to bank that he executed and acknowledged reconveyance of incumbered property, bank and trustee were charged with knowledge of facts in his possession concerning land bank loan obtained by that defendant to discharge his indebtedness to assignor bank.

3. Appeal and error 🔑1001(1)

Affirmance of judgment for defendants in suit on note which defendants claimed had been paid was required, where there was some substantial and material evidence supporting jury's implied finding that note had been paid.

4. Compromise and settlement 🔑6(1)

An alleged agreement, entered into in 1934 by which past-due indebtedness of about $27,000 was to be discharged by payment of about $19,000, was not void on ground that it was not supported by any consideration.

5. Mortgages 🔑315(1)

Where reconveyance by its terms released indebtedness secured by deed of trust purporting to cover two notes, mortgagee's alleged waiver of the security as to one of notes, based on provision of deed of trust that payment of indebtedness might be enforced without sale of property, did not nullify effect of release so as to justify recovery on note, since mortgagee could not waive security for one note and retain it for another. Civ.Code, §§ 3268, 3513; Code Civ.Proc. § 726.

6. Mortgages 🔑218

A provision of deed of trust authorizing action to enforce payment of indebtedness secured without sale of property, if valid, authorized waiver of all of security given for all of secured notes, and did not authorize waiver of security for one note and retention thereof for another note secured by same property under same instrument. Code Civ.Proc. § 726.

7. Mortgages 🔑315(1)

Where reconveyance by its terms released indebtedness secured by deed of trust purporting to cover two notes, mortgagee's alleged waiver of security as to one of notes, based on provision of deed of trust that payment of indebtedness secured might be enforced without sale of property, did not nullify effect of release so as to justify recovery on note; since provision of deed of trust, being inconsistent with purposes of entire instrument, was illegal. Code Civ.Proc. § 726.

8. Mortgages 🔑218

A provision of deed of trust authorizing action to enforce payment of indebtedness secured without a sale of property was illegal as an attempt to waive all provisions of deed of trust and destroy its legal effect as a security. Code Civ.Proc. § 726.

9. Mortgages 🔑218

The policy of California law prohibits mortgagor and mortgagee from entering into contract attempting in advance to waive statutory provisions incident to formal foreclosure proceedings. Code Civ.Proc. § 726.

10. Mortgages 🔑218

No distinction is to be made between a mortgage and a deed of trust as respects effect upon their validity of provisions constituting waiver in advance of statutory procedure incident to foreclosure. Code Civ. Proc. § 726.

11. Mortgages 🔑97

The laws in effect at time of execution of mortgage or deed of trust relating to foreclosure thereof enter into and become a part of those contracts. Code Civ.Proc. § 726.

12. Mortgages 🔑218

The statutory procedure for foreclosure of deeds of trust requires the foreclosure, either by suit or trustee's sale, of deeds of trust before suit can be brought on secured note. Code Civ.Proc. § 726.

13. Mortgages 🔑218

The property given as security for note under trust deed furnishes primary fund for payment of debt, and that fund must be exhausted before recourse can be had to maker of note. Code Civ.Proc. § 726.

14. Constitutional law 🔑81

Legislation affecting and intended to benefit a large class of inhabitants of state is legislation affecting public welfare of state.

15. Mortgages 🔑218

The statutes covering procedure for foreclosure of mortgages and deeds of trust, having been passed to promote public welfare by protecting debtor class from oppression, were to be construed as declaring public policy of state and could not be waived by deed of trust purporting to authorize action to enforce payment of indebtedness secured without a sale of property as required by statute. Civ.Code, §§ 3268, 3513; Code Civ.Proc. § 726.

16. Mortgages 🔑330

Although statutes in effect at time of execution of trust deed regulate foreclosure thereof, subsequent statutes were to be considered by court in determining public policy of state relating to enforcement of statutes covering foreclosure. Code Civ. Proc. §§ 580a, 580b, as added by St.1933, p. 1672, and § 726, as amended by St.1933, p. 2118.

17. Mortgages 🔑315(1)

Where reconveyance by its terms released indebtedness secured by deed of trust purporting to cover guaranteed note, mortgagee's alleged waiver of security as to that note, based on provision of deed of trust authorizing action to enforce payment of indebtedness without sale of property, did not nullify effect of release so as to justify recovery on note against guarantors, since they would thereby be deprived of benefit of the security. Code Civ.Proc. § 726.

18. Subrogation 🔑7(1)

A guarantor upon paying debt is entitled to be reimbursed by receiving benefit of any security creditor held against debtor.

19. Mortgages 🔑315(1)

Where reconveyance by its terms released indebtedness secured by deed of trust purporting to cover guaranteed note, and effect of mortgagee's alleged waiver of security as to note, urged as having nullified effect of release, would be to deprive guarantors of benefit of the security, recovery on note could not be sustained on ground that security was without value to guarantors, in view of evidence from which jury could have concluded that value of security exceeded total indebtedness.

20. Evidence 🔑474(18)

A witness was competent to testify as to value of realty where it appeared at time of giving of testimony that he was an owner thereof.

21. Appeal and error 🔑1058(1)

The exclusion of evidence which was merely cumulative was not prejudicial.

◆

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by H. C. Winklemen against Douglas R. Sides and others to recover on a promissory note. Judgment for defendants, and plaintiff appeals.

Judgment affirmed.

Conley, Conley & Conley, of Fresno, for appellant.

Chester O. Hansen, Shepard & Shepard, David E. Peckinpah, and Harold M. Child, all of Fresno, for respondents.

MARKS, Justice.

This is an action to recover on a promissory note executed by Douglas R. Sides and guaranteed by G. W. E. White and R. W. Binkley. The note is dated August 19, 1932, is for the principal sum of $3,375.-45, payable on demand to the Bank of America National Trust & Savings Association, the assignor of plaintiff.

All defendants pleaded payment of the note. The guarantors interposed additional special defenses pertaining to them alone. The jury returned a general verdict in favor of the three defendants. Plaintiff urges that this demonstrates the verdict was based on an implied finding that the note had been paid. Otherwise, no verdict would have been returned in favor of Sides. There is much logic in this argument and we will adopt it in this opinion. If the judgment may be supported on the theory of payment it will be unnecessary for us to consider any of the questions raised under the special defenses of the guarantors. While defendants do not agree with this position, they cannot complain of our adoption of this theory, if the judgment is affirmed.

In order to properly understand the question before us it is necessary to recite in some detail the financial transactions of defendants with each other and with various banks which occurred during several years prior to the trial of this action in 1937.

For the sake of brevity we will refer to the Bank of America National Trust and Savings Association, as The Bank; to the Federal Land Bank of Berkeley, California, as the Land Bank; and, to the Pacific Coast Joint Stock Land Bank, as the Coast Bank.

Some years prior to 1932, defendants Sides and White, with one Wells, were interested in farming one hundred sixty acres of land in Tulare county. Title stood in the name of a corporation in which they were the sole stockholders. The corporation was indebted to a predecessor of the Selma branch of The Bank in a considerable sum. Binkley became interested in the farming venture but did not become a stockholder. The corporation was dissolved and its debts were assumed by the four men. Each one gave his note for his proportionate share of the indebtedness. The note of each maker was guaranteed by the three other men.

Binkley paid his note. White reduced his note by payments to $1,050. He secured this debt to The Bank by a deed of trust on real property. Wells died leaving a bankrupt estate. The principal of his note was about $2,900. This was settled for $1500, paid as follows: Binkley paid The Bank $500 in cash. Sides gave The Bank his note for $500, guaranteed by White. White gave The Bank his note for $500, guaranteed by Sides. This left, as the sole obligation of the old farming venture remaining in the original form, if not amount, the note of Sides guaranteed by White and Binkley. This note is the basis of the instant action.

The complaint in this action was filed in March, 1933. The separate answers were filed: By Binkley in October, 1935; by White and Sides, in March, 1936. Much of the time elapsing between the filing of the complaint and the answers was used in negotiations and attempts to settle the controversies between the parties, including the settlement of the obligations arising out of the old farming venture, two of which were liquidated in the manner already mentioned, as well as other obligations of defendant Douglas R. Sides and Thomas M. Sides, his brother, their wives, and of Minnie Hansen. All these negotiations on behalf of the Sides brothers were carried on by Douglas, Thomas residing in Oakland and Cincinnati during this time.

The Sides brothers owned one hundred twenty acres of land near Selma, in Fresno county. In 1932 this property was encumbered by a deed of trust securing a principal obligation of $16,000, payable to the Coast Bank, and a second deed of trust securing a note for $6,907.24, payable to The Bank. This second deed of trust contained the recital that it was given: "Second: As security for the payment of such additional amounts as may be hereafter loaned by the Beneficiary, or its successors, to the Trustor, or any of them, or any successor interest of the Trustor, with interest thereon, and for the payment of any other indebtedness or obligation of the Trustor, or any of them, and for all present or future demands of any kind or nature, which the Beneficiary or its successor may have against the Trustor, or any of them, whether created directly or acquired by assignment; whether absolute or contingent; whether due or not or whether otherwise secured or not, or whether existing at the time of the execution of this instrument, or arising thereafter."

The obligation to the Coast Bank called for substantial periodical payments. These the Sides brothers were not able to make. The Coast Bank offered them a substantial discount for an early cash payment of the loan. Douglas Sides approached the officers of The Bank and asked for assistance to enable him to accept this offer. At the suggestion of an officer of The Bank a plan was developed whereby The Bank would advance sufficient money to purchase the Coast Bank obligation at a discount; that a loan, sufficient to retire the obligations of the Sides brothers, would be obtained from the Land Bank. The Bank purchased the note and deed of trust from the Coast Bank at a discount of $2,900. A loan was secured from the Land Bank in the sum of $13,500, and a Commissioner's loan in the sum of $6,500, with the Selma property as security for these loans. In December, 1934, the $20,000 obtained on these loans, less expenses of $983.50, was paid by the Land Bank to The Bank which executed a reconveyance under the Coast Bank deed of trust and another under its own deed of trust. This latter reconveyance contains the following:

"Know All Men By These Presents:

"Whereas, the indebtedness to be paid secured by the Deed of Trust made, executed and delivered on January 18, 1932, by Douglas R. Sides and Elsa I. Sides, his wife, and Thomas M. Sides and Ruth C. Sides, his wife and Minnie Hansen, a widow, to Corporation of America, as Trustee for Bank of America National Trust & Savings Association, as Beneficiary, which Deed of Trust was recorded on January 30, 1932, in the office of the County Recorder of County of Fresno, State of California, in Volume 1194 of Official Records, at Page 332 et seq., *has been fully paid;* (Emphasis ours.) * * *."

The deed of trust to The Bank under which this reconveyance was given contains the following: "The recitals in any full or partial reconveyance shall be conclusive proof against all persons of the truthfulness thereof."

Plaintiff, assignee of The Bank, maintains that the only obligations of either of the Sides brothers which were paid with the money received by The Bank from the Land Bank, was the debt originally held by the Coast Bank, and the note of $6,907.24, given by the Sides brothers, their wives, and Minnie Hansen, to The Bank; that the note in suit here of $3,375.45, signed by Douglas R. Sides and guaranteed by White and Binkley, was not secured by the second deed of trust and was neither paid by the money received from the Land Bank nor acknowledged paid by the reconveyance from which we have already quoted.

Defendants maintain that the note of Douglas R. Sides in suit here was secured by the plain and clear terms of the second deed of trust to The Bank which we have quoted; that because it was so secured it is included in the recital of the reconveyance that all debts of Thomas M. and Douglas R. Sides and others have been paid; that because of the provision in the deed of trust which made the recitals of the reconveyance "conclusive proof against all persons of the truthfulness thereof", neither The Bank nor its assignee for collection, the plaintiff, can be allowed to contradict the clear provisions of the reconveyance that the note of Douglas R. Sides in question here has been paid.

Defendants also rely upon an alleged agreement with The Bank, whereby the money received by The Bank from the Land Bank would be in full payment to The Bank of all indebtedness, whether secured or not, of any member of the Sides family.

[1] The evidence on this last contention is hopelessly conflicting. Under the time-honored rule that conflicts in evidence are addressed to the jury and are settled by its verdict we will largely confine our statement of the facts to such of the evidence as tends to support the implied finding of the jury that the note in question here has been paid. If there is substantial material evidence in the record supporting that finding the judgment must be affirmed, unless there were prejudicial errors of law occurring during the trial.

In approaching the evidence on this question, it should be observed that C. W. Christensen, an executive officer of The Bank, was manager of The Bank's branch in Selma. He was also such officer or agent of the Corporation of America, the trustee named in the deed of trust to The Bank, that he executed and acknowledged the reconveyance of the incumbered property. At the same time he was secretary-treasurer of the Selma-Del Rey National Farm Loan Association, acting under the Land Bank. All applications for loans to that bank originating in the Selma-Del Rey District had to go through his office.

[2] Christensen had been a banker in Selma for a number of years. He had been president of a local bank which was taken over by The Bank and operated as its Selma branch. He had been the personal banker of defendants. Many of the conferences concerning the settlement of the Sides brothers' financial difficulties were had with him or in his presence in the Selma Branch Bank and he had personal knowledge of many of the transactions heretofore and hereafter outlined. His official position was such as to charge The Bank and the Corporation of America with notice and knowledge of the facts concerning the transactions in question which came into his possession. Just what authority he had from the Land Bank does not appear. It would seem, however, that he held a position involving such a relationship of confidence that he should have disclosed to that bank any information he had which would materially affect its loan to Thomas M. Sides.

[3] Douglas R. Sides took his financial difficulties involved here to Christensen late in 1932 or early in 1933. Christensen advised him to apply to the Land Bank for a loan. The first application was made out in March, 1933, and was left with

Christensen. It was not sent to the Land Bank because that institution was not then making loans. A second application was made out a few months later. These applications were signed by Douglas R. Sides individually, and Thomas M. Sides, by Douglas R. Sides, his attorney in fact. The second application was also left with Christensen and remained with him. A third application to the Land Bank for a loan was dated December 5, 1933. It was signed by Thomas M. Sides and stated that he was the owner of the Selma property. About that time Douglas R. Sides was appointed appraiser for the Land Bank. Being such appraiser he could not obtain a loan from the Land Bank. To obviate this situation he and his wife, by a deed dated February 5, 1934, and recorded the next day, conveyed his half interest in the Selma property to his brother Thomas M. Sides. Christensen had knowledge of this transaction and the reasons for it. By a deed dated February 7, 1934, and acknowledged on the same day, Thomas M. Sides and wife conveyed an undivided one-half interest in the Selma property to Douglas R. Sides. This deed was immediately placed in the possession of Elsa I. Sides, wife of Douglas. It was not formally delivered to Douglas until in March, 1936, and about that time was recorded. The third application for the loan bears a stamp showing it was received by the appraisal committee of the Land Bank on March 10, 1934. It bears the certificate, dated December 9, 1933, of the loan committee of the Selma-Del Rey National Farm Association appraising the Selma property at $33,050 and recommending a Land Bank loan of not to exceed $15,000. Following this, in the application, is a certificate dated December 20, 1933, signed by C. W. Christensen certifying that the loan had been approved by the favorable vote of the board of directors. The loans of $13,500 by the Land Bank, and of $6,500 by the commissioner, were approved, either on March 20, or August 7, 1934, and were made on the strength of this application. The $19,016.50 was paid to The Bank by the Land Bank in December, 1934.

The Bank was required to and did execute the following "scale down" agreement:

"The Federal Land Bank of Berkeley and/or the Bank Commissioner, having agreed to make a loan to Thos. M. Sides on certain conditions, which conditions are made a part of this agreement and among which is the condition that the applicant's total obligations, both secured and unsecured, shall not exceed the amount of Twenty Thousand & no/100 Dollars (20,000) when said loan is completed;

"Now, Therefore, the undersigned creditor of said applicant hereby agrees that it will accept the sum of $20,000.00 less loan expense of $983.50 in full satisfaction of the existing obligation of $21,725.86 now due it from said applicant and will execute a full and unconditional release of said obligation upon the payment of the sum herein agreed to be accepted, payment to be made in Federal Farm Mortgage Corporation bonds."

It was stipulated at the trial that the instructions of the Land Bank to the title company handling this escrow were that no money should be paid to The Bank until the Selma real estate was free and clear of all encumbrances.

Three dates are particularly important: (1) The "scale down" agreement was received by the Land Bank on September 27, 1934. (2) The reconveyance by the Corporation of America, reciting that all indebtedness of Douglas R. Sides and wife, Thomas M. Sides and wife and Minnie Hansen, trustors, to The Bank, secured by the second deed of trust, had been fully paid, was dated and acknowledged on November 26, 1934. (3) Under date of September 12, 1934, Douglas R. Sides executed a new note to The Bank in the principal sum of $2,695.86.

Officers of The Bank testified that the note for $2,695.86 represented the difference between the $19,016.50, received from the Land Bank by The Bank, and the total of the Coast Bank loan, less the discount, and the loan by The Bank of $6,907.24, plus accrued interest. Douglas R. Sides testified that this note for $2,695.86 was also paid with the money received by The Bank from the Land Bank under his agreement with the former to cancel all of the Sides family indebtedness in this transaction.

In considering this new note it should be observed that, as between the parties, the conveyance by Douglas R. Sides of his half interest in the Selma property to Thomas M. Sides was simply for the purpose of placing the record title of the property in Thomas M. Sides so that the loan from the Land Bank could be obtained and would not be defeated by the fact that Douglas R. Sides was at the same time a part owner of the property and an appraiser for the Land Bank. Apparently the real truth of this transaction was not communicated to the Land Bank though it was known to an officer of The Bank and of the Corporation of America, which officer was also an agent for the Land Bank.

If the quoted paragraph of the second deed of trust be given the clear meaning of the language there used, this new note became an obligation secured by this deed of trust. If the reconveyance be given the meaning its words imply, then it recited that this note had been paid. We gather from the record that the Land Bank intended to make the loan only upon the condition that the owner, or owners, of the Selma property had no secured or unsecured obligations totaling more than $20,000, the amount of its loan. Douglas R. Sides, by his deed, intended to convey to his brother only the bare legal title to this property. Unless we conclude that all debts of the Sides family were paid by the payment from the Land Bank to The Bank this intent was violated. As far as we can determine the agent of the Land Bank who had knowledge, either actual or implied, of all these facts did not communicate any of them to the Land Bank. His other principal, The Bank, received the money from this loan. Plaintiff's argument that this new note, dated September 12, 1934, was proof that The Bank did not agree to accept the $19,016.50 from the Land Bank in payment of all the indebtedness of the Sides family, requires a careful scrutiny in the face of these facts. The same may be said of the renewals of the $500 note given by Douglas R. Sides in payment of his part of the Wells indebtedness. In any event this evidence of these new notes, regardless of its weight, merely creates another conflict in the evidence which the jury resolved against plaintiff.

Douglas R. Sides testified that all his indebtedness to The Bank was paid; that a vice president of The Bank told him "they would take $18,000 * * * for my indebtedness"; that the larger loan was finally secured and the money paid to The Bank in full payment of all this indebtedness.

R. W. Binkley also interviewed officers of The Bank on the matter of the payment of the note in suit here of which he was guarantor. He detailed one of these conversations, as follows:

"Q. Will you give us the conversation as near as you can recall? A. Well, this was in November, on a Friday before the Stanford-California game, and I simply dropped in. I was up at the Stanford-California game, and I said, 'I would like to find out where we stand on this Sides note.'

"Q. That is, the note that is here in question and the one that is being sued on? A. Yes. And Mr. Wente said, 'We have not worked this thing through yet.' He said, 'The first appraisal of Mr. Sides property, the Federal Land Bank only offered $16,000, and' he says, 'that is not enough to pay off his indebtedness, and,' he said, 'we have asked for a new appraisal on it, in the hopes of getting more.' And Mr. Robinson, who was sitting to my left at the desk, was there at the time, and I said, 'How much will it take to pay off all his obligations?' And he said, 'It will take plenty.' I said, 'How much will it take? Give him a discount on the thing, and how much would you have to get from the Federal to square up?' And he said, '18,000.' I said, 'You mean that for $18,000 you will square up all the indebtedness of the entire Sides family?' * * * He said, 'Yes, by blank, we will take $18,000 for the whole blankety, blank business and be glad to get rid of it.' He said, 'We are fed up on Sides; they have been only grief to us and' he says, 'If you or the Federal Land Bank or anybody else will give us $18,000 we will be glad to wipe out the whole slate of all that the Sides family owes us.' And then he facetiously said to me, 'Doctor, there is a good chance for you to make some money; if you will give us $18,000 we will sign over everything that the Sides family owes; we will sign it over for its full face value, and then you can go collect all you can out of the Sides family.' I said, 'Well, I wish I had $18,000 because I feel he has got one of the best ranches in the community, and I think I could make something on it, but if I had $18,000 I wouldn't be up here about this.' * * *

"Q. Is that all the conversation, Doctor, at that time? A. I remember the way it ended I was just trying to think; when the interruption came, it disturbed my train of thought. Then I said to Robinson definitely then, as I was ready to go, I said, 'Then I am at liberty to go home and tell Sides if he can get a loan of $18,000 that you will square him up?' And he said, 'Yes.' I says, 'Well, that is fine. If they got an appraisal of $16,000 last time we certainly ought to—they are getting more generous—we ought to get $17,000 on it, and if we can't get $18,000, I think between White, Sides and myself we ought to be able to raise the extra thousand to add to it and square him up.' He says, 'I don't care where the money comes from. Just so long as we get $18,000, we will square the thing up. Because with the turn over that is present in the bank we can make more on the $18,000 than we can trying to get all these thousand dollars out of Sides for the next 25 years.' I said, 'I will go back and tell Sides,' and with that, I left the Bank of America and then went back to Selma and informed Sides."

He also testified concerning another conversation, as follows: "I ran across the street from the drug store into the bank and called Mr. Christensen there to the counter, in the front of the bank and I said, 'Is it true you people are going to transfer that property of Doug's over to Tom and leave me unprotected?' He says, 'Yes, it is the only way we can get the federal loan. We had to get that federal loan through to pay this thing off.' I said, 'That is not fair to me, Mr. Christensen, to take away the only security I have and give it to somebody else, because—' I said about the same thing to him. I said, 'Doug Sides could go through bankruptcy and leave me to pay this note then.' He said, 'If we get the federal loan through, the note will be paid and you won't have to pay it.' "

Concerning the note in question being secured by the second deed of trust given by the Sides family to The Bank, Binkley testified as follows: "And then later, when Mr. Christensen asked me to sign the Sides note, this one in question, I told him something of the same nature. I don't remember the words, but if I was stuck I wanted to know it now instead of later. 'And Mr. Sides is not getting in any better shape, but getting in worse shape, and I want to know where I stand before I put my name on it.' I said, 'If you take a crop mortgage on his chattels, like sweat boxes and plows and tractors and things that will guarantee this—' He said, 'We already have a trust deed which guarantees it.' I said, 'When did you get the trust deed to guarantee it?' He said, 'We took one last January.' I said, 'How does the trust deed of last January guarantee something that we are signing in August?' He says, 'Well, our trust deeds are worded in such a way that it not only covers the indebtedness at the time they are given, but they cover any future indebtedness incurred by the debtor during the lifetime of the trust deed.' And I said, 'May I see that trust deed?' He said he did not have it at hand but he had had a form that they were made on, which he could present to me to show it would cover these things; and one of the assistants then gave me a form which I took back to my office to read over. It was—to study, and it did include these things, the way it was."

It is our opinion that the foregoing evidence furnishes some substantial and material evidence supporting the following conclusions which in turn support the verdict and judgment:

(1) That the note in suit here was secured by the second deed of trust dated January 18, 1932, given by the Sides family to The Bank.

(2) That the recital in the reconveyance of the property described in this deed of trust, to the effect that all indebtedness of the Sides family secured by it had been paid, included payment of the note in suit here.

(3) That by the terms of the deed of trust, the recitals of the reconveyance, including the recital of payment, were made "conclusive proof against all persons of the truthfulness thereof".

(4) That in addition to this documentary evidence, the testimony of Douglas R. Sides and R. W. Binkley constitutes some additional material and substantial evidence supporting the implied finding of the jury that the note in suit here had been paid.

[4] Plaintiff seeks to escape the conclusion that there was a contract to pay the indebtedness of the Sides family, amounting to about $27,000, all of which was past due, with the payment of $19,016.50 received by The Bank from the Land Bank by contending that such agreement, if made, was void because not supported by any consideration. This precise contention was made and held unsound in two cases recently decided. In Wagner v. Shoemaker, Cal.App., 85 P.2d 229, 230, it was said:

"Shoemaker maintains and contends that the contract of September 8, 1935, merely reduced the amount to be paid on a past due obligation and extended the time of payment; that it is not supported by any consideration and is void. The same argument was made in the case of Brooks v. Fidelity Savings & Loan Assn., 26 Cal.App.2d 114, 78 P.2d 1175, hearing denied, which involved a contract to accept $10,000, in payment of a $15,000 obligation upon which there was an unpaid principal balance of $11,118.56. There, as here, the owners agreed to apply for a new loan on the property. In holding this contract was supported by a sufficient consideration, the court said (page 1177):

"'Weighing all of the conditions then existing—a depressed market for real property, the value of ready cash, the scarcity of bidders at foreclosure sales due to financial conditions which then existed in the general business depression—defendants may have preferred an agreement for the payment of $10,000 in cash rather than to take over real property on foreclosure.

"'It is also alleged that plaintiffs expended money and time in procuring the consent of the Reconstruction Finance Corporation to advance the money, something plaintiffs were not called upon to do by the terms of their note.

"'We believe that sufficient consideration did exist for the execution of the agreement, and on that issue the complaint stated a cause of action.'"

[5] Plaintiff urges that if the note in question ever was secured by the deed of trust to The Bank, the security was waived by The Bank, and at all times material here it was an unsecured obligation and was not included within the recital of payment contained in the reconveyance. This argument is based largely on a provision of the deed of trust, and on sections 3268 and 3513 of the Civil Code, and such cases as Miller & Lux, Inc. v. San Joaquin Light & Power Corporation, 120 Cal.App. 589, 8 P.2d 560.

The deed of trust contains the following: "The beneficiary may bring an action to enforce the payment of said promissory note or notes and/or all indebtedness secured hereby without causing the Trustee to sell said property as herein provided; it being understood that all rights and remedies allowed the Beneficiary or the Trustee, under the law and this instrument, and the note or notes secured hereby, shall be concurrent and cumulative. The trustor hereby waives the provisions of Section 726 of the Code of Civil Procedure of the State of California."

Section 3268 of the Civil Code provides as follows: "Except where it is otherwise declared, the provisions of the foregoing fifteen titles of this part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."

Section 3513 of the Civil Code provides as follows: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

In Miller & Lux, Inc. v. San Joaquin Light & Power Corporation, supra, it was held that, generally speaking, a party may waive the benefits of a contract which run to him.

The question of a mortgagee's right to waive the security and sue on the note without first foreclosing is an interesting one that does not seem to have been decided in California. There is argument, assumption or dicta which might be construed as tending to support the right to waive the security and sue without foreclosure in the following cases: Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann.Cas.1916D, 171; Western Fuel Co. v. Sanford G. Lewald Co., 190 Cal. 25, 210 P. 419; Murphy v. Hellman, etc., Bank, 43 Cal.App. 579, 185 P. 485, and Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940.

In Martin v. Becker, supra, Western Fuel Co. v. S. G. Lewald Co., supra, and Murphy v. Hellman, etc., Bank, supra, it is stated that section 726 of the Code of Civil Procedure was enacted for the benefit of the mortgagor and in each case it is stated that it did not appear that the mortgagor had waived the benefit of that section. In Bank of Italy v. Bentley, supra, it is stated that the deed of trust there involved did not give to the beneficiary the right to sue before exhausting the security, and further, that the beneficiary had neither expressly nor impliedly waived its security before suing on the note. It is obvious that those cases do not answer the question of waiver which is before us here.

The statements in the first three of those cases are merely of the fact that the security had not been waived and no attempt was made to determine rights of the parties where a waiver might have been attempted. In the Bank of Italy case the statement that the deed of trust did not provide for a waiver of any of its provisions or that a waiver had neither been alleged nor proved is not a holding that such a waiver in the document, or such a waiver pleaded and proved, is a legal and binding waiver of an existing right.

We are not seriously impressed with the argument of waiver for four separate reasons which we must separately consider.

First: Assuming the waiver provision of the deed of trust valid, The Bank could not take the inconsistent position of having waived the security for one note and having retained it for another note where the same property was given as security in one deed of trust for all of the notes.

Plaintiff urges that the waiver of the security was made only as to the note in question here and not as to the secured note for $6,907.24. He claims that the security for the note of $6,907.24 was not waived. The same security was given to secure all of the notes in a single deed of trust.

[6] There is no provision in the deed of trust permitting suit before foreclosure on one of the secured notes while retaining the security for other secured notes. The contract attempts to waive the provisions of section 726 of the Code of Civil Procedure. If such a provision be valid it authorized a waiver of all of the security which was given for all of the secured notes. It did not permit the security to be held for one purpose and abandoned for another. If valid, a waiver of security on one of the notes was a waiver of all the security. The Bank could not waive the security for one note and retain the same security for another note where the security for all notes was the same property and the lien was created in a single instrument.

In Jones v. Maria, 48 Cal.App. 171, 191 P. 943, it was said: "Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right—an election by one to forego some advantage he could have taken or insisted upon. A person who is in a position to assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such right. Once such right is waived, it is gone forever; the person who has waived the right will thereafter be precluded from asserting it."

The Bank asserted it held the Selma property as security for the $6,907.24 note after the purported waiver of the security for the note in suit here. Its claim of waiver is not convincing under evidence of its own conduct which shows it claimed security for one secured note after the purported waiver of that security for payment of another secured note. A waiver of security must be a waiver of the security,—that is, of all security.

[7] Second: The provision in the deed of trust waiving the benefits of section 726 of the Code of Civil Procedure is inconsistent with the purposes of the entire instrument and attempts to destroy its legal effect as a deed of trust.

The law has been zealous in protecting the legal rights of the borrower who gives security for his debt. He cannot give a deed to real estate or a bill of sale of personal property and agree in advance that if his debt is not paid when due, title to the security shall vest in his creditor. Such a contract is void and the creditor must resort to foreclosure proceedings to divest the debtor of his title. See 17 Cal.Jur. p. 735 et seq., and cases cited.

The debtor cannot in advance waive his right of redemption, for such a contract is void under the maxim that "what is once a mortgage is always a mortgage". In Bradbury v. Davenport, 114 Cal. 593, 46 P. 1062, 1063, 55 Am.St.Rep. 92, the Supreme Court said: "Aside from the provision of said section of the Civil Code, it is well settled that the mortgagor is not allowed to renounce beforehand his privilege of redemption; that, while generally any one may renounce any privilege or surrender any right he had, an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions; that, when one borrows money upon security of his property, he is not allowed by any form of words to preclude himself from redeeming (Jones, Mortg. § 251, 1045), though the doctrine, 'once a mortgage, always a mortgage,' does not apply to subsequent contracts. Watson v. Edwards, 105 Cal. 70, 75, 38 P. 527, 528."

In Blodgett v. Rheinschild, 56 Cal.App. 728, at page 737, 206 P. 674, at page 678, it was said: "Turning now to a consideration of certain contracts which the law forbids a mortgagee to make with his mortgagor: It is an established doctrine that 'what is once a mortgage is always a mortgage,' which means that no agreement in advance to waive the equity of redemption is valid, and that when once it is established that a transaction is impressed with the character of a mortgage the right to redeem will continue until the debt is paid or until the equity of redemption is foreclosed or barred, or duly and sufficiently released. Civ.Code, § 2889; Bradbury v. Davenport, 114 Cal. 593, 55 Am.St.Rep. 92, 46 P. 1062. For the same reason it is not competent for the parties to make a conveyance of property, absolute in form, a security for the payment of money by a given day, with the further agreement that if payment is not made the instrument shall be treated as an absolute sale. If the instrument is a mortgage when delivered, it will so continue until the right of redemption is cut off in some of the modes recognized by law. Bearss v. Ford, 108 Ill. 16, 26; 27 Cyc. 975."

[8] We can see no distinction between the illegality of a contract that in advance waives foreclosure and vests title to the security in the creditor on default in the case of a deed given as a mortgage or in the illegality of a contract that in advance attempts to waive the equity of redemption, both of which are void, and the illegality of the instant contract that attempts to waive all of the provisions of the deed of trust and destroy its legal effect as a security.

Third: We regard the portions of the deed of trust we are now considering as contrary to the policy of the California law.

[9, 10] What we have already said and the authorities just cited bear on this question and show that the policy of the California law prohibits the mortgagor and mortgagee from entering into certain contracts attempting in advance to waive the statutory provisions incident to formal foreclosure proceedings. Such contracts are void as violating public policy. There is no distinction to be made between a mortgage and a deed of trust. Bank of Italy v. Bentley, supra.

[11–13] California has enacted an exact system and a definite procedure for foreclosure of mortgages and deeds of trust. These laws in effect at the time of the execution of the mortgage or deed of trust enter into and become a part of such contracts. Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L.R.A.1916B, 1209; Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712; Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609. It is now thoroughly settled here that, generally speaking, this orderly procedure prescribed by our statutes requires the foreclosure, either by suit or trustee's sale, of deeds of trust before suit can be brought on the secured note (Bank of Italy v. Bentley, supra; Birkhofer v. Krumm, 4 Cal.App.2d 43, 40 P.2d 553) and then only for the balance remaining after security is exhausted. The property given as security furnishes the primary fund for the payment of the debt and this fund must be exhausted before recourse can be had to the maker of the note. Birkhofer v. Krumm, 4 Cal.App.2d 43, 40 P.2d 553.

The various reasons for adopting this policy of the law are set forth in several cases.

In Ould v. Stoddard, 54 Cal. 613, the Supreme Court said: "It is not difficult to discover the policy which dictated the enactment of this statute. The tendency of modern legislation is to prevent a multiplicity of suits, and no one doubts the wisdom of it."

The evils sought to be corrected by our foreclosure statutes are amplified in Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 33 P. 550, 551, as follows:

"A glance at the law, as it existed prior to the adoption of our statutes in relation to mortgages, will tend to make manifest the evils sought to be obviated by those enactments. At common law a mortgage was regarded as a conveyance upon condition, to become absolute upon nonperformance of the condition. Upon such nonperformance the courts of law held the estate to be vested in the mortgagee, and refused to recognize the right of redemption. They conceded the jurisdiction of courts of equity to grant relief from the forfeiture, but that was the extent of the mitigation permitted until the passage of the judicature act of 36 & 37 Vict. c. 66, § 24, 25, which provide that when the rules of law and equity are in conflict those of equity shall prevail in all the courts. In the

United States there has been no uniform doctrine in respect to mortgages. A majority of the states adopted the English doctrine. In Delaware, Mississippi, and Missouri the doctrine is that before default the title remains in the mortgagor, but passes to the mortgagee upon his taking possession after default, subject to be defeated upon payment of the debt. Another hardship upon the mortgagor needed a remedy. The mortgagee could bring an action at law to recover the mortgage debt, and although he obtained judgment, and (where permitted so to do by law) imprisoned the mortgagor, it did not, without payment, impair his mortgage.

"The first of the hardships indicated was remedied by section 744 of our Code of Civil Procedure, which provides that 'a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the property without a foreclosure and sale.'

"The right to a personal action to recover a debt secured by a mortgage is inhibited by section 726, Code of Civil Proc., hereinbefore quoted. Under that section there can be but one action for the recovery of any debt, etc., which must be in accordance with the provisions of that chapter. It further provides that a personal judgment may be entered for a balance remaining due, if the proceeds of the incumbered property shall be insufficient, etc. To confine a recovery in such classes to one action, to make the mortgaged property the primary fund out of which satisfaction is to be had, and to give the plaintiff a personal judgment for such balance as may remain due after the exhaustion of the mortgaged property, are the three essential things provided for."

In Felton v. West, 102 Cal. 266, 36 P. 676, 677, it was said: "Formerly the law allowed an action upon a promissory note, and also a suit in equity to foreclose the mortgage given to secure the note. The mischief in such a practice lay in the multiplicity of suits, and the harassing of the debtor by two actions, when the creditor could readily enforce all his rights in one. A remedy for this evil was provided by section 726 of the Code, whereby the creditor was allowed to foreclose his mortgage and have a personal judgment for any deficiency in the same action. This court has construed this law so as to suppress the mischief and advance the remedy by compelling the creditor to exhaust his security before proceeding personally against the debtor."

The following appears in Commercial Bank v. Kershner, 120 Cal. 495, 52 P. 848, 850: "Appellant asks, why not allow a personal action as well before as after the mortgage security has been exhausted? The simple answer is found in the statute, and in its reason and policy, which are to prevent multiplicity of suits, and the attendant annoyance and additional cost to the debtor."

The underlying reason and background for the remedial legislation in favor of mortgage and deed of trust debtors was thus stated by one of the judges in the case of Samuel v. Jarrah Timber & Wood Paving Corp. [1904] A.C.(Eng.) 323, 6 B.R.C. 386: "This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule that a mortgagee can never provide, at the time of making the loan, for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there are great reason and justice in this rule, for necessitous men are not, truly speaking, freemen, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them."

How the courts should ascertain what is the public policy of the state is discussed in Southern Pacific R. Co. v. Stibbens, 103 Cal.App. 664, at page 678, 285 P. 374, at page 379, where it is said: "What is, or what is not, against public policy is a question upon which courts in various jurisdictions do not always agree. 'Some courts, speaking upon this subject, have said that the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses, and what legislation is least objectionable, because it operates prospectively, as a guide in future negotiations, and does not, like a judgment of the court, annul a contract already concluded. There can be no doubt that primarily it is the prerogative of the legislature to declare what contracts and acts are contrary to public policy, and to forbid them;

hence public policy is what a statute enacts. Therefore it is the duty of the judiciary to refuse to sustain that which is against the public policy of the state, when such public policy is manifested by the legislation or fundamental law of the state. Nor can courts declare contracts or acts authorized by statute to be contrary to public policy; but in the absence of a statute they may declare void, as against public policy, contracts which are clearly injurious to the interests of the public.' 6 R.C.L., p. 709. This rule seems to have been adopted in California in the case of Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674, 702, in which it was held as follows: 'The policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws.' The recent case of Maryland Casualty Co. v. Fidelity & Casualty Co., 71 Cal.App. 492, 236 P. 210, 212, has enlarged upon but not departed from this rule. In this case the court said: 'An exact definition of public policy would be difficult to formulate. One that has been frequently approved is that adopted by Lord Brougham, namely, that no one can lawfully do anything which has a tendency to be injurious to public welfare.'" See, also, Hiroshima v. Bank of Italy, 78 Cal.App. 362, 248 P. 947, and Carr v. Kingsbury, 111 Cal.App. 165, 295 P. 586.

[14, 15] Legislation affecting and intended to benefit a large class of the inhabitants of the state is legislation affecting the public welfare of the state. In re Kazas, 22 Cal.App.2d 161, 70 P.2d 962. It cannot be doubted that the debtor class in California constitutes a substantial portion of the state's population. As indicated in the cases already cited, our statutes require creditors to follow the statutes in foreclosures of mortgages and deeds of trust for the various reasons given in those cases. As those statutes were passed to promote the public welfare by protection of the debtor class from oppression, they must be construed as declaring a public policy of the state and they cannot be waived by contract. Sections 3268 and 3513, Civ.Code.

[16] While only statutes in effect at the time a deed of trust is executed become a part of and regulate the foreclosure of that instrument, in determining the question of what is the public policy of the state concerning the enforcement of these laws, we cannot be entirely unconscious of the effect of our decision on amendments to these laws and new statutes passed which bear upon and amplify that public policy.

In 1933 the legislature passed further laws for the purpose of relieving mortgage and trust deed debtors. Among them are sections 580a, 580b, added by St.1933, p. 1672, and an amendment to section 726 of the Code of Civil Procedure, St.1933, p. 2118.

Section 580a was intended to limit the amount of any deficiency judgment to the difference between the unpaid principal and accrued interest of the debt, plus costs and attorney's fees, when allowed, and the actual value of the security at the time of sale to be determined by appraisement. It is obvious that if the creditor could be permitted to waive the security and sue on the note, the effect of this section could be entirely nullified.

Section 580b of the Code of Civil Procedure prohibits a deficiency judgment where a mortgage or deed of trust is given to secure the unpaid portion of the purchase price of real property. If the creditor be permitted to waive his security and sue on his note, he could obtain a personal judgment for the entire unpaid portion of the purchase price which is contrary to the clear intent of the section.

The amendment to section 726 of the Code of Civil Procedure sought to further insure to the debtors the protection afforded them by the two sections just considered.

[17, 18] Fourth: A guarantor should not be deprived of the security given for the principal debt without his consent when the creditor still seeks to hold him to his contract.

"The guarantor of an obligation is entitled to certain rights of subrogation as against the principal debtor. He may enforce any remedy which the creditor has against the principal debtor." 13 Cal.Jur. 121. A guarantor is entitled to be reimbursed by receiving the benefit of any security the creditor held against the debtor. Clark v. Chapman, 98 Cal. 110, 32 P. 812, 33 P. 750. The creditor should not be permitted to urge a secret waiver of the security for the principal debt and still attempt to hold the guarantor to the entire obligation of his contract.

[19] Plaintiff seeks to escape the effect of our last conclusion by urging that the security was without value to the guarantors as the secured debts of the Sides brothers exceeded the value of the security.

A sufficient answer to this argument is that the evidence of the value of the security is conflicting. The jury could have concluded that the value of the security exceeded the total indebtedness by several thousand dollars.

Douglas R. Sides testified that the total indebtedness was twenty-seven or twenty-eight thousand dollars. As there is no evidence of the exact amount of this indebtedness we will assume the correctness of the first figure. This should be reduced by the twenty-nine hundred dollar discount given by the Coast Bank. It is admitted that the Sides brothers should have had and did actually receive the benefit of this discount.

Two witnesses for plaintiff testified that the security was worth $24,000. Opposed to this is the testimony of Douglas R. Sides that the property was worth $36,000. Plaintiff urges that this testimony was incompetent and should not be considered as Douglas R. Sides was not an owner of the property between February 6, 1934, and March, 1936.

[20] When this evidence was given by Sides it had not been developed that he had deeded his interest in the property to his brother. Under that state of the record, as he then appeared to be an owner, he was a competent witness as to value. No motion to strike his evidence of value was made. That evidence remained in the record for consideration. By the foregoing statements we do not wish to be understood as intimating that Douglas R. Sides ever divested himself of all his interest in the property or that he was not an equitable if not a legal owner during the time his brother held the record title.

In addition to the testimony of Douglas R. Sides as to the value of the property there is in evidence the application to the Land Bank for the loan in which the property was appraised at $33,050. This exhibit was introduced by plaintiff and, as we have observed, bears a certificate signed by C. W. Christensen, an officer of The Bank, and at the same time an agent of the Land Bank. It was sent to the Land Bank by Christensen for the purpose of getting the Land Bank to lend $20,000 on the property in question. There is undisputed evidence in the record that the Land Bank would not have loaned in excess of $18,000 on property only worth $24,000. As the totals of the loans through the Land Bank obtained under this application amounted to $20,000 it is evident that reliance was placed on the $33,050 appraisement in the application. The Bank received all of the money obtained on this loan, less the cost of making it. Under these circumstances this appraisement produced and introduced in evidence by plaintiff should not be lightly brushed aside.

[21] Plaintiff urges that the trial judge committed prejudicial error in refusing him the right to introduce evidence showing that The Bank had always carried the note in suit here in its unsecured files and had regarded and treated it as unsecured. We find that this fact and the attitude of The Bank and its officers concerning this note was fully brought out in the cross-examination of Dominic Bianco, an officer of The Bank and a witness for plaintiff. This evidence was not contradicted. The excluded evidence was merely cumulative. As the facts which plaintiff desired to establish by the excluded evidence were all proved by the witness Bianco and were before the jury without contradiction, we cannot regard the error in the questioned rulings, if any, as prejudicial.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

31 Cal.App.2d 419

GOLDEN ARROW MINES, Inc., et al. v. HICKMAN et al.

Civ. 6095.

District Court of Appeal, Third District, California.

March 10, 1939.

1. Appeal and error ⚷10

An appeal, rather than prohibition or mandamus, was proper method of attacking an ex parte order terminating proceedings taken to perfect an appeal from judgment; such order being a special order after judgment.

2. Appeal and error ⚷607(1)

Where appellants filed notice of appeal and request for transcript within ten days from receiving notice of order denying their motion for new trial, a demand for a transcript was timely.

3. Appeal and error ⚷607(1)

Where appeal was taken on judgment roll alone, failure to comply with statute relative to alternative method of preparing transcripts was not error. Code Civ.Proc. § 953a.

4. Appeal and error ⚷607(1)

Where appeal was upon judgment roll alone, statute relating to preparation of a bill of exceptions was not applicable. Code Civ.Proc. § 650.

5. Appeal and error ⚷371

Where appeal was upon judgment roll alone, failure to comply with statute relating to the filing of an undertaking for costs of preparing reporter's transcript was not error. Code Civ.Proc. §§ 953a, 953b.

6. Appeal and error ⚷798

Where notice of appeal was apparently filed within time prescribed by law and no notice or opportunity was given appellants to answer a notice of motion to dismiss proceedings to perfect the appeal, an ex parte order terminating such proceedings was an abuse of discretion.

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Proceeding by the Golden Arrow Mines, Incorporated, formerly Sierra Consolidated Mining Company, a corporation, and another, against George W. Hickman and another. From an ex parte order terminating proceedings taken to perfect an appeal from a judgment for plaintiffs, defendants appeal.

Order reversed and set aside.

Breed, Burpee & Robinson and David K. Gilmore, all of Oakland, for appellants.

Charles H. Seccombe of Oakland, A. J. Just, of Downieville, and J. H. Strauss, for respondents.

PER CURIAM.

This is an appeal from an ex parte order terminating proceedings taken to perfect an appeal from a judgment.

We have before us a clerk's transcript on appeal, which contains a notice of appeal filed July 7, 1937, from a judgment rendered on June 21, 1937, in favor of Golden Arrow Mines, Incorporated, et al., against defendants, the appellants here.

The notice of appeal, among other things, contained a request that a transcript of the testimony be prepared and stated that arrangements had been made personally with the court reporter for her compensation in preparing the record. An affidavit from the court reporter, is contained in the transcript denying that any such arrangement had ever been made. On September 7, 1937, a motion to terminate the proceedings to perfect the appeal was filed in the trial court based upon the grounds, first, that appellants had failed to order a transcript within the time or manner required by law. Secondly, that appellants had failed to comply with section 953a of the Code of Civil Procedure relating to the taking of an appeal in lieu of a bill of exceptions. Thirdly, that appellants had failed to comply with section 650 of the Code of Civil Procedure in that no bill of exceptions had been filed or served within the time required by law. Fourthly, that appellants had failed to comply with section 953b of the Code of Civil Procedure, pertaining to an undertaking for costs of the transcript, and fifthly, that appellants had failed to file any notice of appeal within the time required by law. This motion is supported by an affidavit reciting in general terms that defendants had failed to comply with the various provisions of the code, and had made no demand for a transcript of the record.

Upon this notice of motion to terminate the proceedings, and the affidavit, and also upon the proceedings, records and files in the cause, together with the minutes of the court and the notes of the court reporter, the motion was granted, ex parte and the proceedings were dismissed, and on September 15, 1937, this appeal from that order was taken. Due to the fact that neither counsel nor the court have been able to find authorities bearing upon this question, we have been compelled to view this matter largely as a proceeding of first impression.

[1] In answer first, to the suggestion made by respondent that appellants have mistaken their remedy and should have proceeded by prohibition or mandamus: Inasmuch as prohibition lies only to prevent an act that is threatened to be done, that remedy would not apply here. As to mandamus, that remedy would not be effective, as an order was in fact made. An appeal, therefore, was the proper method of attacking an order terminating the proceedings such as these, it being a special order after judgment. Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922.

[2-5] In answer to the several points made by respondents in their motion to dismiss, their first ground was that appellants had failed to make demand for a transcript within the time and manner provided by law. The record discloses that on July 16, 1937, appellants received notice of the order denying their motion for a new trial. Within ten days, and on July 24th, appellants filed their notice of appeal and request for transcript. The second ground urged in the motion was that appellants had failed to comply with the provisions of section 953a of the Code of Civil Procedure, relative to the alternative method of preparing transcripts. Inasmuch as this appeal has been taken on the judgment roll alone this section has no application. The third ground is that appellants had failed to comply with the provisions of section 650 of the Code of Civil Procedure relating to preparation of a bill of exceptions. As pointed out above the appeal was not upon a bill of exceptions but was upon the judgment roll alone, and therefore that section is not applicable. In the fourth ground it was claimed appellants have failed to comply with the provisions of section 953b of the Code of Civil Procedure relating to an undertaking for costs of preparing reporter's transcript. Inasmuch as the method of appeal as prescribed by sections 953a and 953b is not the method chosen for appeal that objection is not applicable. The fifth ground, that appellants have failed to file notice of appeal is answered by the fact that the appeal was filed within ten days of notice denying the motion.

[6] In view of the fact that the notice of appeal was apparently filed within the time prescribed by law and that no notice or opportunity was given appellants to answer the notice to dismiss we think the dismissal by the trial judge was an abuse of discretion, and the order should be reversed and set aside. It is so ordered.

31 Cal.App.2d 384

SPENCER v. CHEROSKE et al.

Civ. 6043.

District Court of Appeal, Third District, California.

March 9, 1939.

1. **Quieting title ⇐10(1)**

In action to quiet title, plaintiff must rely on the strength of her title and not on weakness of defendant's.

2. **Public lands ⇐117**

A patent from the United States cannot be collaterally attacked.

3. **Public lands ⇐46**

Alleged successor in interest of teamster in Florida war to whom military land bounty warrant was issued was not entitled, as against holders under patent from United States, to have quieted in her title to lands which had never been officially surveyed, or entered or filed upon, or ever opened by United States for sale or entry, or classified for sale at minimum or lower graduated prices, or approved by General Land Office for location and for which successor had not returned required land bounty certificate. Act March 3, 1855, § 5, 10 Stat. 702; 43 U.S.C.A. § 826.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action to quiet title by Susie F. Spencer against Anton F. Cheroske and others.

Judgment for defendants, and plaintiff appeals.

Affirmed.

Manuel Ruiz, Jr., of Los Angeles, and Lawrence Hall, of Long Beach, for appellant.

Keogh, Cate & Colver and Alfred E. Cate, all of Los Angeles, for respondents.

PER CURIAM.

Appellant, as plaintiff, brought an action to quiet title to certain lots situated within the corporate limits of Long Beach, California. Defendants answered denying the claim of appellant, and claimed title thereto in themselves. After a trial upon these issues, findings of fact and conclusions of law were filed, and judgment entered in accordance therewith in favor of defendants.

Plaintiff attempted to file upon certain lands including the property of defendants, by virtue of a military land bounty warrant issued to John Spencer, a teamster in the U. S. Quartermaster's Department for service in the Florida war, an Indian outbreak. Plaintiff claims such right as an heir of and a successor to the interest of John Spencer, now deceased.

This particular warrant was issued by the Department of Interior, Commissioner of Pensions, on the 12th day of December, 1860, under an Act of Congress of March 3, 1855, 10 Stat. 701 et seq. entitled: "An Act in Addition to certain Acts granting Bounty lands to certain Officers and Soldiers who have been engaged in the Military Service of the United States."

The particular warrant before us further recites: "John Spencer * * * is entitled to locate one hundred and sixty acres at any Land Office of the United States, in one body, and in conformity to the legal subdivisions of the public lands, upon any of the public lands subject to sale at either the minimum or lower graduated prices."

The act under which the warrant was issued (U. S. Stats., vol. 1, p. 701, 33 Congress Sess. II, ch. 27, March 3, 1855) provides in effect that each of the surviving commissioned and non-commissioned officers, musicians and privates who were regularly mustered into the service of the United States in any of the wars in which the country had been engaged since seventeen hundred and ninety, shall be entitled to receive a certificate or warrant from the Department of Interior for one hundred and sixty acres of land.

The act then contained a proviso making its provisions applicable to wagon masters and teamsters, and also providing in case of death of a person who, if living, would be entitled to such certificate or warrant, that his surviving widow or children would be entitled to such warrant, and further providing for the assignment thereof.

"Sec. 5. And be it further enacted, That no warrant issued under the provisions of the act shall be located in any public lands, except such as shall at the time be subject to sale at either the minimum or lower graduated prices."

Section 2437 of the Revised Statutes of the United States, 43 U.S.C.A. § 826, provides that it is the duty of the Commissioner of the General Land Office, under such regulations as may be prescribed by the Secretary of the Interior, to locate the warrant in such land district as the holder of the warrant may designate, and upon good farming land, open for entry.

An examination of the law and the facts fully sustain the judgment of the trial court. Plaintiff failed to produce evidence to support her contentions. She failed to show that an actual entry or filing was ever made by her upon this warrant in the General Land Office, or in the local land office for the Southern District of California, wherein the land in question was situated. It is true the warrant was delivered to the General Land Office in Washington, but the same was returned without registration. It also appeared that no such subdivision as section I of township 5 S. range 13 W. San Bernardino Base and Meridian was found or any such official survey made by the United States government, nor does it appear that the land sought to be entered or filed upon was, at the date of the application, nor ever was, public land of the United States, open for sale or entry, or that the same had ever been classified for sale at the minimum or lower graduated prices, or at any price, or that the same was farm land, or that appellant had obtained the approval of the General Land Office for the location or had returned the land bounty certificate as provided by law.

These omissions are alone sufficient to justify the judgment of the trial court. Furthermore defendants established that the land was highly improved city property for which respondents claim title through an unbroken chain of title arising out of a confirmed Mexican land grant, upon which the United States government issued a patent to respondent's predecessors.

[1-3] Regardless of any weakness in the title of defendants, although we can see none, plaintiff must rely upon the strength of her title and not upon the weakness of defendants, so we need not consider further the title of defendants. We find respondents in possession under a patent from the United States, which cannot be collaterally attacked.

Should the judgment of the trial court require the citation of authority for support, we find in Putnam v. Ickes, 64 App. D.C. 339, 78 F.2d 223; Id., 296 U.S. 612, 56 S.Ct. 132, 80 L.Ed. 434; and in Hogan v. U. S. et al., 9 Cir., 72 F.2d 799, an answer to many of the contentions of the plaintiff here urged.

The judgment is affirmed.

PEOPLE v. MONTGOMERY.*

Cr. 1660.

District Court of Appeal, Third District, California.

March 13, 1939.

Rehearing Granted March 27, 1939.

1. Criminal law ⟹108(1)

The courts of county other than that in which public offense is committed have no jurisdiction to inquire into the case unless authorized by law. Pen.Code, § 777.

2. Criminal law ⟹335

The venue of crime must be proved by prosecution.

3. Criminal law ⟹772(4)

Facts relating to venue of which court could take judicial notice could be placed before jury only through appropriate instructions of court. Code Civ.Proc. § 2102.

4. Criminal law ⟹564(1)

Facts relating to venue of which court could take judicial notice were not placed before jury in absence of any instructions bearing on that matter, and where facts necessary to establish venue were not otherwise proved, court was without jurisdiction of prosecution for theft. Pen.Code, §§ 484, 777; Code Civ.Proc. § 2102.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

C. C. Montgomery was convicted for stealing a steer, and he appeals.

Judgment reversed, and case remanded.

Charles Kasch and Wayne P. Burke, both of Ukiah, and John B. Harman, of Fort Bragg, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

Defendant in this case was convicted of a felony, to-wit: a violation of section 484 of the Penal Code, in that, in the county of Mendocino, he feloniously stole, led and drove away a steer which was the personal property of Caspar Lumber Company, a corporation. It was the contention of the defendant at the trial that he had permission from the company to take and sell the steer. Several errors are relied upon for a reversal, but it is only necessary for us to discuss one question—the jurisdiction of the court.

The steer was taken from the slaughterhouse of the Caspar Lumber Company, but there is no direct proof in the record as to the county in which that slaughterhouse is situated. Appellant therefore contends that there was a failure of proof of venue in the case. The answer of the attorney-general to this contention appears in his brief, as follows: "The portions of testimony above set forth show that the steer with which the defendant was charged with stealing was taken from the slaughter-house of the Caspar Lumber Company; that the slaughter-house was one-quarter of a mile from Caspar; that Caspar was within six miles of Fort Bragg, an incorporated city, of which the court must take judicial notice as hereinabove stated. Therefore, it definitely appears that the slaughter-house from which the steer was taken was approximately six and one-quarter miles from the City of Fort Bragg, and the court will take judicial notice of the fact that any point within a distance of forty miles of Fort Bragg would be within the County of Mendocino."

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*Subsequent opinion 89 P.2d 184.

The question therefore presented is whether or not those facts of which the court can take judicial notice are thereby placed before the jury without any instructions whatever in respect to them.

[1] The rule of the common law that crimes are, although local, cognizable and punishable exclusively in the jurisdiction where committed, has been adopted under the provisions of section 777 of the Penal Code, which reads in part as follows: "Except as herein otherwise provided, the jurisdiction of every public offense is in the county where it is committed." It follows that the courts of another county have no jurisdiction to inquire into the case unless authorized by law.

[2] It is a familiar rule of criminal law that the venue of the crime must, like any other fact in the case, be proved by the prosecution. People v. Parks, 44 Cal. 105; People v. Roche, 48 Cal. 382; People v. Bevans, 52 Cal. 470; People v. Murphy, 51 Cal. 376; People v. Aleck, 61 Cal. 137, 138.

[3, 4] Conceding that the court could take judicial notice of the facts detailed by the attorney-general above, we are of the opinion that the only manner in which those facts could be placed before the jury would be through appropriate instructions of the court. This situation is expressly provided for by section 2102 of the Code of Civil Procedure, as follows: "Whenever the knowledge of the court is, by this Code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it." The proper procedure to follow under such circumstances is set forth in People v. Mayes, 113 Cal. 618–624, 45 P. 860, 862, in this language: "A witness on behalf of the defendant testified that on the night when the animal was taken he met Ruiz, one of the witnesses for the prosecution, driving a dark-colored animal; that the moon was up and shining, and the night was pretty light. On being asked what time of the night it was, he said that he was unable to tell, but thought that it was 'along about ten o'clock, somewheres about there, I suppose,' and at another time he said that it was 'betwixt nine and ten, I suppose.' The court instructed the jury, as a matter of judicial knowledge, that the moon on that night rose at 10:57 p. m. It does not appear that any evidence upon that point had been offered at the trial, nor was such evidence necessary. People v. Chee Kee, 61 Cal. 404. Section 1875, subd. 8, Code Civ.Proc., declares that courts take judicial knowledge of 'the laws of nature, the measure of time and the geographical conditions and political history of the world,' and that 'the court may resort for its aid to appropriate books or documents of reference'; and section 2102, Code Civ.Proc., declares, 'Whenever the knowledge of the court is by this Code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to adopt it.' 'Judicial notice will be taken of the time the moon rises and sets on the several days of the year, as well as of the succession of the seasons, the difference of time in different longitudes, and the constant and invariable course of nature.' Case v. Perew, 46 Hun [N.Y.] 57. See, also, State v. Morris, 47 Conn. 179; Munshower v. State, 55 Md. 11 [39 Am.Rep. 414]."

This court referred to the same rule in Fouch v. Werner, 99 Cal.App. 557–562, 279 P. 183, 185, where we said: "It is true that the court will take judicial notice of the time when the sun rises and sets [citing authorities], and may so instruct the jury. (Section 2102, Code Civ.Proc.)" It thus appears that though the trial judge here might have (through judicial notice and by reference to a map of California), known certain facts which would have justified a finding on his part that the crime was committed in Mendocino county, the law did not impute such knowledge to the jury, and they could only acquire it by means of instructions, as required by the code section quoted above. "Judicial notice" means notice to a judicial officer, but not to a jury. In the instant case no instructions whatever were given to the jury bearing on this matter, and necessary facts to establish venue were not proven.

It follows that upon the record before us the court had no jurisdiction to try the case.

It is therefore ordered that the judgment be reversed, and the case remanded for a new trial, or such other proceedings as may be proper in the premises.

We concur: PULLEN, P. J.; THOMPSON, J.

On Petition for Rehearing.

PER CURIAM.

The petition for rehearing is granted, and the cause ordered resubmitted as of this date upon the briefs on file.

STACEY et al. v. HAYES.

Civ. 2238.

District Court of Appeal, Fourth District, California.

March 10, 1939.

Rehearing Denied April 5, 1939.

Hearing Denied by Supreme Court May 8, 1939.

1. Appeal and error ⚷516

The trial judge's knowledge concerning place of automobile collision involved in suit constituted evidence which was not in the record before reviewing court.

2. Appeal and error ⚷907(4)

On appeal, reviewing court was required to presume that missing evidence consisting of trial judge's knowledge of place of accident supported findings and judgment in automobile collision case.

3. Automobiles ⚷181(1)

An automobile guest may not recover for injuries from host unless host was guilty of willful misconduct. St.1935, p. 154, § 403.

4. Automobiles ⚷181(1)

"Willful misconduct" within automobile guest statute is established by showing that defendant intentionally did something in operation of motor vehicle which he should not have done, or intentionally failed to do something he should have done under circumstances disclosing express or implied knowledge that injury to guest would be a probable result. St.1935, p. 154, § 403.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

5. Automobiles ⚷181(7)

Speed of itself is not "willful misconduct" within automobile guest statute. St. 1935, p. 154, § 403.

6. Evidence ⚷19

It is common knowledge that a reasonably competent driver should have been able to negotiate descending curve on paved dry roadway of ample width at 35 miles an hour by merely exercising ordinary care.

7. Evidence ⚷19

It is common knowledge that an automobile being driven around curve and down gentle grade at 35 miles an hour may be swerved slightly from its direct path in safety.

8. Automobiles ⚷181(1, 7)

Driving automobile 21 inches to left of center line of highway around curve and down gentle grade at 35 miles an hour, and failure to observe carefully roadway ahead, did not constitute "willful misconduct" within automobile guest statute so as to render host liable to guest for injuries sustained in collision with another automobile also crowding center line. St.1935, p. 154, § 403; p. 177; §§ 511, subd. 3, 525.

9. Automobiles ⚷181(1)

The existence or absence of willful misconduct within automobile guest statute must depend upon facts of each case. St. 1935, p. 154, § 403.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Gladys Stacey and another against Emmett Hayes to recover for injuries sustained in a collision by the named plaintiff while riding as a guest of the defendant in his automobile. Judgment for plaintiffs, and the defendant appeals.

Judgment reversed.

Borton, Petrini, Conron & Borton, of Bakersfield, for appellant.

Calvin H. Conron, Jr., and J. W. Heard, Jr., both of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiffs in the total sum of $2,500 damages suffered as a result of injuries to Mrs. Stacey while riding as a guest of defendant in his automobile. Plaintiffs are husband and wife.

Shortly after 7 o'clock on the evening of November 26, 1936, Mrs. Stacey and defendant started on a short ride. They passed over a bridge on Oak street, west of the west city limits of Bakersfield, went on a short distance and turned around for the return trip to Bakersfield. Shortly after leaving a ramp which descended from the east end of this bridge, defendant's car came into collision with another car and Mrs. Stacey suffered the injuries complained of.

The main part of the Oak street bridge extends from east to west with the easterly portion curving to the south. On leaving the bridge the roadway continues over a ramp which also curves to the south and descends to the level of the surrounding country. The curve of the roadway on the ramp is described as rather sharp.

The roadway on the bridge is paved and is twenty-four feet wide. It narrows to twenty-two feet on the ramp, then widens out to about thirty feet at the place of the accident. There are smooth dirt shoulders on both sides of the hard surfaced portion of the roadway.

[1, 2] The case was tried without a jury. The trial judge was very familiar with the place of the accident and during the trial announced that this knowledge should be substituted for an exact description of it by witnesses. Counsel concurred in this suggestion. While this method of procedure saves time in the trial court, it leaves an appellate court entirely in the dark as to what may be important features of the case as its members have no way of knowing what this knowledge might be as it is confined in the mind of the trial judge. That knowledge is evidence which is not in the record. Ethel D. Co. v. Ind. Acc. Comm., 219 Cal. 699, 28 P.2d 919. On appeal it must be presumed that such missing evidence supports the findings and judgment. Haase v. Central Union High School Dist., 27 Cal.App.2d 319, 80 P.2d 1044.

[3] Of course, this being a guest case, defendant must have been guilty of wilful misconduct in order to permit a recovery by plaintiffs. Sec. 403, Vehicle Code, St. 1935, p. 154.

The only question we need consider is whether or not the finding of fact on this issue supports the conclusion of wilful misconduct on defendant's part. That finding is as follows:

"It is true that at said time and place said defendant, Emmett Hayes, wilfully drove, operated and controlled his said automobile in an improper manner and with total disregard of the rights and safety of plaintiff Gladys Stacey and others, in the form and manner as follows: that said defendant drove said vehicle twenty-one inches over the center line of said highway and into the path of said oncoming vehicle; that in conducting such maneuver said defendant operated said vehicle around a curve at the southerly end of said Oak Street Bridge, on said highway, at a rate of speed between thirty and thirty-five miles per hour; that said defendant knew and realized the speed and location of said vehicle at the time said (vehicle) was traversing from the southerly ramp of said bridge and in the face of said approaching vehicle; that said plaintiff, during all of the time said vehicle was traversing the southerly ramp of said bridge, warned the defendant that the vehicle was being operated on the wrong side of the highway and warned the defendant that there was an approaching car in the immediate vicinity of said defendant's vehicle; that plaintiff Gladys Stacey protested against the conduct of the defendant before-mentioned; that defendant, in spite of the protest of said plaintiff, and knowing the dangerous position and speed of said vehicle, failed to change the course of the vehicle so as to cause it to return to its proper side of the highway, and failed to lower the rate of speed at which it was being driven."

"That such conduct upon the part of the defendant at the time and place of said accident did constitute wilful misconduct; * * *"

The approved definition of wilful misconduct is found in Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, 197, where the Supreme Court said:

"The phrase 'willful misconduct,' as employed in our so-called guest statute, has been variously defined in the many cases that have had occasion to consider the same. We shall not attempt to reconcile the several definitions and applications given to this phrase. It is satisfactorily defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, 990, wherein it is declared that '"willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.'

"The case of Howard v. Howard, 132 Cal.App. 124, 128, 22 P.2d 279, 281, after defining gross negligence as set forth in Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, and what is meant by willful misconduct as set forth in Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, declares that: '"The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."'"

[4] In order to support the conclusion of wilful misconduct the quoted finding must affirmatively show that defendant intentionally did something in the operation of his motor vehicle which he should not have done, or intentionally failed to do something he should have done, under circumstances disclosing either an express knowledge on his part or a knowledge to be implied from the facts and imputed to him under the surrounding circumstances, that injury to his guest would be a probable (not a possible) result. Though there need be no actual conscious intent to injure the guest, the act done or the omission made must be intentional. The probability of injury to the guest from such act or omission must have been an apparent consequence to a man of ordinary prudence and intelligence.

In analyzing the finding it is apparent that the trial court expressly relied on two acts of defendant upon which to predicate wilful misconduct, namely, speed of between thirty and thirty-five miles an hour, and, driving with the left side of his car twenty-one inches to his left of the center line of the highway. The finding also justifies the inference that defendant was not carefully observing the roadway ahead of him.

The evidence, and lack of evidence, before us support the finding of speed and the driving of the car on the left hand side of the road, both of which acts violate the statutes. Sec. 511, subd. 3, and sec. 525, Vehicle Code. Inattention to the roadway ahead may be negligence. It goes without saying, that defendant was guilty of negligence. He might even have been guilty of gross negligence.

[5, 6] It is established that speed, of itself alone, is not wilful misconduct. McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189; Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292; Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243.

While the speed of thirty-five miles an hour was a violation of law, if the driver's view on the curve was obstructed (which fact we must assume, Haase v. Central Union High School Dist., supra), still under all the circumstances here existing it was not of itself wilful misconduct. The roadway was paved, dry, and of ample width. The descending grade was not steep. While the curve to the right was sharp, the lights of the approaching car were visible, according to Mrs. Stacey's testimony. It is common knowledge that under those circumstances a reasonably competent driver should have been able to negotiate the descending curve at that speed by merely exercising ordinary care. There is nothing in that speed, under those circumstances, that would make injury to a guest a probable result.

The trial court found that defendant's car was twenty-one inches over on the wrong side of the road. The left front corners of the two cars came into collision. The broken glass from the headlights was in about the center of the road. At the point of collision there was about ten feet of paved highway to the right of defendant's car and about the same width of pavement to the right of the driver of the other car. It is evident that had either driver swerved his car slightly to his right there would have been no collision.

[7, 8] We think speed had little to do with the accident for it is common knowledge that an automobile being driven around a curve and down a gentle grade at thirty-five miles an hour may be swerved slightly from its direct path in safety. It is apparent that the proximate cause of the accident was the position of defendant's car over the center line of the road and his inattention to an approaching vehicle, together with the fact that the driver of the other car was equally inattentive and was also crowding, if not actually upon, the center line. That driver was also violating section 525 of the Vehicle Code. These facts do not establish the necessary probability of the accident and the consequent probability of injury to the guest. Ordinary care on the part of either driver would have avoided the collision.

In the case of McLeod v. Dutton, supra, the defendant drove at a high rate of speed on his left hand side of the road when another car was also on that side of the road in front of him. Dutton in that case, as did Hayes in the instant case, testified that he was not conscious of the automobile in front of him in time to avoid the collision. In commenting on this situation in McLeod v. Dutton, supra, the court said:

"In the instant case if it be assumed that the driver of the Cord car intentionally raced it, that he intentionally ignored the 'Slow' sign, and that he did such acts in the dark on a foggy night, those facts, standing alone, did not constitute willful misconduct. The record must further show that such acts were done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result. The latter factors are wholly absent in the instant case.

"The fact, if it be a fact, that David C. Dutton, Jr., saw the Dodge car when it was three-tenths of a mile away, does not change the result. There is nothing in the evidence disclosing that when he attempted to pass the Packard car he knew, or had any reason to know, that the Dodge car was a short distance ahead on its left-hand side of the road and in a position practically broadside to the course of travel.

"Whatever might be the force and effect, in an action based on simple negligence or gross negligence, of Barbara's caution about fast driving and to slow down, it is clear from what has been said that such evidence did not prove nor tend to prove knowledge of the presence of the Dodge car nor its position." [13 Cal.App.2d 545, 57 P.2d 191.]

It is evident that the quoted finding simply establishes the fact that defendant violated his statutory duties in driving his car. The evidence does not disclose that he had any knowledge of the approaching car or of its position on the road. We believe that what was said in Howard v. Howard, 132 Cal. App. 124, 22 P.2d 279, 281, is appropriate. In that case it was said:

"The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. * * * If he may be said to have disregarded the possible consequences of his act, such disregard was due to carelessness rather than to wantonness and recklessness, and was undoubtedly based upon his belief that no injury was probable. While he may be said to have been reckless in the sense of being careless, that is only negligence and is not within the statute."

[9] There is little to be gained by quoting further from the numerous authorities in which wilful misconduct has been discussed. The facts of no two cases are entirely similar and the existence or absence of wilful misconduct must depend upon the facts of each case. However, we cite the following cases that have assisted us in forming our opinion that the finding here does not support the conclusion that defendant was guilty of wilful misconduct. Meek v. Fowler, supra; Porter v. Hofman, Cal. Sup., 85 P.2d 447; Sparrer v. Kersgard, Cal.Sup., 85 P.2d 449; Howard v. Howard, supra; Lennon v. Woodbury, supra; McLeod v. Dutton, supra; Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948; Del Bosque v. Kakoo Singh, 19 Cal.App.2d 487, 65 P.2d 951.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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31 Cal.App.2d 362

PEOPLE v. HATCHER.

Cr. 1665.

District Court of Appeal, Third District, California.

March 7, 1939.

Criminal law 🔑1130(4)

Where no brief was filed in appellant's behalf and no appearance was made for him when case was called for hearing on oral argument, judgment of conviction must be affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Earl Hatcher was convicted of incest, and he appeals.

Affirmed.

Roger C. Donahue, of Madera, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Madera county of the crime of incest, a felony.

The transcript on appeal was filed in this court December 30, 1938. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on March 7, 1939. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment is affirmed.

31 Cal.App.2d 412

LIVEZEY v. ROGERS.

Civ. 11697.

District Court of Appeal, Second District, Division 1, California.

March 10, 1939.

Hearing Denied by Supreme Court May 8, 1939.

1. Automobiles ⟹175(1)

Whether a given vehicle is an authorized emergency vehicle exempt from certain provisions of vehicle code must be determined by the type of ownership, whether public or private, and the use to which such vehicle is being devoted at the particular time in question. St.1935, pp. 96, 180, 187, §§ 44, 517, 554.

2. Automobiles ⟹175(1)

If motor vehicle is privately owned, in order to be classified as an "emergency vehicle" so as to authorize exemption from certain provisions of vehicle code, it must be used in enforcing the provisions of the vehicle code. St.1935, pp. 96, 180, 187, §§ 44, 517, 554.

3. Automobiles ⟹175(1)

If vehicle is publicly owned in order to be classed as an "emergency vehicle," and therefore exempt from certain provisions of the vehicle code, it must be used for the purpose of enforcing the provisions of the vehicle code, or for traffic patrol duty or in response to emergency calls. St.1935, pp. 96, 180, 187, §§ 44, 517, 554.

4. Automobiles ⟹245(36, 82)

Where motorcycle officer suing for personal injuries claimed exemption from certain provisions of vehicle code on ground that he was making an emergency call on an "ambulance follow-up" in addition to deciding whether officer was making an emergency call, the question of ownership of motorcycle as well as determination whether the officer's motorcycle was an authorized emergency vehicle was required to be submitted to jury. St.1935, pp. 96, 180, 187, §§ 44, 517, 554.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Personal injury action by Albert Livezey against Marie Snow Rogers. Judgment for plaintiff, and defendant appeals.

Reversed.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel), for appellant.

Glenn A. Lane, of Los Angeles (R. R. Sleeper, of Los Angeles, of counsel), for respondent.

YORK, Presiding Justice.

Respondent was awarded a verdict by the jury in the sum of $6,214.09 for damages for injuries sustained by him in a collision between his motorcycle and the automobile of appellant at the intersection of Second street and Commonwealth avenue in the city of Alhambra. This appeal is prosecuted from the judgment entered pursuant to such verdict, appellant's motions for nonsuit and new trial having been denied by the trial court.

Appellant here urges that the court erred in refusing to submit to the jury the question of the ownership of respondent's motorcycle at the time the accident occurred; that the court erred in instructing the jury as a matter of law that respondent was operating an authorized emergency vehicle at the time of the collision; that the court also erred in instructing the jury on the question of an emergency call and in refusing to instruct upon the question of an emergency vehicle, and finally, that the court erred in unduly restricting the time for argument of the cause to the jury.

The record herein reveals that respondent was a motorcycle officer employed by the city of Alhambra, and that on or about three o'clock in the afternoon of June 20, 1936, he was on duty at the Alhambra Police Station at which time and place he received an order from his superior officer to make what is termed an "ambulance follow-up" to Curtiss and Hellman streets in said city. Immediately thereafter, respondent started his motorcycle, opened the siren and proceeded south on Second street in front of a police car which was also going to the "ambulance follow-up". Respondent crossed Main street which is about 150 feet south of his starting point and continued for about 1200 feet to the intersection of Second street and Commonwealth avenue, traveling at a speed of from 40 to 45 miles per hour. As respondent approached the intersection in question, he saw appellant's car on Commonwealth about 150 feet west of Second street, but he did not see it again until the instant of impact in the center of the southwest corner of the intersection. Respondent did not make the boulevard stop before entering Commonwealth avenue, but the police car following him stopped. Appellant was traveling easterly on Commonwealth at a speed of from 30 to 35 miles per hour and saw respondent's motorcycle when it was 40 to 50 feet north of the north curb of Commonwealth avenue as it traveled south on Second street, her automobile at that time being on the west curb line of Commonwealth just entering Second street. Appellant did not hear respondent's siren until she entered the intersection, and she applied her brakes just before the impact. Commonwealth is a boulevard and boulevard stops are posted on Second street at said intersection.

Appellant contends that section 517, as it read at the time of the accident, St.1935, p. 180, it having since been repealed (Stats. 1937, p. 168), and section 554 of the Vehicle Code, St.1935, p. 187, which provide for the exemptions allowed an authorized emergency vehicle and enumerate the rights and duties incident to its use, must be construed in the light of section 44 of said code. In other words, before the operator of an authorized emergency vehicle is entitled to disregard certain provisions of the Vehicle Code by virtue of the exemptions granted by said sections 517 and 554, and before other persons using the highways must yield the privileges conferred by these sections to an emergency vehicle, it must first be shown that the vehicle claiming such rights and privileges is in fact an authorized emergency vehicle within the definition of such under said section 44.

It is undisputed that at the time and place in question respondent drove his motorcycle through a boulevard stop duly posted by a boulevard stop sign erected by the city of Alhambra pursuant to an authorizing ordinance, and that appellant was operating her automobile upon a through boulevard designated as such by a city ordinance of the city of Alhambra and was traveling within the speed limit provided by law under such a situation. At the trial of the action it was the contention of appellant that respondent at the time the accident occurred was not exempted from the obligations imposed by the Vehicle Code, and that he was under a duty to exercise a boulevard stop at the intersection where the accident occurred before preceeding to cross the boulevard. It is here contended that the respondent neither established as a matter of law nor of fact his right to claim the exemption from the obligations of the Vehicle Code permitted under certain specified circumstances to the operators of authorized emergency vehicles.

Section 44 of the Vehicle Code defines an authorized emergency vehicle as follows:

"(a) A vehicle publicly owned and operated by a police or fire department or traffic law enforcement officer in responding to emergency calls or in traffic patrol duty.

"(b) A motorcycle, either publicly or privately owned, operated by a police or traffic law enforcement officer in enforcing the provisions of this code. * * *"

Section 517 of the Vehicle Code, as it read at the time the accident herein occurred, provided as follows (Stats.1935, p. 180):

"(a) The speed laws shall not apply to the driver of an authorized emergency vehicle when driving in response to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, nor to a licensed physician when driving in response to emergency calls.

"(b) The provisions of this section shall not relieve any driver of an authorized emergency vehicle or any licensed physician from the duty to drive with due regard for the safety of all persons using the highway nor shall the provisions of this section protect any such driver or any licensed physician from the consequences of an arbitrary exercise of the privileges declared in this section."

Section 554 of the Vehicle Code provides:

"Upon the immediate approach of an authorized emergency vehicle giving audible signal by siren:

"(1) The driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right hand edge or curb of the highway clear of any intersection and thereupon stop and remain in such position until such authorized emergency vehicle has passed, except when otherwise directed by a police or traffic officer. * * *"

It is contended by appellant that the mere fact that respondent at the time of the accident was going to an "ambulance follow-up" does not bring him within the purview of section 44, supra, making his vehicle an authorized emergency vehicle; and that because of the failure of respondent to establish the precise nature of the mission in question, the jury had no evidence before it upon which to determine whether or not the vehicle was an authorized emergency vehicle. Consequently, it was prejudicial error for the trial court to instruct the jury as a matter of law that respondent was operating an authorized emergency vehicle.

Respondent testified that an ambulance follow-up call is "where the Alhambra Emergency Ambulance has been called out on some kind of an emergency case"; and that when such a call is received at the police station, an officer must go to the scene of the accident as quickly as possible, either picking up another officer on the way or a motorcycle officer as soon as one is found available. With reference to this question, the chief of police testified: "On all ambulance follow-up calls, if an officer was alone he was to pick up another officer, and particularly a motorcycle officer, so that when they got to the scene of the accident one man could take care of the traffic and the other take care of the accident. One man alone at an accident was not enough". Other than this testimony, the record is silent with regard to the nature of the errand upon which respondent was bound at the time the accident occurred.

[1-3] Whether a given vehicle falls within the category of subdivisions (a) and (b) of section 44, supra, two factors must be taken into consideration, namely, the type of ownership, whether public or private, and the use to which such vehicle is being devoted at the particular time in question. If the vehicle is privately owned, in order to be classed as an emergency vehicle under subdivision (b), supra, it must be used in enforcing the provisions of the Vehicle Code. On the other hand, if it is publicly owned, it can be classed as an emergency vehicle under subdivisions (a) and (b) of said section 44, supra, only if it is being used for the purpose of enforcing the provisions of the Vehicle Code, or for traffic patrol duty, or in responding to emergency calls.

The complaint herein alleged that the motorcycle was owned by respondent, but it developed at the trial that title to the machine was in the City of Alhambra and that respondent was buying it on the instalment plan, the city allowing him $30 per month for its operation and maintenance. Thereupon, respondent was permitted by the court to amend his complaint to show that "at all times herein mentioned, the City of Alhambra was the registered and legal owner of a certain motorcycle bearing 1936 license #E-1274; that at the time of the accident hereinafter mentioned, the plaintiff was vendee under a conditional sales contract wherein the City of Alhambra agreed to sell said motorcycle to the plaintiff for the sum of $239.25, and said plaintiff had agreed to pay to said City of Alhambra on account of said conditional sales contract the sum of $239.25."

As to the question of ownership, the trial court gave no instruction to the jury in that regard, and refused to give an instruction with reference thereto which was requested by appellant; but charged the jury as a matter of law that respondent was operating an authorized emergency vehicle.

[4] Appellant's contention that this was error on the part of the trial court must be sustained for the reason that in addition to deciding whether or not respondent was making an emergency call, the question of ownership of the said motorcycle, as well as the determination as to whether or not respondent's motorcycle was an authorized emergency vehicle within the definition of section 44 of the Vehicle Code, should have been submitted to the jury.

Spencer v. Schiffman, 119 Cal.App. 746, 7 P.2d 361, was a case in which two motorcycle officers were responding to an alleged emergency call which was in fact a call to investigate an accident, and were traveling at the rate of 37 miles per hour. Upon reaching an intersection the rate was reduced to 25 miles per hour, at which speed a collision occurred between the motorcycle and an automobile, in which the officers were injured. The court there held that the police officers were negligent; that they were not protected by any provision of the California Vehicle Act, St.1935, p. 93 et seq., and damages were denied. It was there stated at page 748, 7 P.2d at page 362: "Apparently what the plaintiffs relied upon as a justification for their failure to attempt to stop the motorcycle, and to avert or avoid the happening of the accident, was the fact that they were police officers, and as such, in the performance of their official duty, were on an errand the object of which was to investigate the facts concerning an accident which theretofore had occurred and 'to render all the aid possible.' * * * As far as the record discloses, neither of the plaintiffs knew or had been informed that in connection with the particular accident which they were on their way to 'investigate' and to render 'aid,' any person had either violated the law, or was charged with or suspected of having done so. The mission of plaintiffs was entirely civil in its nature, and the character of the services proposed to be rendered by plaintiffs had no relation to any known or suspected criminal act on the part of any person whomsoever. It is therefore clear that * * * the line of duty in which the plaintiffs in the instant case were engaged at the time and place of the accident in question did not place them in a position where they legally might claim the benefit which the law bestows upon police officers when they are engaged in those duties which are generally described in the statute to which reference has been had." See, also, Falasco v. Hulen, 6 Cal.App.2d 224, 44 P.2d 469; Hopping v. City of Redwood City, 14 Cal.App.2d 360, 58 P.2d 379.

It was error for the trial court to charge the jury that "The plaintiff at the time of the accident was operating an authorized emergency vehicle." Such issue should have been submitted to the jury for its determination. Because of this conclusion, it is deemed unnecessary to pass upon the other points raised by appellant.

The judgment is reversed.

We concur: DORAN, J.; WHITE, J.

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31 Cal.App.2d 363

PEOPLE v. PERRY.

Cr. 1666.

District Court of Appeal, Third District, California.

March 7, 1939.

Criminal law ⇨1182

Where transcript on appeal was filed December 30, 1938, and no brief was filed in behalf of defendant and cause was regularly placed on calendar for oral argument on March 7, 1939, but no appearance was made for defendant at time case was called for hearing, conviction was affirmed. Penal Code, §§ 245, 286, 288a, 1253.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Joe Perry was convicted of violation of Penal Code, §§ 245, 286, 288a, and he appeals.

Affirmed.

Hugh J. Tye and Law T. Freitas, both of Stockton, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of San Joaquin county of the crime of a violation of sections 286, 288a and 245 of the Penal Code of the State of California felonies.

The transcript on appeal was filed in this court December 30, 1938. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on March 7, 1939. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

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31 Cal.App.2d 173

PEOPLE v. BARNETT.

Cr. 3168.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1939.

Rehearing Denied March 6, 1939.

Hearing Denied by Supreme Court March 23, 1939.

1. Larceny ⇨14(1)

Where a person parts with possession of his money to accused with intent that it shall be used by accused for specific and limited purpose, and at the time accused receives the money he intends to convert it to his own use, accused is guilty of "larceny by trick and device."

[Ed. Note.—For other definitions of "Larceny by Trick," see Words & Phrases.]

2. False pretenses 🔑12

Where a person parts with both title and possession of money to accused who induces the person through false pretenses to so part with title and possession, accused is guilty of "obtaining money by false pretenses."

3. Criminal law 🔑1144(13)

On appeal from conviction under counts of information charging grand theft, the District Court of Appeal had duty to view evidence in light most favorable to the people.

4. Larceny 🔑55

In prosecution on information charging grand theft, evidence sustained implied findings of trial court that accused was guilty of larceny by trick and device, and hence corroboration of complaining witness was unnecessary to sustain conviction.

5. Larceny 🔑62(2)

Evidence that accused obtained money from complaining witness with which to purchase for witness from third person an interest in oil lease which accused actually had purchased for a smaller sum, and that accused did not return to the complaining witness any of the balance of the money, constituted evidence of intent to steal sufficient to sustain conviction under information charging grand theft.

6. Larceny 🔑55

An intention to steal may be inferred from all facts in evidence bearing upon the question, a person being presumed to intend to do that which he voluntarily and willfully does in fact do.

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Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

William D. Barnett was convicted on counts of information charging grand theft, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jesse J. Frampton, Deputy Dist. Atty., both of Los Angeles, for the People.

CRAIL, Presiding Justice.

This is an appeal from a conviction of William D. Barnett on each of two counts of an information which charged grand theft.

It is the contention of the appellant that the theory upon which the prosecution proceeded and the only one which its evidence tended at all to support was that the money of the complaining witness, Mary Hill, was obtained by false pretenses; that the only evidence of the false pretenses was the testimony of Mrs. Hill, and that there was no corroboration such as is required under section 1110 of the Penal Code.

It is the contention of the attorney-general, however, that the defendant was convicted of the crime of larceny by trick and device, a crime for the conviction of which no corroboration was necessary.

[1, 2] The law of this state is (1) that where a person parts with the possession of his money to the defendant with the intent that it shall be used by the defendant for a specific and limited purpose, and at the time the defendant receives the possession of said money he intends to convert said money to his own use, he is guilty of larceny by trick and device; and that (2) when a person parts with both the title and possession of his money to the defendant and said party has been induced by the defendant through false pretenses to so part with both his title and possession, then he is guilty of obtaining money by false pretenses. 26 A.L.R. 381, note, and California cases cited on page 382.

In the case of People v. Curran, 24 Cal.App.2d 673, 75 P.2d 1090, 1091, this court said, "The distinction between the offenses of larceny and of obtaining money by false pretenses depends upon the intention with which the owner of the property parted with it to the person taking it. 'In larceny, the owner of the thing has no intention to part with his property therein to the person taking it, although he may intend to part with the possession. In false pretenses, the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud.' People v. Delbos, 146 Cal. 734, 736, 81 P. 131."

Adapting the law to this case, then if Mary Hill parted with the money to the defendant with the intention that the money was not to be his personally, but was to be used by him for her to purchase certain oil leases, and the money or a large part of it was not so used by the defendant, but was converted to his own uses, then he is guilty of larceny by trick and device; but if Mary Hill, at the time she turned the money over to the defendant, intended to part both with the title and possession of the money to the defendant and she had been induced by the defendant through false pretenses to so part with both her title and possession, then the defendant would be guilty of obtaining money under false pretenses.

[3, 4] It is the duty of this court to view the evidence in the light most favorable to the People. Mrs. Hill was a widow and met the defendant in his capacity as a salesman selling land located in New Mexico. Four days after their meeting the defendant and his codefendant Amigo came to her home, at which time defendant stated that Amigo was a mining man and down here to buy up some oil leases and make some money out of them; that the defendant, Mrs. Hill and Amigo could get forty acres of land in McKinley county for $1,000; that the defendant would put up $330 and Mrs. Hill and Amigo would each put up a like amount to buy said forty-acre lease. Mrs. Hill said she would consider it. Two days later defendant called at her home again in connection with their joint purchase of said forty-acre lease, at which time she delivered to the defendant $5 to apply toward her share and agreed to deliver the balance of $328 later. The forty-acre lease was to be purchased in the name of Mrs. Hill and Amigo and a separate agreement was to be executed evidencing defendant's one-third interest in said lease. On April 2, 1936, defendant and Amigo called on Mrs. Hill at her home, at which time she delivered to defendant $328 in cash, representing the balance due from her on the purchase price of said McKinley county lease. On April 9th, defendant and Amigo again called on Mrs. Hill at her home, at which time defendant presented to her three copies of a document, all three copies of which were signed by Mrs. Hill and codefendant Amigo, transferring to defendant a fully paid up one-third undivided interest in said forty acres. Mrs. Hill intended and the defendant and Amigo each understood the money was delivered to them and was to be used by them as the joint purchase price of the lease from a third party. Mrs. Hill specifically testified that she did not intend to part with the title to her money to the defendant. Defendant had previous to his meeting Mrs. Hill purchased said forty-acre lease from one Leona Douglas for the sum of $40, and had caused the title to said lease to appear in the name of the witness Starr without Starr's knowledge or consent, and on April 7th defendant secured Starr's signature to an assignment in blank to said forty-acre lease and later filled in the names of Mrs. Hill and Amigo, as assignees, thus making it appear as though said assignment of lease had been purchased from a man by the name of Starr, when in truth and in fact neither of the defendants had paid Starr anything for said assignment. The defendant and his codefendant represented that each of them was investing the sum of $333 together with Mrs. Hill as part of the purchase price of said lease, when in truth and in fact they already owned said lease, and instead of the purchase price being $1,000, it was only $40. From a statement of the evidence which we have set forth it is clear and unequivocal that Mrs. Hill parted with the possession of the money to the defendant with the understanding that he would use her money in connection with money advanced by himself and his codefendant for the purchase from some third person of the oil lease. She did not purchase the lease from the defendant or Amigo and therefore never passed title of such money to the defendant or to Amigo. The same situation exists and is true with regard to count two of the information.

In our view, therefore, there is substantial evidence to sustain the implied findings of the trial court that the defendant was guilty of larceny by trick and device.

In his reply brief the defendant contends that the theory upon which the case was tried in the superior court was that of obtaining money by false pretenses, and that the People cannot be heard at this late date to claim that the conviction was upon the ground of larceny by trick and device. In this connection we find in the record that during the examination of the first witness the following took place: "Mr. Hess [attorney for one of the defendants]: * * * If Mr. Frampton will be fair enough to say that his case is false representations—Mr. Frampton [Deputy District Attorney]; No, I will not say that. I deny it." When the second witness was on the stand the following occurred: "Mr. Hess: * * * Now, the prosecution will admit that the information is based upon a charge of grand theft involving false pretenses. * * * and Mr. Frampton will admit to the court that that is the nature of the charge here. Mr. Frampton: I don't make any such admission. * * * our theory is grand theft." There are other and similar statements in the record which indicate that the case was not being tried on the theory that the money was obtained under false pretenses but as a grand theft case by trick and device.

[5, 6] The defendant also contends in his closing brief that there is no proof that Barnett intended to steal Mrs. Hill's money. The evidence is that he obtained from her $333 with which to purchase for her from third persons a one-third interest in an oil lease which he actually purchased for the sum of $40, and that he did not return to her any of the balance of the money. A person is presumed to intend to do that which he voluntarily and wilfully does in fact do. The intention to steal is inferred from all the facts and circumstances in evidence bearing upon the question.

The defendant next contends in his closing brief that Mrs. Hill received all that she bargained for. She placed her money in the hands of the defendant to be used for a specific purpose. It was not so used and it was not returned to her.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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31 Cal.App.2d 267

PEOPLE v. SIMPSON.

Cr. 3176.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1939.

1. Criminal law 🔑641(1)

The right of accused to the aid of counsel in his defense is a fundamental right and includes privilege of consultation, advice, and assistance in preparation of the defense. Pen.Code, § 825.

2. Criminal law 🔑590(2)

Counsel for an accused should be allowed ample time to advise accused, subpœna and interview witnesses, and properly prepare written instructions for delivery to court at time of trial. Pen.Code, § 825.

3. Criminal law 🔑590(2)

Where trial court approved withdrawal of public defender two days before case was set for trial, and court ordered substitution of attorney who stated that she could not represent accused without time to prepare defense, action of trial court in requiring case to proceed to trial on afternoon of day on which case was set for trial, although attorney did not appear for accused, was reversible error. Pen.Code, § 825.

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Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Fred S. Simpson was convicted of robbery and assault with a deadly weapon, and he appeals.

Reversed and new trial ordered.

Lee Stanton, of Los Angeles, for appellant.

Earl Warren, Atty Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was convicted of the crimes of robbery and assault with a deadly weapon. Upon his arraignment he was without counsel and the public defender was appointed by the court to act for him and pleas of not guilty were entered. The trial was set for December 8, 1938. The record discloses that on December 6, 1938, defendant was before the court with Deputy Public Defender Neeley and the following took place:

"Mr. Neeley: In this case, if the Court please, because of a difference between counsel and the defendant as to how the matter should be tried, I feel that this is a proper case for us to move that the public defender be relieved, and the defendant desires to have that done.

"The Court: When is it set for trial?

"Mr. Neeley: It is set for trial on the 8th. I am satisfied there is ample time to interview the witnesses, and the defendant informs me this morning that he has at last been able to obtain private counsel.

"The Court: Simpson, who have you obtained as counsel?

"The Defendant: Anna Zacsek. I would like to have the case postponed.

"The Court: Where is Miss Zacsek?

"The Defendant: I was informed through a friend of mine yesterday that they were going to retain Miss Zacsek.

"Mr. Neeley: I will state to the Court that I had no chance to notify her to be here. I knew if I waited until I could reach her that it would be that much closer to the trial date, and I thought if it was put on the calendar for today with the understanding that on the 8th it would be continued, it would be all right.

"The Court: You want no longer the public defender to represent you?

"The Defendant: That is correct.

"The Court: Do you want the Court to relieve the public defender from defending you this morning?

"The Defendant: Yes.

"The Court: All right. The public defender is relieved. Now, the case is set for trial on the 8th of December. I will pass on the continuance on December 8th. You had better get private counsel in here as soon as you can.

"Mr. Neeley: May the record show that the transcript and information are delivered to the defendant?

"The Court: Yes. Communicate with your attorney immediately.

"Mr. Neeley: I will call her for the defendant, your Honor."

Defendant again appeared in court on December 8 with his counsel, Anna Zacsek, whereupon the following took place:

"The Court: People v. Fred S. Simpson.

"Miss Zacsek: May it please the Court, in this matter I have been requested by the defendant to represent him. I think it was two days ago. However, there was the matter of finances to be determined.

"The Court: On December 6th, on request of the defendant, the Court permitted the public defender to withdraw.

"Miss Zacsek: I cannot represent the defendant unless I have time to study the case and see what, if anything, can be done about it. If it should meet with the Court's approval and the approval of the district attorney that the matter be continued for some weeks, at that time I believe I would be in a position to handle the matter.

"The Court: What is your desire about it?

"The Defendant: That will be all right with me.

"The Court: Do you want the case continued?

"The Defendant: Yes, sir.

"Mr. Richardson: We are ready for trial.

"The Court: How long will it take to try the case?

"Mr. Richardson: About a day.

"The Court: Do you want Miss Zacsek substituted as your attorney in the case?

"The Defendant: Yes, sir.

"The Court: I will make that order that she be substituted as attorney.

"Miss Zacsek: May it please the Court, I didn't catch what the Court said about the motion.

"The Court: The motion for continuance before the Court is denied.

"Miss Zacsek: Then if it is denied, and it is to proceed, I cannot go on record.

"The Court: Very well, I will pass the matter.

"Mr. Richardson: May I call the witnesses?

"The Court: Yes.

"(The witnesses were called by Mr. Richardson.)

"The Court: How long will it take?

"Mr. Richardson: Not over a day.

"The Court: I will pass it. (11:18 o'clock A. M.)

"The Court: The case of the People v. Fred S. Simpson is continued until 2 o'clock today."

The case was again called for trial by the court at 3:50 p. m. on December 8, defendant appearing without counsel. Defendant again requested the court for a continuance, stating: "I would like to find a lawyer and subpoena my witnesses and talk to them." The court thereupon ordered the jury impaneled and the first witness for the prosecution was examined by the district attorney and by the court but no questions were asked by the defendant. On December 9 other witnesses were called by the prosecution. At the conclusion of the testimony on behalf of the prosecution the court asked the defendant if he wished to offer anything on his own behalf, whereupon the following took place:

"The Defendant: Your Honor, I am not represented by counsel and have no knowledge of law, and I stand mute. I don't know anything about law or witnesses. I cannot get out to get witnesses.

"The Court: You can give the names of your witnesses to the Court and the Court will have them subpoenaed before the court. Do you desire to do that?

"The Defendant: I have had no opportunity.

"The Court: I am now affording you the opportunity.

"The Defendant: I need a week or 10 days.

"The Court: If you don't care to avail yourself of the Court's offer—

"The Defendant: I would like to have someone contact them. I don't know where they are.

"The Court: All right. The evidence is closed. Do you wish to argue the case?

"Mr. Richardson: I will submit it.

"The Court: Anything you desire to say to this jury?

"The Defendant: I have nothing, your Honor."

[1] The right of a person accused of crime to the aid of counsel in his defense is a fundamental right which has been recognized and upheld throughout our national history. It has been expressly inserted in the Constitution of California and in the Penal Code. The right has been so zealously guarded that it has been made a misdemeanor for a police officer to refuse to allow an attorney to visit a prisoner upon the request of the accused. Pen.Code, § 825. This right does not stop short at representation at the trial but it includes the privilege of consultation, advice and assistance in the preparation of the defense. Mr. Presiding Justice Finlayson, in a proceeding involving the right of a prisoner to consult privately with counsel in preparing for the defense in a criminal action, In re Rider, 50 Cal.App. 797, 195 P. 965, quoted with approval the vigorous language of a decision rendered by the criminal court of appeals of Oklahoma [State v. Davis, 9 Okl.Cr. 94, 130 P. 962, 44 L.R.A.,N.S., 1083]: "It would be a cheap subterfuge of and a shameless mockery upon justice for the state to put a man on trial in its courts, charged with an offense, which involved his life, liberty, or character, and then place him in such a position that he could not prepare to make his defense. * * * In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights. * * *" In Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 60, 77 L.Ed. 158, 84 A.L.R. 527, the much-discussed Scottsboro case in which several Negroes had been condemned to death, the court held that the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution, U.S.C.A. Mr. Justice Sutherland stated on behalf of the court: "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob. * * * It is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Although the deputy public defender could not bind the court, he stated that he had put the matter of his being relieved on the calendar for December 6 with the understanding that on December 8 it would be continued. It is apparent that he considered that a continuance would probably be necessary when the matter was called for trial. The court approved the withdrawal of the public defender on December 6 with the knowledge that defendant had not at that time actually engaged or consulted with counsel and insisted upon the trial of the case two days later notwithstanding the statement of the new attorney who then appeared for defendant that she was not prepared to take charge of the defense. The court ordered the substitution of Miss Zacsek as attorney for defendant after she had stated to the court that she could not represent defendant without time to prepare the defense, and denied the continuance after the substitution was made. When the court denied the motion for a continuance Miss Zacsek said: "Then if it is denied, and it is to proceed, I cannot go on record." To this the court replied: "Very well, I will pass the matter." Thereafter the case was continued until the afternoon session, at which time Miss Zacsek failed to appear and the court ordered the trial to proceed in the absence of any representation of defendant.

[2, 3] To deny reasonable time for counsel to prepare for trial is to strip the right of representation of much of its value. Counsel should be allowed ample time to talk to and advise the accused, subpoena and interview witnesses and

properly prepare written instructions for delivery to the court at the time of trial. After Miss Zacsek was notified that she was to represent defendant a period less than two days for the actual work of preparation remained before the hour of trial. By compelling defendant to stand trial after such a brief period for preparation the court deprived defendant of a substantial right, a right guaranteed him by the Constitution. If convictions are to be upheld by reviewing courts the trial judges must see that defendants are accorded fair trials.

The judgments are reversed and a new trial is ordered.

We concur: CRAIL, P. J.; McCOMB, J.

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30 Cal.App.2d 750

AUSTIN et al. v. TURRENTINE, Judge.

Civ. 2200.

District Court of Appeal, Fourth District, California.

March 11, 1939.

Hearing Denied by Supreme Court April 10, 1939.

Appeal and error 🔑832(4)

Where refusal to instruct witness to produce corporate books was predicated solely on ground that books were not material or necessary to proof of petitioners' cause of action and that books could only be material if it was established that petitioners became entitled to an accounting, it could not be urged on petition for rehearing that reviewing court erroneously assumed that books were in witness' possession.

◆

On petition for rehearing.

Petition denied.

Prior opinion, 87 P.2d 72.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for petitioners.

Stearns, Luce, Forward & Swing and Fred Kunzel, all of San Diego, for respondent.

PER CURIAM.

In denying respondent's petition for rehearing and to clarify the additional point raised in that petition, i. e., that this court erroneously assumed that the books of account of the Hallmark Oil Company, Inc., were in the possession of the defendant Charles H. Forward, we should add that from an examination of the testimony it is not altogether clear whether the books of account of the Hallmark Oil Company, Inc., prior to April 1, 1935, were in the possession of the defendant witness. However, from respondent's return to the petition for a writ of mandate the only ground for refusing to instruct the witness to produce the books of that company subsequent to April 1, 1935, was predicated upon the ground that they were not material or necessary to the proof of petitioner's cause of action and that said books could only be material when and if it was established that the petitioners became entitled to an accounting. Such was the apparent basis for the refusal of the court to instruct the witness to produce them.

With this explanation the petition for rehearing is denied.

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31 Cal.App.2d 228

HACKEL et al. v. LOS ANGELES RY. CORPORATION.

Civ. 6063.

District Court of Appeal, Third District, California.

Feb. 24, 1939.

1. **New trial** 🔑163(1)

Under statutes, as amended, a determination of motion for new trial may be made in chambers at any time. Code Civ. Proc. §§ 166, 657, 660, 663.

2. **New trial** 🔑163(1)

An oral instruction by trial judge to clerk in chambers, in absence of parties or their counsel, after argument in open court on motion, was a valid order granting a new trial. Code Civ.Proc. §§ 166, 657, 660, 663.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit in equity by Arnold M. Hackel and another against the Los Angeles Railway Corporation to have an order, in another action between the parties, granting a new trial, and a judgment entered for defendant pursuant thereto, declared void, and to have the judgment for plaintiffs in the original trial declared in effect. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Joseph L. Fainer and H. C. Ellis, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (George D. Jagels and E. H. Chapman, both of Los Angeles, of counsel), for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This appeal is taken from an order and judgment of the superior court of Los Angeles county made and entered on September 29, 1936, wherein the general demurrer of the defendant to plaintiffs' complaint as amended was sustained, without further leave to amend. Plaintiffs had filed a suit in equity seeking relief on the following state of facts, which are more fully set forth in the complaint to which the demurrer was filed.

On July 5, 1935, the plaintiffs, Arnold M. Hackel and Goldie Hackel, instituted an action for damages in the superior court of Los Angeles county, on account of personal injuries sustained by them in a collision between their automobile and a trolley car operated by the defendant corporation. The action came on regularly for trial on October 9, 1935, in department 2 of the superior court, before Judge Harry A. Archbald, and a jury. At the conclusion of the trial on October 10, 1935, the jury rendered a verdict in favor of the plaintiffs and against the defendant in the sum of $12,500, which judgment was duly entered and docketed.

Thereafter, on October 18, 1935, the defendant corporation filed a motion for a new trial, which came on for hearing on November 10, 1935, before Judge Archbald, in open court, and at the conclusion of argument by both sides the matter was taken under advisement and submitted for decision. On November 26, 1935, one of counsel for the plaintiffs was served with a written notice prepared by counsel for the defendant corporation, stating that defendant's motion for a new trial had been granted by the court on the ground of insufficiency of the evidence. Several days later, a postcard signed by H. L. Mohrenstecker, deputy clerk of the court, was received by plaintiffs' counsel containing the same statement.

Thereafter the case was again set for trial in department 17 of the superior court, and came on regularly for trial on January 16, 1936, before Judge Carl A. Stutsman and a jury. At the conclusion of the trial on January 17th, the jury returned a verdict in favor of the defendant and against the plaintiffs. Plaintiffs subsequently filed a motion for a new trial on the usual statutory grounds, which motion was by the court denied.

On July 20, 1936, one of counsel for the plaintiffs had a conversation with H. L. Mohrenstecker, deputy clerk of department 2, and then and for the first time learned that no written order granting defendant's motion for a new trial had been made or signed by Judge Archbald within the statutory period, and that the only record of any attempted disposition of the motion by him was an unsigned entry made by the clerk herself in her minute book on November 26, 1935, which entry was made by her following an oral instruction given her by Judge Archbald in chambers and not in the presence of the parties involved or their counsel.

Upon discovering these facts counsel for the plaintiffs prepared a complaint seeking relief in equity, which was filed on August 14, 1936. By this action plaintiffs sought to have the court, sitting in equity, order, adjudge and decree,—

(1) That the alleged order granting defendant's motion for a new trial, claimed by defendant to have been made and entered by Judge Harry A. Archbald on November 26, 1935, be declared null and void, and of no effect, and that the entry of the alleged order by the clerk of said court, be declared null, void and of no effect;

(2) That the judgment in favor of the defendant and against the plaintiffs, made and entered in department 17 of the superior court on January 17, 1936, be vacated and set aside, and the same declared null, void and of no effect; and

(3) That the judgment in the sum of $12,500, previously made and entered in department 2 of the superior court on October 10, 1935, in favor of the plaintiffs and

against the defendant, be declared a valid and existing judgment in full force and effect, and that a writ of execution be issued thereon.

The defendant corporation filed a demurrer to this complaint, which was by the court sustained, but with leave to amend. Plaintiffs thereupon filed an amended complaint, to which defendant again demurred and which the court sustained without leave to amend, judgment being entered thereon on September 29, 1936.

[1, 2] The principal and practically only important question involved in this appeal, and in connection with which the lower court ruled against the plaintiffs by sustaining defendant's demurrer to their complaint on file, is whether a bare oral instruction given by the trial judge to his clerk in chambers, and not in the presence of the parties or their counsel, constitutes a valid order granting a new trial, after the motion thereon has been argued in open court and submitted for decision.

Appellants contend that a decision on a motion for a new trial can be rendered in only one of two ways: (1) By audible pronouncement in open court; or (2) By the filing with the clerk in the action of a written order, signed by the judge. The case of United Railroads of San Francisco v. Superior Court, 197 Cal. 687, 242 P. 701, appears to be authority for the rule above stated. However, since the date of the rendition of the decision last cited, sections 166 and 167 of the Code of Civil Procedure have been amended, St.1933, pp. 1827, 1835. Section 166 now reads, in part, as follows: "The judge or judges * * * of the Superior Court, may, at chambers, * * * hear and determine all motions made pursuant to Sections 657 and 663 of this Code." Section 657 relates to the grounds on motion for a new trial.

It is contended by appellants that the only effect of the amendment to the section quoted above is to permit the trial judge to hear and determine such a motion in chambers, and that a ruling upon such motion, if not made at the conclusion of the hearing, must necessarily be made in writing and signed by the judge. We are of the opinion that the contention thus made by appellants has been squarely disposed of against him in the case of Willis v. Superior Court, 214 Cal. 603, 7 P.2d 303. In that case the judge of the superior court of Glenn county was presiding in the superior court of Mendocino county, and there heard a motion for a new trial. Without deciding the matter, the judge returned to Glenn county, and thereafter, and on July 24, 1931, signed an order granting a motion for a new trial, and placed said order in the mail, directed to the county clerk of Mendocino county. The order was received and entered in the records of the latter county on July 27, 1931. The period prescribed by section 660 of the Code of Civil Procedure within which the court must pass on such a motion expired on Saturday, July 25th, the fifty-ninth day after notice of the entry of the judgment, for the reason that July 26th, the sixtieth day, was a Sunday. It was there contended that the order was invalid, for the reason that it was ineffectual for any purpose unless it was filed with the clerk of the court, and that although it was signed in the judge's chambers within the sixty-day period, it was nevertheless ineffective for any purpose, for the reason that the judge had no authority under the law to make such order in chambers. It is interesting to note that the Willis case, which was a petition for a writ of review, was originally filed in this court. Thereafter, this court rendered its opinion, 4 P.2d 975. We there held that the order granting the motion for a new trial was null and void, and that the amendments to the Code of Civil Procedure above mentioned did not in any way affect the holding in the case of United Railroads of San Francisco v. Superior Court, cited above. A reading of our decision shows a great similarity between the points discussed there and the points discussed in appellant's opening brief in this case. Upon a hearing granted in the Willis case, the Supreme Court upheld the validity of the order granting the motion for a new trial on the ground that the said amendments to the Code of Civil Procedure changed the rule formerly established in the United Railroads case. Referring to the order there made in chambers, the court said: "It seems clear that the amendments were intended expressly to grant a power not previously enjoyed by superior judges." [214 Cal. 603, 7 P.2d 304.] Appellants concede that under such amended sections the trial judge had a right to hear and determine the motion in chambers. Appellants go further and concede that if the judge, in disposing of the motion in chambers, made any order on such motion immediately at the conclusion of the hearing, and in the presence of counsel, it would be valid. It is difficult to follow this distinction which is attempted to be made. The statute states that the judge has a right to determine "the motion in chambers". To say that this determination must be made only under such conditions and circumstances, is placing something in the statute which we believe was never intended to be there. We are of the opinion that a reasonable construction of the statute would be to the effect that the determination of the motion may be made in chambers at any time. Such appears to be the holding in the Willis case. Under the statute the court could hear and determine the motion in chambers with the same force and effect as though such hearing were held in open court, and if an oral pronouncement in open court on the determination of the motion could be made there (as appellants concede), there is no reason why such oral pronouncement could not be made in chambers, at any time subsequent to the hearing.

It appears from the foregoing that the complaint failed to state a cause of action, and the ruling of the trial court sustaining the demurrer to the amended complaint without leave to amend was therefore proper.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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31 Cal.App.2d 370

PEOPLE v. MIRANDA et al.

Cr. 378.

District Court of Appeal, Fourth District, California.

March 8, 1939.

1. Criminal law 🔑982

Refusal of trial court to follow recommendation of probation officer that application for probation be granted under certain conditions was not an abuse of discretion where application was fully considered in open court, as against contention that trial judge acted under mistaken impression that he could not grant probation under the law.

2. Criminal law 🔑274

The right of defendants, after judgment of conviction had become final, to withdraw pleas of guilty could not be based merely upon the fact that their attorney assured them that probation would be granted if pleas of guilty were entered.

3. Criminal law 🔑274

Where judgment of conviction had become final, denying defendants' motion for permission to withdraw pleas of guilty, after denial of application for probation, was not an abuse of discretion especially where defendants failed to show that they were not guilty of offense with which charged.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Quirino Miranda and Jesse Cleland were convicted of grand theft of an automobile, and they appeal from an order denying their motion for permission to withdraw pleas of guilty or for further consideration on an application for probation.

Order affirmed.

David C. Marcus, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellants, with another man named Hernandez, were jointly charged with the crime of grand theft of an automobile. All three pleaded guilty on November 7, 1938, and applied for probation. The matter was referred to the probation officer with instructions to investigate and report on November 21, 1938. At that time the probation officer filed a report stating that each of the three defendants had had experiences which had brought them to the attention of the officers and to confinement in the county jail but recommending, in spite of the seriousness of this offense, that each be given probation under strict conditions, including some confinement in jail. The judge, after stating that he had read the report of the probation officer, proceeded to consider the matter in open court. In addition to the report of the probation officer, the reporter's transcript contains thirteen pages of record of what was said on this occasion. The matter was rather thoroughly discussed by the court, the district attorney, counsel for the defendants and the probation officer, and the various defendants answered many questions asked of them by the court. At the conclusion of the hearing probation was denied as to each of the defendants and judgment was pronounced sentencing all three to confinement in San Quentin.

On December 10, 1938, counsel for these appellants filed a notice that on December 12, 1938, they would move for permission to withdraw their pleas of guilty and in lieu thereof enter pleas of not guilty, or that the court further consider their application for probation and grant probation to each of them. This motion was presented and argued on December 12, supported by the affidavits of these appellants in which they set forth a story of what occurred at the time the automobile was taken which differs materially from their previous story, as given to the probation officer and to the arresting officers. In these affidavits each appellant also stated that he pleaded guilty to the charge because he was assured by his attorney that he would be given probation. After a hearing on December 12, 1938, this motion was denied and this appeal followed.

No appeal was taken from the judgment pronounced on November 21, 1938, and this appeal is from the order denying the motion for permission to change the plea, or for further consideration of the application for probation. It may well be questioned whether the trial court had authority to grant the relief asked for in the absence of a motion for a new trial and after the judgment had become final. We have, however, considered the matters presented on this appeal and find them without merit.

It is first urged that the order denying probation was based solely upon a "misapprehension of the law" on the part of the trial judge, as a result of which he believed he had no discretion in the matter but was compelled by law to deny probation. This is based upon the following situation. At the time the three defendants took the automobile in question, the one who was driving it ran into some parked cars, causing considerable property damage. At the hearing on the application for probation the appellants testified that Hernandez had driven the car. In speaking of Hernandez, the court remarked that since he ran into another car while he was drunk he had committed another felony. Later on, after Hernandez had testified that he had not been the driver of the car, the court, in pointing out that he could not tell which of the three had driven the car, again stated that two felonies had been committed. The appellants now point out that the court was in error in stating that two felonies had been committed, since no bodily injury had resulted and, under the statute, the crime of driving while intoxicated was merely a misdemeanor. It is then argued that but for this error the court would have granted probation and that this case falls squarely within the rule laid down in People v. Jones, 87 Cal.App. 482, 262 P. 361, and People v. Lovelace, 97 Cal.App. 228, 275 P. 489.

[1] In both of those cases the court had refused to consider the application for probation. In the instant case, such an application was thoroughly considered. The remarks made by the court at the hearing were quite lengthy and it not only appears that the court's discussion of the fact that two crimes had probably been committed was limited to his inquiry into the question of whether he should, under the circumstances, give a lighter punishment to the two who had not actually driven the automobile than that given to the driver thereof, but the entire record indicates that the court did not for a moment doubt that under the law he had the power to grant probation if he chose to do so. It appears beyond question that his entire consideration was directed to the question of whether or not he ought to grant probation. He went into this question with unusual thoroughness and finally, after a long comment on the seriousness of stealing a car, he said: "I think I will deny the application for probation for all three of the defendants, and that will be the order." The record does not support the contention that the trial judge was laboring under the impression that he had no right to grant probation, and no abuse of his discretion appears. People v. Martino, 113 Cal.App. 661, 299 P. 86; People v. Roach, 139 Cal.App. 384, 33 P.2d 895.

[2, 3] The only other point raised is that the court abused its discretion in denying to appellants the right after judgment to withdraw their plea of guilty and to enter a plea of not guilty. The appellants concede that their right to thus change their plea cannot be based upon the fact that their attorney assured them that probation would be granted if they entered a plea of guilty. It is contended, however, that an abuse of discretion in not per-

mitting such a change of plea conclusively appears here because the appellants are "not guilty of the offense charged". It is not pointed out to us how it appears that the appellants are not guilty of the offense with which they were charged. Presumably, reliance is here placed upon the story told by the appellants in their affidavits in support of their motion for permission to change their plea. As we have said, this story differs materially from the story previously told by them to the officers and to the probation officer, all of which appears in the record of the hearing on the application for probation. The appellants had pleaded guilty and the judgment pronounced against them had become final. The matter set up in the affidavits used at the last hearing, at best, was merely conflicting with the evidence already before the court and, aside from any other considerations, the matter was entirely one within the discretion of the trial judge.

The order appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

THOMAS v. THOMAS.*

Civ. 12158.

District Court of Appeal, Second District, Division 2, California.

March 9, 1939.

Hearing Granted by Supreme Court May 8, 1939.

1. Divorce 🔑**331**

A foreign divorce decree can be established in California, and when so established has the same effect as local divorce decree, including requirement to make future monthly payments of alimony, together with power to enforce provisions thereof by contempt proceedings.

2. Divorce 🔑**271**

A new judgment establishing final Butte county divorce decree in Los Angeles county would reserve the power to modify alimony.

3. Appeal and error 🔑**907(3)**

All presumptions and intendments are indulged in trial court's favor where case comes before District Court of Appeal on the judgment roll alone.

4. Appeal and error 🔑**907(3)**

The District Court of Appeal would not presume that plaintiff had remarried after filing of complaint to establish divorce decree in another county, where such issue was not raised in trial court, and case came before District Court of Appeal on judgment roll alone.

5. Divorce 🔑**271**

Where final divorce decree was established in another county, question, whether wife's need for alimony and husband's ability to pay alimony remained unchanged, could be raised at any time in trial court.

6. Appeal and error 🔑**907(3)**

The District Court of Appeal would not presume that question whether wife's need for, and husband's ability to pay, alimony had changed, was raised in wife's action to establish divorce decree in another county, where case came before District Court of Appeal on judgment roll alone.

7. Appeal and error 🔑**842(1)**

On appeal from judgment in action to establish Butte county divorce decree in Los Angeles county, whether remedy by contempt under Butte county decree was sufficient in fact, without the necessity of further remedies, was question of law which District Court of Appeal could determine.

8. Divorce 🔑**271**

A final Butte county divorce decree providing for future alimony would be established in Los Angeles county to which the parties had removed, where wife had not remarried and wife's necessity for and husband's inability to pay alimony remained unchanged.

9. Judgment 🔑**910(1)**

The five-year statute of limitations was applicable to action to establish Butte county divorce decree in Los Angeles county. Code Civ.Proc. § 336, subd. 1.

WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Suzette Thomas against Clyde Thomas to establish a decree of divorce which had theretofore been obtained in Butte County, California, as a judgment against the defendant in Los Angeles County. From the judgment, the plaintiff appeals.

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*For subsequent opinion see 94 P.2d 810.

Reversed with directions.

H. Dexter McKay and William Ellis Lady, both of Los Angeles, for appellant.

Horowitz & McCloskey, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal by the plaintiff from a judgment in an action which sought to establish a decree of divorce which had theretofore been obtained in Butte county, California, as a judgment against the defendant in Los Angeles county. All of the allegations of the complaint were found to be true by the trial court and all of the allegations of the answer were found to be untrue, with the exception of some small items covered by the statute of limitations. It is the contention of the plaintiff that the Butte county decree should have been established in Los Angeles county.

Matters involving the Thomas divorce case have been in the appellate courts of this state before. See Thomas v. Superior Court, 9 Cal.App.2d 383, 49 P.2d 898, and Thomas v. Superior Court, 129 Cal.App. 282, 18 P.2d 755.

The complaint, after alleging the matters required for statistical purposes, alleges that on September 19, 1928, there was instituted in the superior court of Butte county an action for divorce and other relief, in which the plaintiff herein was plaintiff and the defendant herein was defendant; that said complaint alleged that the defendant was guilty of extreme cruelty toward the plaintiff, setting forth the facts thereof, and a full true and correct copy thereof is attached to the complaint herein and made a part hereof; that jurisdiction was obtained over the defendant; that on October 2, 1928, an interlocutory decree of divorce was entered in said action, a full true and correct copy of which is attached to the complaint, marked "Exhibit B", and made a part hereof; that said decree became final, has never been vacated, set aside, appealed from or modified, and is now in full force and effect; that plaintiff has at no time remarried; that the defendant failed to pay certain payments which became due under said decree and that there is now due the sum of $3,870, together with interest thereon; that plaintiff and defendant are now and have been for more than five years last past residents of the county of Los Angeles; wherefore, plaintiff prays that the court make and enter an order or decree herein embodying the said decree of the Butte county court and containing provisions similar to said decree requiring defendant to pay to plaintiff the sums as above set forth, and the further sum of $50 per month commencing with May 1, 1936, and that defendant be ordered to forthwith pay to plaintiff said sums and all sums that may accrue after the commencement of this action until the further order of the court and further providing that payment thereof be compelled in the manner provided by the laws of California as in such cases made and provided.

Answering the allegations of the complaint the defendant admitted the entry of the interlocutory decree of divorce, but denied that the same is now in full force or effect, and alleged certain facts to sustain the contention that said decree had been modified. He denied the allegations of the complaint with relation to defendant's alleged failure to make the payments alleged to have fallen due, and alleged that all payments were made, and alleged that the final decree of divorce in said action modified and superseded the interlocutory decree with regard to the payment of alimony, and finally the defendant alleged that the action was barred by the statute of limitations.

After hearing the evidence, the trial court found that all the allegations of the complaint were true, as heretofore set forth, but on said findings gave judgment solely for a money judgment for $3,000 with interest, being the amount due at the time of the filing of the action, except the part thereof which was barred by section 336, subdivision 1, of the Code of Civil Procedure, refusing by implication to enter a judgment of substantially the same form as that upon which the action was based.

Authorities on the question are meager. 15 Cal.Jur. 258; 34 C.J. 1080; 15 R.C.L. 898.

[1] It has been determined by decisions of our higher courts that it is proper to establish in this state the decree of a foreign state obtained in a divorce action, and that such establishment shall have the same force and effect as a local judgment in a divorce action, including the requirement to make future monthly payments of alimony, together with the power to enforce the provisions thereof by contempt proceedings. **Creager v. Superior Court**, 126 Cal.

App. 280, 14 P.2d 552; Straus v. Straus, 4 Cal.App.2d 461, 41 P.2d 218, 42 P.2d 378; Palen v. Palen, 12 Cal.App.2d 357, 55 P.2d 228.

In the early case of Ames v. Hoy, 12 Cal. 11, where it was claimed that an action did not lie on a judgment obtained in one of the district courts of the state, the court says: "Several questions are made: 1. That suit cannot be maintained in this State on a domestic judgment. At common law, actions could be so maintained. (1 Ch.Pl. 103–4.) There is nothing in our statute which divests the right; and the policy and inconvenience, suggested by appellant, applied as well in England as here. The chief argument is, that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien; and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that a defendant may be vexed by repeated judgments on the same cause of action, is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt."

In the case of Lilly-Brackett Co. v. Sonnemann, 163 Cal. 632, 126 P. 483, 484, 42 L.R.A.,N.S., 360, Ann.Cas.1914A, 364, the court said: "It may be inconvenient that two judgments should subsist in the same state against the same person on the same demand; but no such inconvenience can exist in the case of judgments rendered in different states; and there is no sufficient reason for the application of the purely technical doctrine of merger, subversive of substantial justice, as it would be, in such cases. Indeed, in view of the fact that one satisfaction would satisfy both judgments, there is little to be said in favor of the doctrine of merger, reasonable as that doctrine may be in ordinary cases, *by a second judgment obtained upon the first, even in the same state.*"

[2] On his part the defendant contends that it is against public policy and therefore improper to permit the second court to make orders with respect to the future payment of alimony where it has no power to modify these orders from time to time. He gives no other reason why such a judgment would be against public policy, but in our view the new judgment would reserve the power to modify the order respecting alimony from time to time. Furthermore, it would be a great convenience to the parties to have the continuing action now pending in Butte county established in Los Angeles county where both of the parties now reside.

[3] The case comes before us on the judgment roll alone, and all presumptions and intendments are to be indulged in favor of the trial court. Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513.

In this connection the defendant contends that it must be here presumed that the evidence taken in the trial court fully justified its denial of the relief which the plaintiff sought. He says it must be presumed that the evidence showed the following: (1) That the plaintiff remarried after the commencement of the action and before the trial; (2) that there was no evidence of necessity for alimony on the part of the plaintiff justifying the continuance of the alimony award; (3) that the defendant was and would be unable to pay any alimony, and (4) that a remedy by way of contempt under the Butte county divorce decree was sufficient in fact and that no further remedies were necessary.

[4-8] Taking up these questions in their order, (1) the plaintiff alleged that she was not remarried at the time of the commencement of the action. No issue was raised in the trial court that the plaintiff had remarried after the filing of the complaint, and this court may not indulge such a presumption. (2) We have made a rather full symposium of the pleadings. There is no issue raised in the pleadings that any change had arisen justifying a discontinuance of the alimony award. Such an issue still may be raised at any time in the trial court. We may not indulge a presumption that such an issue was raised and that there was evidence to support it in the trial court. (3) The same is true with regard to the issue of inability on the part of the defendant to pay any alimony. (4) Defendant's fourth contention raises a question of law which this court may determine, and in our view the facts found justify the establishment of the Butte county divorce decree in Los Angeles county.

[9] The trial court properly applied the statute of limitations section 336, subdivision 1, Code of Civil Procedure. Reay v. Heazelton, etc., 128 Cal. 335, 60 P. 977.

The judgment is reversed with directions to the trial court to enter a judgment in compliance with the above decision.

I concur: McCOMB, J.

WOOD, Justice (dissenting).

I dissent. In Ames v. Hoy, from which quotation is made in the majority opinion, the second judgment was obtained in the same county as the earlier judgment, the record of which had been destroyed by fire. In Lilly-Brackett Co. v. Sonnemann, from which quotation is also made in the majority opinion, the California judgment was based on a judgment obtained in the state of Massachusetts, upon which a judgment had been rendered in the state of Washington. The language quoted is by Mr. Bigelow in his note to section 599a of Story on Conflict of Laws. In my opinion two judgments may not be existent in the same action in separate counties in California, both providing for the same future payments. We are not called upon to determine whether the judgment is correct in so far as it applies to past due installments.

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31 Cal.App.2d 166

In re BERNAY.

Cr. 3190.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1939.

Drunkards 🔑2(1)

The commitment of an alleged inebriate to a state hospital by Superior Court after holding a hearing and taking testimony when alleged inebriate was brought before it without being informed as to her right to make a defense or afforded reasonable opportunity for production and examination of witnesses was unauthorized. St.1937, p. 1142, § 5402.

Proceeding in the matter of the application of Abbott C. Bernay, in behalf of Geneva Wright, for a writ of habeas corpus to procure the release of Geneva Wright from a state hospital.

Judgment in accordance with opinion.

B. Warren Vinetz, of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for Thomas W. Hagerty, Superintendent and Medical Director of Camarillo State Hospital.

PER CURIAM.

This is a petition for a writ of habeas corpus to procure the release of Geneva Wright, who is confined in the state hospital at Camarillo, California, as an inebriate, pursuant to a commitment issued out of the superior court of the state of California, in and for the county of Riverside. At the hearing upon the writ it was shown that upon the 17th day of November, 1938, an affidavit of intemperance was filed in the aforesaid superior court, pursuant to which a warrant of apprehension was issued and served upon said Geneva Wright, who was brought before said court on November 22, 1938. A transcript of the proceedings had before the superior court was introduced into evidence, indicating that the following proceedings were had:

"The Court: An affidavit has also been filed in the Superior Court of Riverside County, on the part of A. L. Wright, your father, alleging you to be a person addicted to the intemperate use of stimulants. The affidavit alleges that for the last ninety days Geneva Wright has been using alcoholic stimulants to excess, and when under the influence of same, abuses nurses and affiant verbally, and has hallucinations and delusions of persecution. Do you desire to testify in your own behalf?

"Geneva Wright: Why I would like to have an attorney on that, and a jury trial.

"The Court: In regard to an affidavit for excessive use of stimulants, there is no attorney, and there is no jury trial provided.

"Geneva Wright: I thought probably that was the way it was.

"The Court: I will ask that the witnesses be sworn. Probably the doctors better be sworn again. * * *"

Whereupon the court proceeded to take testimony, following which the commitment to the state hospital at Camarillo was issued, pursuant to which Geneva Wright was delivered into the custody of the proper authorities of said hospital, where she is now held and confined.

Section 5402 of the Welfare and Institutions Code St.1937, p. 1142, provides in substance that any person brought before the court as an inebriate shall be informed of the charge against him or her, and also informed of his or her rights to make a defense to such charge and to produce witnesses in relation thereto. It is further required that the judge shall by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses.

In the instant case, it is at once apparent from the transcript of the proceedings had, which indicate a forthwith hearing before the court at the time the alleged inebriate was brought before it, that the provisions of the aforesaid section were not complied with, either with reference to giving her information with respect to her rights to make a defense to such charge and to produce witnesses in relation thereto, or to giving her what the code section denominates "a reasonable opportunity" for the production and examination of witnesses.

Having been denied her legal rights pursuant to the code provision, it is ordered that the said Geneva Wright be discharged from the custody of the state hospital at Camarillo.

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31 Cal.App.2d 355

In re VELLADAO'S ESTATE.

DE FRAGA et al. v. NIEMEIER et al.

Civ. 11006.

District Court of Appeal, First District, Division 2, California.

March 7, 1939.

1. Wills 🔑324(2)

In will contest, evidence of insanity in testator's family and of testator's weakness from fatal illness before date of will *held* insufficient to make jury question on competency.

2. Wills 🔑324(3)

In will contest, evidence indicating that will was executed in presence of disinterested persons, without knowledge of principal beneficiary, *held* not to make jury question on issue of undue influence, though beneficiary was caring for testator and stood in a confidential relation to him.

3. Wills 🔑155(1)

To establish "undue influence" in will contest, pressure which overpowered the mind and bore down the volition of testator at the very time the will was made must be proved.

[Ed. Note.—For other definitions of "Undue Influence," see Words & Phrases.]

4. Wills 🔑163(2)

The existence of a confidential relation between beneficiary and testator does not create presumption of undue influence, in absence of evidence that beneficiary was active in procuring execution of will or participated therein to any extent.

5. Wills 🔑163(6)

A will bequeathing $500 to testator's aged sister, whom testator had previously helped, and several thousand dollars to housekeeper who had served efficiently for 18 years for only $20 per month, was not unjust so as to authorize inference of undue influence. Code Civ.Proc. § 1958.

6. Evidence 🔑54

The court may not infer, from alleged fact that will was unnatural, that undue influence was exercised, and then infer from fact that testator's housekeeper was a beneficiary that housekeeper exercised the undue influence inferred. Code Civ.Proc. § 1958.

7. Appeal and error 🔑854(5)

The rule that motion for nonsuit should express the precise grounds therefor is applicable when motion is denied, but not where motion is granted, and granting of such motion will be sustained if proper on any ground whether specified in the motion or otherwise.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Proceeding in the matter of the estate of Joseph F. Velladao, deceased, wherein

Maria Velladao de Fraga and another filed contest of the will, opposed by Lillian Louise Niemeier and another, proponents. From an order granting nonsuit, contestants appeal.

Affirmed.

S. Joseph Theisen and Arthur J. Harzfeld, both of San Francisco, for appellants.

B. H. Dean, Jr., of Oakland, for respondent American Trust Co., administrator.

Donahue, Richards & Hamlin, of Oakland, for respondent Niemeier.

STURTEVANT, Justice.

After the will of the decedent had been admitted to probate two nieces of the decedent filed a contest based on the allegations that the decedent was incompetent when he made his will and that it was obtained by the exercise of undue influence. Lillian L. Niemeier and Maria Motta, legatees named in the will, appeared and answered. The contest was heard before the trial court sitting with a jury. After the contestants had presented their case the trial court granted the motion of the proponents for a nonsuit. From the minute order entered thereon the contestants have appealed.

From the briefs of contestants we gather the following facts. The decedent died July 8, 1935, aged eighty-five years. He had never married, and had no occupation. His next of kin and sole heirs at law were his widowed sister, Mary Velladao Avelar, aged eighty-nine, and his four nieces, Mary Sheldon and Maria Motta, and contestants, Maria Velladao de Fraga and Evelyn Gertrude Lawrence, incompetent. He left an estate appraised at $35,771.39. Arbitrarily deducting, for debts, expenses of last illness and funeral, executor's, administrator's and attorney's fees, and expenses of administration, $5,771.39, leaves, for simplicity of calculation, an estimated net estate of $30,000.

The contested will was dated April 13, 1935, less than three months prior to his death, at a time when he was very weak, had been suffering for many years from heart trouble, diabetes, kidney and bladder trouble, asthma, rheumatism and other ailments, from which he was then very thin, gone away to almost nothing, could hardly speak, had a glassy stare in his eye, too sick to get shaved, and too far gone to be interested in letters. The chief beneficiary was respondent Mrs. Niemeier, who had been his trusted housekeeper and with whom he had been living alone at his home at 1794 Hazel avenue, Hayward.

In addition to the bequests to Mrs. Niemeier, there were, in May or June, 1935, after the date of the purported will and within two months prior to his death, placed in joint tenancy wtih her, decedent's 1095 shares of Transamerica Corporation, valued by contestants at $12 per share.

Decedent and his relatives were Portuguese. From Portugal he and his sister and brothers had gone to the Azores, from whence he and one of his brothers had gone to Gold Hill or Virginia City, working in the mines, after which the decedent came to California. He had no occupation. He used to send money all the time to his aged sister while she was in the Azores. In 1920 he sent for her and had her brought to his home at Hayward. She remained there three weeks, after which she went elsewhere to live. She did not understand the English language. Having brought her here from a foreign country, he was by federal laws required to obligate himself to support her in order to prevent her from becoming a charge upon the public. He faithfully carried out this natural and legal obligation. He sent her money every month, and brought her chickens, fruit, and all the things he used to have about his place, as much as he could spare. He visited her and she visited him from time to time. He always treated her very well and assured her that he would always take care of her.

With his other relatives he got along equally well. He visited his niece Mary Sheldon at Los Gatos once every year for several days at a time and frequently at San Francisco. She visited him at Hayward every two or three months, at times with her sister Evelyn Lawrence. She was fond of him, felt very close to him, and regarded him very highly since he had given her every reason to do so. He was a kindly old gentleman. When she visited him she seldom went away empty handed. Decedent's relations with his sister and nieces were thus shown to have been affectionate and cordial.

Mrs. Niemeier was first introduced to the decedent in 1910 or 1911 by his nurse, a friend of hers, and she took care of him in his illness for about five years on and off. In 1917, at the request of her friend, she went to work for decedent at his home at 1794 Hazel avenue, Hayward, and he and she continued to reside there until his death. From 1912 he was ill and weak, and he continued ill and weak until the time of his death, gradually becoming worse. During this entire period he was very weak, was suffering from heart trouble, diabetes, kidney trouble, bladder trouble, asthma, rheumatism, and other ailments. These diseases continued from a time prior to Mrs. Niemeier's employment in 1917 until his death, getting worse and worse, and he became weaker and weaker. On April 10, 1935, three days before the date of the will, he was so ill that he could hardly speak, hardly above a whisper. His respiration was very bad, he was very thin, and had gone away to almost nothing. He had a very glassy stare in his eye, his facial expression was like a dying man, he had a long beard, yet was too ill to get shaved, too sick, too far gone to be interested in letters, and even too ill to state whether he had a doctor. The doctor had given him up, had said that he was dying and that complications would set in any minute and he was gone. As further evidence of his incompetency contestants introduced evidence that insanity existed in the family, his niece, Evelyn Lawrence, having been adjudged incompetent.

The relations between the decedent and Mrs. Niemeier had soon grown to the extent that during these years she had confidence in him and he had confidence in her. They trusted each other implicitly. The contestants say the evidence shows acts of Mrs. Niemeier in keeping decedent's relatives away from him. They point out that his aged widowed sister did not continue to live with him after he had brought her from the Azores. In 1934, the year before he died, decedent told his niece Mary Sheldon that "Mrs. Niemeier nagged and bossed him so much that he darn near threw her out recently." On April 10, 1935, three days before the date of the will, when his niece Mrs. Sheldon went to visit him, Mrs. Niemeier appeared at the door and said that she could not go in, but she walked by notwithstanding. She found her uncle propped up with blankets and pillows, and she asked Mrs. Niemeier "if I might be alone with him a minute and she shook her head and remained in the room". Mrs. Niemeier went outside with Mrs. Sheldon when she left the room. The latter asked Mrs. Niemeier to let her know when he passed away, but never heard from her. "Once before she would not let me see him alone."

[1] In their brief the proponents state that "the appellants have combed the record with meticulous care and have extracted therefrom and set out in their brief every shred of evidence" bearing upon the issue of competency. In the reply brief the contestants concede that summary to be a correct statement. As to the competency of the decedent, Mrs. Niemeier and Mrs. Sheldon were the only witnesses examined on the subject. Neither of those witnesses testified to any fact proving or tending to prove that the deceased was not mentally competent the day he executed the will that is under attack, or at any other time. Therefore, in so far as the issue of competency is concerned, the nonsuit was properly granted. Estate of Fraser, 177 Cal. 266, 170 P. 601.

[2, 3] Passing to the contention that the will was the result of undue influence exercised on the volition of the decedent, the evidence was equally weak. There was not a particle of evidence that Mrs. Niemeier ever asked the decedent to make a will, nor to name her as a beneficiary if he did make one, nor that anyone else did any of these things acting in her behalf. The uncontradicted evidence regarding the execution of the will was as follows. A short time before the will was executed the decedent asked Miss Noack to tell Mr. W. T. Knightly, an officer of decedent's bank, to call, as decedent wanted to make a will. Later, Mr. Knightly called and brought with him Lester Foley, an attorney at law. Those two men entered the room and had a talk with decedent. No one else was present. Later they left and thereafter Mr. Foley and Miss Elaine Enos, his secretary, called bringing with them the will. They entered the room where the decedent was and transacted their business. No one was present excepting those three. After the will had been signed by the decedent, Mr. Foley and Miss Enos signed as witnesses. Mrs. Niemeier did not know a will had been written until after the death of the decedent. On the trial the contestants did not call as witnesses Mr. Knightly, Mr.

Foley, Miss Enos, or Miss Noack. In the case entitled Estate of Bryson, 191 Cal. 521, 217 P. 525, the court was considering a will contest. In that case, as in this case, at the end of the presentation of the testimony by the contestants the trial court granted a motion for a nonsuit. In that case, as in this case, it was claimed that one of the beneficiaries stood in a confidential relation to the decedent. On page 541, 217 P. on page 534, Mr. Justice Seawell, speaking for the court, said: "It may be stated that, so far as opportunity is concerned, any one of the heirs of the testatrix had equal opportunity to visit with, consult, and advise with testatrix. We entertain no doubt that Isaac H. Bryson advised with his mother fully on both business and personal matters and on subjects affecting the present and future welfare of the family. This was not only his privilege, but his duty. Unpleasant as well as pleasant matters were no doubt the subject of consideration. Proof to establish undue influence must be had of a pressure which overpowered the mind and bore down the volition of the testator *at the very time the will was made*. Estate of Carithers, 156 Cal. 422, 105 P. 127. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment. Estate of Kilborn, 162 Cal. [4], 11, 120 P. 762." (Emphasis ours.) Applying those rules to the instant case it is obvious that the record was wholly insufficient and that the trial court properly granted a nonsuit on the issue of undue influence.

[4] The contestants seek to excuse this deficiency by stressing two separate facts. They claim Mrs. Niemeier stood in a confidential relation to the decedent and that it may be presumed she exercised an undue influence. The proponents concede at once that a confidential relation existed, however, they assert there is no evidence that she was active in procuring the execution of the will or that she participated therein to any extent. That is a sound distinction. Estate of Shay, 196 Cal. 355, 364, 237 P. 1079.

[5, 6] The other contention made by the contestants is that the will was most unnatural. They stress the fact that the decedent sent to the Azores and requested his sister Maria V. Avelar to come to California and that he promised to help her. Those facts are not disputed, nor is it claimed the decedent did not keep his promise. However, by the terms of the will he bequeathed to his sister $500, whereas he bequeathed to Mrs. Niemeier several thousand dollars. Again it is not disputed that Mrs. Avelar was eighty-nine years of age; that from about the time she arrived in California she went to live with her daughter and was living with that daughter at the time of the trial. The decedent had been in the habit of giving his sister $5 a month and a legacy of $500 would provide for the continuation of those payments probably as long as the sister might survive. Moreover, Mrs. Niemeier had served most efficiently as nurse and housekeeper for eighteen years on a nominal wage of $20 per month. Bearing these facts in mind this court may not say the will was an unjust will. In Estate of Shay, supra, at page 364, 237 P. at page 1083, the court said: "Whether or not the will is unjust is a matter of opinion as to which we have no right to substitute the opinions of the jurors or of the members of this court for that of the testator." The contention of the contestants is, in effect, to infer that the will was unnatural; that the will being unnatural it may be inferred undue influence was exercised; and that as Mrs. Niemeier was a beneficiary under the will it may then be inferred that she exercised the undue influence. Such reasoning may not be based on the facts adduced in the record before us. Code Civ.Proc. § 1958. It therefore follows that on the issue of undue influence the evidence was wholly insufficient and the trial court did not err in granting the motion for a nonsuit as to that issue.

[7] In the next place the contestants complain that the motion for a nonsuit did not express the precise grounds therefor and the motion should have been denied. 9 Cal.Jur. 548. The vice in that contention is that the rule relied on is applicable when a motion is denied but it has no application where the motion is granted. In the latter instance the ruling will be sustained if it was properly granted upon any ground whether it was specified in

the motion or otherwise. Anchester v. Keck, 214 Cal. 207, 214, 4 P.2d 934.

Finally the contestants set forth several rulings made by the trial court excluding certain evidence. We have examined each one and do not hesitate to state that each separate ruling has our entire approval. No one of the rulings presented a debatable question of law.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

31 Cal.App.2d 364

O'ROURKE et al. v. DAY AND NIGHT WATER HEATER CO., Limited.

Civ. 2224.

District Court of Appeal, Fourth District, California.

March 7, 1939.

Rehearing Denied April 5, 1939.

1. Negligence 🔑27

Manufacturer of water heaters had duty to subject parts purchased from others to ordinary and simple tests of fitness for intended use, as respects liability to consumer for injuries resulting from defective parts.

2. Negligence 🔑27

A manufacturer is liable for consumer's injuries resulting from manufacturer's use, in its product, of defective parts purchased from others, where the defective condition of the part used could have been discovered by reasonable inspection and tests which were omitted.

3. Negligence 🔑27

The care required of a manufacturer who uses parts made by others varies with the danger to be expected and the kind of inspection called for varies with the nature of thing to be inspected, as respects liability to consumer for injuries resulting from defective parts.

4. Negligence 🔑121(1)

In buyer's action against manufacturer for injuries resulting from explosion of gas in a defective water heater, burden of proving negligence of manufacturer in using defective safety pilot device in manufacturing the heater was upon buyer.

5. Negligence 🔑27

Where manufacturer used safety pilot device designed to stop flow of gas if pilot light of water heater should be extinguished, which device was manufactured as a sealed unit by another, manufacturer was not required to make inspections and tests of safety pilot other than those which might be made without destroying usefulness of device, as respects manufacturer's liability to consumer for injuries resulting from use of defective safety pilot.

6. Negligence 🔑27

Where manufacturer used a delicate device known as safety pilot to stop flow of gas if pilot light of water heater should be extinguished, which device was manufactured by another as a sealed unit, and manufacturer tested completed water heater twice under working conditions, and safety pilot functioned when heater was installed by dealer in buyer's residence, external inspections and tests were sufficient to absolve manufacturer from liability to consumer for injuries resulting from the use of defective part.

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Richard O'Rourke and another against the Day and Night Water Heater Company, Limited, a corporation, for injuries sustained as the result of an explosion of butane gas in a water heater manufactured by the defendant. From a judgment for the defendant notwithstanding verdict for the plaintiffs, plaintiffs appeal.

Affirmed.

John G. Covert, of Hanford, and Norman H. Elkington, of San Francisco, for appellants.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, and Sidney J. W. Sharp, of Hanford, for respondent.

BARNARD, Presiding Justice.

This is an action for damages on account of injuries sustained by the plaintiffs through an explosion of butane gas, which occurred in the basement of the O'Rourke home on April 21, 1936. This explosion occurred as Richard O'Rourke, in the act of relighting the pilot light on a water heater, put a lighted match through the heater door.

The water heater in question was manufactured by the defendant, and sold to a wholesale dealer who sold it to a retailer, from whom it was purchased by O'Rourke in December, 1935. This water heater was equipped with a thermostatic device which would automatically turn on the main gas burner whenever the water in the heater fell below a certain temperature. It was also equipped with a "safety pilot" manufactured by another company and furnished to the defendant at the rate of about 2000 per month. This safety pilot was a patented device, the function of which was to shut off the supply of gas whenever the pilot light was extinguished as, otherwise, the action of the thermostatic device would turn on a full flow of gas when the water in the heater had cooled.

This safety pilot consists of a brass casting, to which are attached two tubes, some eight or nine inches long, which extend into the heater to a point near the burner. The lower of these tubes conveys a small amount of gas which runs the pilot light at the end of that tube. Immediately above that tube is a larger tube, the end of which is directly in the flame of the pilot light. In the upper tube is a copper rod, the expansion, and contraction of which causes the safety valve to operate. There are some twenty parts in the valve itself, including a spring, a snap diaphram, a needle valve and a plunger. All of these parts are sealed inside the brass casting. The valve itself must be adjusted to ¾ths of 1/1000th of an inch. In other words, the valve will open or close admitting or shutting off the gas when the expansion or contraction of the copper rod causes a movement on the plunger of ¾ths of 1/1000th of an inch.

In this action, based upon the negligence of the defendant in manufacturing the water heater, the jury found for the plaintiffs and the court granted a motion for a judgment notwithstanding the verdict. From the judgment so entered this appeal was taken.

While the evidence is conflicting in that regard we think it is sufficient to sustain the implied finding that the presence of a large quantity of gas, which led to this explosion, was caused by the failure of this safety pilot to function properly, thereby permitting the gas to flow when the pilot light became extinguished. However, no question of warranty is here involved and the appellants base their entire case on the rules laid down in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440, and approved in Kalash v. L. A. Ladder Co., 1 Cal.2d 229, 34 P.2d 481, and Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013, to the effect that the manufacturer of an article knowing that it is to be used by others than the immediate purchaser, is liable for injury to such others which is directly traceable to negligence on the part of the manufacturer if the nature of the article is such that it is reasonably certain to place life and limb in peril when negligently made, and that such a manufacturer is not absolved from the duty of inspection because it bought one of the component parts from another manufacturer, but owes a duty to subject all parts so purchased from another to ordinary and simple tests, and is guilty of negligence if it fails to make such tests. The only negligence ascribed by the appellants to the respondent is in failing to comply with the above rule by sufficiently testing these safety pilots which were obtained from another manufacturer. It is claimed that this respondent "by making simple tests, could have determined that each valve placed by it on a water heater was in a good condition and properly adjusted", and that the evidence fails to show that this was done.

In support of this proposition the appellants point to the following evidence. A representative of the respondent testified that he knew of the explosive nature of the gas to be used in these heaters and of the great danger that would follow if a defective safety pilot was placed on a water heater; that they did not have in their factory any man whose duty it is or who was qualified to examine the interior of these safety pilots; that these safety pilots are very complicated devices; that they are received in the stock room where a clerk looks them over on the outside to see that they appear to be in good shape; that if they are "broken off or bent out of shape" he would probably find it; that the devices are then given an external inspection in the assembling department; that they would have no way of telling whether the steel in the spring of the device had become crystallized; that other than by a "fire test", that is testing it as an actual operation, they had no way of determining whether the spring was broken or the device out of adjustment; and that in giving them this test they find some, probably two or three out of a thousand, which are improperly adjusted and which are sent back to the manufacturer of the device. A representative of the latter company testified that the coil spring in the device is a very important part thereof; that his company purchased these springs from another manufacturer and tested each shipment by inspecting and testing probably ten or fifteen springs out of each thousand; that after the safety pilot is assembled in their plant it is given two fire tests and if it works it is sent out to the respondent, and other manufacturers of water heaters; and that it is a delicate operation to adjust the device so that it will work.

In addition to the above the respondent points to the following evidence. A manager of the company which manufactures the safety pilots testified that these devices, manufactured by his company, are used on approximately 70 per cent of the water heaters of this type manufactured in the United States; that they tested each shipment of springs as they came in, picking ten or fifteen out of each thousand and breaking the spring down, testing its tensile strength and the correct weight; that each spring, as it was put into the device, was also tested by hand; that there is an inspection of each part of the device as it is made, there being gauges on every machine making the parts; that after making a general inspection of each part that goes into the safety pilot the assembled device is twice subjected to a fire test to see if it works; that before making the fire tests the moving parts are tested to see that the valve assembly is timed correctly with the snap diaphram; that another person tests the adjustment of the copper bar, the expansion and contraction of which causes the valve assembly to work; that once set the device is not apt to get out of alignment unless it is damaged in some way, or has been tampered with; that the valves are set so that when the copper expands approximately 1/10,000th of an inch it opens and when it contracts about 1/5000th of an inch it closes; that the devices are inspected before they leave the plant to make sure they are good; and that after a final checking they are placed in clean paper sacks and packed in cardboard boxes with strips to separate the valves from each other, as in an egg crate. A representative of the respondent testified that after the safety pilots are installed in the heaters they are given two separate fire tests to see that they are working properly; that he knew of no other test that he could give them; and that dropping the devices or mishandling them would get them out of order. Another representative of the respondent testified that these safety pilots are never intrusted to a public carrier but are "carried on our own trucks". There is also evidence that the manufacturer of the safety pilot device seals all of the working parts thereof in the brass casting with a special material in order to make it gas tight.

[1] Under the rules above referred to, in the exercise of reasonable care, a duty rested upon the respondent as the manufacturer of these heaters to subject the parts purchased from other manufacturers to ordinary and simple tests, at least, of their fitness for their intended use. The respondent inspected these devices in so far as this could be done externally and twice subjected them to a "fire test" similar in all respects to the conditions to be met in actual operation, in order to see that they worked. The appellants do not claim that any further external test was either reasonable or possible, and they even allege in their complaint that "the negligent and careless construction" of the safety pilot "was not observable in the exercise of ordinary or reasonable care". The real question here presented is whether the respondent, by making these external inspections and tests, fulfilled the duty resting upon it, or whether a compliance with the rules of care required it to also make an internal inspection with further tests of the working parts.

[2] Liability is imposed by the rules in question where the defective condition of the part used could have been discovered by reasonable inspection and tests and where these have been omitted. The reasonableness of the inspection and tests used must depend upon the circumstances of the particular case. Ordinary and simple tests may well disclose defects in pieces of wood to be used as rungs in ladders or spokes in wheels. Assuming that more complicated tests, necessary to disclose the condition of parts made of iron, steel or other metal, might be held requisite in some cases, in the exercise of ordinary care, we have here a further and different condition since this device consists of a complicated, delicately

adjusted mechanism which came sealed in a casting and the usefulness of which would certainly be destroyed if it were opened.

[3, 4] Not only does the care required of a manufacturer who uses parts made by others vary with the danger to be expected, but the kind of inspection called for must vary "with the nature of the thing to be inspected". MacPherson v. Buick Motor Co., supra [217 N.Y. 382, 111 N.E. 1051]. If the respondent was required to make an internal inspection of this device and test its parts, as the appellants contend, the delicate adjustment of the parts and the workability of the unit would be lost. If the tensile strength of the spring and diaphram must be tested by the respondent, as is suggested, those parts would be completely destroyed. There is not even anything in the evidence to indicate that anything more could have been done by the respondent, had internal inspection been made, then had already been done by the manufacturer of the device. The manufacturer had inspected and tested each part, and twice tested the completed unit under operating conditions. The respondent had made such external inspection as was possible and had then twice tested the device in actual operation. It worked when the dealer installed the heater in the appellants' home and at least twice thereafter, once immediately after it was installed and again three months later, on both of which occasions Richard O'Rourke relit the pilot after it had been put out or had gone out. It worked when installed and was working three months later, and the reason it failed to work on the occasion in question is left entirely to conjecture. Although the burden of proving negligence rested upon the appellants there is an entire absence of evidence even tending to show that any defective condition existed at the time the device was used in the manufacture of the water heater or for some months thereafter.

[5] The article in question, the safety pilot, came to the respondent as a sealed unit. Its very nature precluded an internal inspection and any such inspection would have necessarily destroyed the adjustment of its parts, which was essential to its operation. In such a case as this the rule relied upon by the appellants does not require the making of inspections and tests other than those which may be made without destroying the usefulness of the article.

[6] We conclude that the rules in question did not require the respondent to make internal inspections and tests of this complicated and delicate device which came to it finely adjusted and sealed, and that under such circumstances such external inspections and tests as were possible were all that was required of it in the exercise of ordinary and reasonable care. There being no evidence of negligence on the part of the respondent, it follows that the action of the court was correct.

The judgment is affirmed.

We concur: MARKS, J; GRIFFIN, J.

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31 Cal.App.2d 491

CARPENTER, Ins. Com'r, v. GOLDEN STATE SECURITIES CO.

Civ. 12128.

District Court of Appeal, Second District, Division 2, California.

March 15, 1939.

Rehearing Denied April 13, 1939.

Hearing Denied by Supreme Court May 13, 1939.

Appeal and error 🔑133

A memorandum made on clerk's desk calendar after certain motions were argued and submitted stating, in substance, that judgment was ordered for plaintiff and containing an order for attorney's fees was not a "judgment" or an "order" from which an appeal would lie.

[Ed. Note.—For other definitions of "Judgment (In Law)" and "Order," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding by Samuel L. Carpenter, Jr., Insurance Commissioner of the state of California, as conservator of the Great Republic Life Insurance Company, against the Golden State Securities Company, wherein defendant appealed from a purported judgment and purported orders made after entry of judgment. On motion of plaintiff to dismiss appeal.

Appeal dismissed.

Hearing denied by Supreme Court; SHENK and LANGDON, JJ., dissenting.

Newby & Newby and Dee Holder, all of Los Angeles, for appellant.

John L. Flynn, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a purported judgment and purported orders made after the entry of the judgment, and the case comes before us on the motion of the respondent to dismiss the appeal upon the ground that no appeal lies from a mere memorandum of the clerk which on its face indicates that formal judgment or order is to be thereafter entered.

Judgment was entered on July 26, 1938. Thereafter plaintiff and defendant filed motions for a new trial, and plaintiff filed a motion to vacate and set aside the judgment theretofore entered. Said motions came on for hearing, were argued and submitted, and on September 27, 1938, the clerk made the following memorandum on the clerk's desk calendar: "Motion of plaintiff to vacate and set aside judgment and enter another and different Judgment submitted August 17, 1938, is now granted. Judgment is now ordered for the plaintiff and against the defendant in the sum of $6,995.44, with interest thereon at 7% from July 30, 1937, to date, attorney fees in the sum of $311.23 and costs. Plaintiff's motion for a new trial submitted August 17, 1938 is now denied, except as hereinbefore provided. Defendant's motion for a new trial submitted August 17, 1938 is now denied."

It will be observed from a mere reading of the memoranda that it is neither a judgment nor an order. Instead of rendering judgment, the memoranda says, "Judgment is now ordered." It also contains an order for attorney's fees, but it does not state in whose favor the judgment for attorney's fees is to be rendered.

In the case of Neblett v. Neblett, 13 Cal.App.2d 304, 56 P.2d 969, 971, this court reviewed numerous cases where such a question has arisen: "It has been held in a number of cases that a minute order may serve only as a memorandum for the entry of final judgment. In Ferris v. Baker, 127 Cal. 520, 59 P. 937, 939, it was argued that an appeal from a formal order should be dismissed because it was taken more than six months after a previous minute entry of the court's decision. The court in rejecting this contention said: 'The order in this case was a mere narration by the clerk as follows: "Defendants move the court for nonsuit on the grounds stated. Said motion is argued, and thereupon granted."' The order did not show what were the grounds of the motion; it did not purport to be a dismissal of the action, nor a judgment of any kind, and was in fact but a memorandum affording data from which a judgment or proper order might be drafted, similar to the minute made when final judgment is announced, directing that it pass for one party or the other. Obviously, no execution could have issued on such an order when a cause is submitted on evidence for both sides.' In Estate of Yale, 208 Cal. 102, 280 P. 358, 359, the court dismissed an appeal from the minute order and denied a motion to dismiss an appeal from a later formal order. The court said: 'It is our conclusion, founded on a reading of the several minute orders and of that portion of the formal judgment hereinabove quoted, that the minute orders were intended by the trial court, and must have been understood by the parties, to be and to serve merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause. In such a case an appeal is held to lie from the formal judgment.' In Scrimsher v. Reliance Rock Co., 1 Cal. App.2d 382, 36 P.2d 688, 691, the court said: 'But, where the minute order was intended by the trial court and must have been understood by the parties to be, and served merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause, the appeal lies from the formal judgment, and the time within which it may be taken begins to run from the date of its signing.' See, also, Macnevin v. Macnevin, 63 Cal. 186; Gullick v. Interstate Drilling Co., 111 Cal.App. 263, 295 P. 549."

In our view the clerk's memoranda are unavailing for any purpose except to indicate how the court intends to render its judgment and orders, and an appeal does not lie in this case from the said memoranda. The appeal will lie when the court renders judgment and makes said orders.

Appeal dismissed.

We concur: WOOD, J.; McCOMB, J.

31 Cal.App.2d 352

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. BURG BROS. et al.

Civ. 10893.

District Court of Appeal, First District, Division 2, California.
March 7, 1939.

1. Mortgages ⚷330

The statutes relative to determining amount of, and time for entering, deficiency judgments, do not operate retroactively so as to apply to deeds of trust executed before statutes were enacted. Code Civ.Proc. § 580a; Civ.Code, § 2924½.

2. Statutes ⚷263

A statute will not be deemed retroactive unless such legislative intention clearly appears.

3. Mortgages ⚷330

Where Legislature in enacting statutes relative to determining the amount of and the time for entering deficiency judgments disclosed no intention to make statutes retroactive, so as to deprive money lender of substantive right in a prior contractual obligation, Court of Appeal was required to presume that Legislature did not intend that statutes should have such operation. Code Civ.Proc. § 580a; Civ.Code § 2924½.

◆

Appeal from Superior Court, Contra Costa County; Benjamin C. Jones, Judge.

Suit by the Bank of America National Trust & Savings Association against Burg Bros. and another, for deficiencies remaining after trustee's sale under deeds of trust. From a judgment for plaintiff, defendants appeal.

Judgment affirmed.

Phil F. Garvey, of San Francisco, for appellants.

McKee, Tasheira & Wahrhaftig, of Oakland, and Louis Ferrari, George D. Schilling, C. H. White, and D. Bianco, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover deficiencies remaining after trustee's sales under four separate deeds of trust. From the judgment for plaintiff the defendants appealed on the grounds that the trial court failed to apply the provisions of sections 580a of the Code of Civil Procedure and 2924½ of the Civil Code, both enacted in 1933. It is the position of respondent that, since the deeds of trust were all executed prior to the enactment of these code sections, the rights of the parties are governed by the law existing at the time of the contracts.

[1] Section 580a of the Code of Civil Procedure provides generally that before entering any deficiency judgment, the court shall find, through the appointment of an appraiser, the fair market value of the property at the time of the sale and enter its judgment for not more than the excess of the entire amount due over such fair market value, with interest. Section 2924½ of the Civil Code precludes the entry of a deficiency judgment unless one year, as distinguished from the former period of three months, has elapsed between the recordation of the notice of breach and election to sell and the date of sale under a deed of trust. In the instant case all the deeds of trust were executed prior to the effective date of these statutes, but all sales thereunder were made subsequent to such date. The single question involved, therefore, is whether these statutes have a retroactive operation upon deeds of trust executed before their effective date.

In holding that they did not so operate, the trial court based its decision upon numerous authorities of the courts of this state which are all reviewed in the very able opinion of Mr. Justice Haines, sitting pro tempore in Birkhofer v. Krumm, 27 Cal.App.2d 513, 533, 81 P.2d 609, 619. We cannot improve upon the language or the reasoning of that opinion and may adopt its summarization of the effect of section 580a reading: "its provisions looking toward the limitation of deficiency judgments to the difference between the whole indebtedness and what the court may find to have been the fair market value of the real property by which, prior to the sale, the indebtedness was secured, have uniformly been held inapplicable to contracts made before the effective date of the code section, regardless of whether the sale of the security was had before or after such effective date". With equal clarity the court in the Birkhofer case disposed of section 2924½ of the Civil Code and held, on the authority of Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712, that the section did not apply to preexisting contracts under circumstances such as are presented in the instant case.

The appellants, however, insist that all these authorities must fall before the rule announced in Richmond Mtg. & Loan Corp. v. Wachovia B. & T. Co., 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 A.L.R. 886. Mr. Justice Haines, however, clearly analyses the differences in the situation under the California law and that under the laws of North Carolina where the Wachovia case arose. Of particular significance are the provisions of the North Carolina procedure subjecting such sales to judicial control and judicial approval and exempting the restrictions upon deficiency judgments where the sale is less than the ascertained fair market value from all those proceedings wherein the obligee has elected to pursue his alternative statutory remedy by foreclosure in equity and sale under process of the court. This distinction is also recognized in Miller v. Hart, 11 Cal.2d 739, 81 P.2d 923, where a similar alternative remedy was held to be optional with the obligee and for that reason not in conflict with the substantive rights of the creditor existing under a trust deed at the time of its execution.

[2, 3] While the court in the Birkhofer case (as well as those in the cases therein cited) is content to rest its decision on the ground that a retroactive application of the statute would invade the constitutional rights of the obligee, all those decisions might well rest upon the firmer foundation that the legislature did not intend that the statute should operate retroactively. It has long been the rule of this state that no statute shall be held retroactive unless such intention clearly appears. In the early case of Higgins v. B. R. & A. W. & M. Co., 27 Cal. 153, 159, decided in 1865, the Supreme Court said: "It is a rule never to apply a statute retrospectively by mere construction. * * * All laws are to be construed according to the intention of the Legislature, and in getting at that intention courts must presume a prospective and not a retrospective operation was meant *unless such presumption is repelled by express words.*" (Italics ours.) In the comparatively recent case of Jones v. Union Oil Co., 218 Cal. 775, 777-778, 25 P.2d 5, 6, the court reaffirmed this rule to the extent that, "It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed. * * * The rule that a statute is presumed to operate prospectively only, *unless an intent to the contrary clearly appears,* is especially applicable to cases where retroactive operation of the statute would impair the obligations of contracts or interfere with vested rights." (Italics ours.) To this rule of construction must be added the further observation that legislation of this type affecting legal procedure in the protection and enforcement of substantive rights in property must be presumed to have been enacted in conformity to and in harmony with constitutional restrictions and the judicial pronouncements heretofore noted. Hence, when the legislature enacted the code sections herein referred to and gave no intimation of an intention to make them act retrospectively so as to deprive the lender of a substantive right in a prior contractual obligation, we must presume that it did not intend that the legislation should have such retrospect operation.

For these reasons, the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

31 Cal.App.2d 348

STONE v. CONKLE et al.

Civ. 10545.

District Court of Appeal, First District, Division 1, California.

March 7, 1939.

1. Insane persons 🔑75

Legal services rendered an incompetent in proceedings to restore incompetent to competency are "necessaries" and contract to pay reasonable value thereof is implied and is enforceable in suitable proceedings.

[Ed. Note.—For other definitions of "Necessaries," see Words & Phrases.]

2. Insane persons 🔑75

The alleged fact that attorneys who conducted proceeding to restore incompetent to competency were employed by incompetent's brother-in-law would not destroy right of attorneys to recover from the incompetent, upon her restoration to competency, reasonable value of the legal services rendered.

3. Insane persons ⚷75

An incompetent or her estate is liable for necessaries furnished the incompetent, irrespective of liability of a third person in ordering the necessaries for the incompetent.

4. Husband and wife ⚷19(1)

A husband is liable for necessaries furnished to his wife by a third party.

5. Husband and wife ⚷19(18)

Legal services rendered to incompetent wife to restore her to competency were "necessaries" for which husband was liable notwithstanding that husband opposed the proceeding to restore the wife to competency.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by George C. Stone against Myrtle Conkle and another for legal services rendered by the plaintiff's assignors. From the judgment, the plaintiff appeals.

Reversed.

Faulkner, Doyle & Sanford and Lawrence McCune, all of San Francisco, for appellant.

Bullock & Manders, of Redwood City, for respondents.

TYLER, Presiding Justice.

The plaintiff, George C. Stone, is the assignee of one Carroll Bucher and of the firm of Faulkner, Doyle & Sanford of their account against defendants and respondents for legal services rendered and for costs advanced in the sum of $1,162.50. Carroll Bucher is an attorney at law, as are also George C. Faulkner, William T. Doyle and Henry G. Sanford, who compose the law firm of Faulkner, Doyle & Sanford. The respondents, Joseph Conkle and Myrtle Conkle, are husband and wife. Prior to 1936, respondent Myrtle Conkle had been committed to Agnew State Hospital for the insane upon the complaint of her husband. Thereafter she had been judicially declared incompetent and her husband, Joseph Conkle, had been appointed guardian of her person and estate. In the early part of 1936, while on parole from Agnew State Hospital, respondent Myrtle Conkle visited her sister and brother-in-law, Mrs. and Mr. L. S. Durben, at their home in Santa Barbara, and while there she and her brother-in-law consulted Carroll Bucher with reference to initiating proceedings to restore her to competency. Bucher examined the records in San Mateo county and at Agnew and filed the petition as requested. At that time he was called east and had no opportunity to prepare for the trial. In May of 1936 Durben and Mrs. Conkle came to the offices of Faulkner, Doyle & Sanford and consulted Mr. Doyle. Mr. Durben advised Mr. Doyle that Mr. Bucher had referred Mrs. Conkle and him to that firm and that he understood they were to proceed with the case. All but one of the conversations had by Mr. Doyle in connection with the matter were with Mrs. Conkle. Any arrangements that might theretofore have been made between Bucher and Durben or Mrs. Conkle were not discussed with or by Mr. Doyle at any time, Doyle particularly informing Mr. Durben and Mrs. Conkle that the firm of Faulkner, Doyle & Sanford was looking to Mrs. Conkle and her property for reimbursement for services to be rendered by them. Thereafter Faulkner, Doyle & Sanford proceeded with the preparation of the trial, employing a skilled psychiatrist; the trial lasted for a period of three days. The petition for restoration was contested by the husband and guardian, Joseph Conkle. At the conclusion of the trial the jury rendered a unanimous verdict restoring Myrtle Conkle to competency.

After her restoration, Mrs. Conkle employed the firm of Faulkner, Doyle & Sanford to file proceedings for divorce against her husband on the ground of extreme cruelty. The divorce complaint was prepared and filed and subsequently certain alimony and counsel fees were awarded the wife. Likewise, subsequent to her restoration to competency, Myrtle Conkle employed the firm of Faulkner, Doyle & Sanford in an ancillary proceeding to compel respondent Joseph Conkle to account as guardian for his administration of the estate of his wife. An order was accordingly obtained compelling him to file an account as guardian, which account was subsequently filed and several hearings had thereon. All proceedings subsequent to the restoration to competency verdict were at this point stayed by reason of the reconciliation of Conkle and his wife, and plaintiff's assignors were instructed to drop all proceedings.

After the foregoing evidence was introduced on the part of the plaintiff, a legal expert whose qualifications were admitted, was called by plaintiff to testify as to the reasonable value of the attorneys' fees. He estimated the services rendered by Mr. Bucher, prior to the trial, at the sum of $150, and the reasonable value of the services rendered by Faulkner, Doyle & Sanford in the proceedings with reference to the restoration to competency of respondent Myrtle Conkle at the sum of $500. He further testified that the reasonable value of legal services rendered by Faulkner, Doyle & Sanford in the accounting proceeding was $200, and for legal services in the divorce proceeding $50. Upon the conclusion of the presentation of the evidence, the trial court granted the motion of respondent Joseph Conkle for a nonsuit as to all legal services performed and costs advanced by plaintiff's assignors, and likewise granted the motion of the respondent Myrtle Conkle for nonsuit for all legal services rendered and costs advanced by plaintiff's assignors prior to the decree restoring her to competency.

Upon the completion of the defense offered by respondent Myrtle Conkle to legal services rendered subsequent to her restoration to competency, the trial court allowed plaintiff the sum of $175, based upon legal services rendered in the accounting proceeding, and the further sum of $12.50 based upon legal services rendered in the divorce proceedings, and costs in these two proceedings in the sum of $50.

It is conceded by appellant that the trial court was legally correct in granting the motion of respondent Joseph Conkle for nonsuit as to legal services rendered by plaintiff's assignor subsequent to the restoration to capacity of respondent Myrtle Conkle. It is contended, however, that the trial court fell into error in granting the motion for nonsuit of both defendants as to legal services rendered prior to the restoration to capacity of respondent Myrtle Conkle.

The appellant claims:

1. That the legal services rendered the respondent in the proceedings to restore her to capacity were necessaries.

2. That an incompetent is liable for necessaries furnished her during incompetency, irrespective of concurrent liability of a third person in ordering the necessaries.

3. That a husband is liable for necessaries furnished to his wife by a third person.

4. That the evidence is insufficient to sustain the finding of the trial court that plaintiff's assignors were employed by Durben.

[1-3] There is no doubt that legal services rendered an incompetent in proceedings looking toward restoration to capacity are necessaries, and a contract to pay the reasonable value thereof will be implied by law and may be enforced in suitable proceedings. Estate of Doyle, 126 Cal.App. 646, 14 P.2d 920; 4 Cyc. 993. Respondent does not seriously question this rule, but the trial court particularly found that the legal services rendered were at the request of L. S. Durben, for which reason it was held no recovery could be had. As above indicated, the evidence is insufficient to show that plaintiff's assignors were employed by Durben as Mrs. Conkle and her brother-in-law were both informed that the property she was supposed to possess would be looked to for compensation for the services rendered. But, irrespective of this fact, the action being for necessaries, it is immaterial whether the services were performed at the request of the incompetent or of a third party, as the law implies a promise and creates an obligation on the part of the incompetent to pay the reasonable value therefor. The mere claim, therefore, that plaintiff's assignors may have been employed by the brother-in-law, Durben, would not militate against or destroy the right of plaintiff's assignors to recover the reasonable value of the legal services against the respondent Mrs. Conkle because the law is clear that, irrespective of the liability or nonliability of a third person in ordering necessaries for an incompetent, the incompetent herself or her estate is nevertheless liable for such necessaries. McClenahan v. Keyes, 188 Cal. 574, 206 P. 454.

[4, 5] The court likewise erred in granting the nonsuit of respondent Joseph Conkle. Legal services rendered an incompetent, under the laws of this state being necessaries, a general rule that a husband is liable for such furnished to the wife by a third party is too well established to require citation or authority, and this is true irrespective of the fact that the husband did not desire the services rendered or that he opposed the proceeding. The law imposes the obligation and enforces it by a contract remedy.

The judgment is reversed.

We concur: KNIGHT, J.; WARD, J.

31 Cal.App.2d 144

WEISZ et al. v. McKEE et al.

Civ. 2178.

District Court of Appeal, Fourth District, California.

March 16, 1939.

Hearing Denied by Supreme Court April 17, 1939.

Pleading 🔑350(3)

Where allegation in complaint respecting interests of certain defendants was admitted by their answer, judgment on pleadings that such defendants were owners of their admitted undivided interests, while leaving action pending as to remaining defendants, was not premature adversely affecting rights of plaintiffs against such defendants, since, if plaintiffs could show no interest in property of such defendants, they could not be aggrieved by declaring someone else to be owner.

◆

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

On motion for rehearing.

Motion denied.

Prior opinion 87 P.2d 379.

Charles J. Katz and Alfred Gitelson, both of Los Angeles, for appellants.

Rutan, Mize & Kroese and Robert Mize, all of Santa Ana (Harold H. Coyle, of Placentia, of counsel), for respondents.

PER CURIAM.

In view of the persistence of appellants and the sincerity of their counsel in his belief that both the judgment of the trial court and the decision of this court were erroneous, we will say by way of explanation in denying appellants' motion for rehearing that had these particular defendants, respondents herein, moved for judgment on the pleadings under the limited prayer for relief set forth in the answer, the authorities cited by appellants would have been applicable. Kershaw v. Hogan, 127 Cal.App. 89, 15 P.2d 535; Islais & Salinas Water Co. v. Allen, 132 Cal. 432, 64 P. 713. But appellants injected, in connection with respondents' motion, their motion for judgment on the pleadings. Both were heard and determined at the same time and one judgment was entered thereon. The court rendered a judgment adjudicating the rights of the parties in accordance with the allegations of the complaint wherein appellants allege that respondents were the *owners* of certain definite interests in and to the property and that they claimed some right, title and interest in the described property other than as alleged in the complaint, and that said defendants should set forth those interests in and to the property so that the respective interests may be determined and adjudicated. In the answer respondents set forth their specific interests as definitely alleged in the complaint and frankly admitted in the answer that they claimed no other or greater right, title or interest in and to the property than that as alleged in the complaint and likewise admitted that they claimed no interest in any royalty adverse to the alleged interest of plaintiffs. Based on the pleadings, the court has made a determination of their respective rights in the real property but has reserved for subsequent decision the rights of appellants to an undivided 12 per cent interest in the remaining property, i. e., property alleged to be claimed by the remaining defendants. It would appear that the rights of appellants as against these respondents have not been affected by the judgment entered under the pleadings. If appellants can show no interest in the property of respondents they cannot be aggrieved by a judgment declaring someone else to be the owner. Rockey v. Vieux, 179 Cal. 681, 683, 178 P. 712.

Petition for rehearing denied.

WEST KEY NUMBER SYSTEM

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31 Cal.App.2d 430

CAIN v. MARQUEZ et al.

Civ. 2222.

District Court of Appeal, Fourth District, California.

March 10, 1939.

Hearing Denied by Supreme Court May 8, 1939.

1. Automobiles 🔑193(10)

An employee on his way to lunch, even though he is driving employer's automobile, is not engaged in furthering any end of the employer, and is not acting within the "scope of employment," as respects employer's liability for employee's negligence.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

2. Master and servant 🔑302(1)

A deviation from the strict course of duty does not necessarily take an employee out of the "scope of employment" if meanwhile his main purpose is still to carry on his employer's business, as respects employer's liability for employee's negligence.

3. Master and servant 🔑302(6)

An employee's deviation from strict course of duty to exonerate employer from liability for injuries resulting from employee's negligence must be for a purpose entirely personal to employee and must be so substantial as to amount to an entire departure.

4. Master and servant 🔑302(6)

An employee does not cease to be acting within the "course of employment" because his immediate pursuit of his employer's business is subject to necessary personal acts, nor do slight delays or deflections from the most direct route for a private purpose affect employer's liability for employee's negligence where pursuit of employer's business continues to be the controlling purpose.

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

5. Master and servant 🔑332(2)

Whether an employee's deviation from strict course of duty has been so material or substantial as to constitute a complete departure is usually a fact question in action involving employer's liability for employee's negligence.

6. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit, presumptions are not strong for correctness of trial court's ruling, but evidence must be construed as strongly as possible the other way, since plaintiff is entitled to a judgment on the merits if there is any substantial evidence in his favor.

7. Master and servant 🔑304

A master is liable for the result of a servant's negligence when servant is acting in the course of his employment.

8. Master and servant 🔑302(1)

Where a servant temporarily abandons his master's service, master again becomes liable for servant's acts when servant resumes his duties, and the re-entry is not affected merely by servant's mental attitude, but there must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged.

9. Automobiles 🔑245(31)

Whether employee, who drove his automobile to parents' home to get tools, proceeded to boarding house to have dinner, and then started back to employer's garage to do some work, had abandoned his employment so that employer was not liable for death of bicyclist with whom employee collided after leaving boarding house, was for jury.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Henrietta Cain against Phil Marquez and Al Weedall for the death of her son. A motion made by defendant Al Weedall for a nonsuit having been granted, counsel for plaintiff dismissed the action as to defendant Phil Marquez only, and from the judgment of nonsuit, plaintiff appeals.

Reversed.

Borton, Petrini & Conron, of Bakersfield, for appellant.

Brittan & Mack, of Bakersfield, for respondent.

GRIFFIN, Justice.

This is an action in which Henrietta Cain instituted suit against Phil Marquez and Al Weedall for damages arising out of the death of Frank Cain, resulting from injuries sustained in an accident that took place at the intersection of Owens and Nile streets in the city of Bakersfield on the evening of October 24, 1936. Plaintiff and appellant is the widowed mother of Frank Cain, the deceased, who was 17 years of age at the time of his death. Appellant is the sole heir at law of the deceased.

The accident grew out of a collision between a bicycle being ridden by Frank Cain and an automobile driven by Phil Marquez. Marquez was an employee of respondent Al Weedall. At the time of the accident Marquez was en route to the shop of Al Weedall, which was located at 2814 Chester street. He had left the shop at about six o'clock p. m. to go to the home of his parents on Hoover street. The purpose of that trip was to obtain a micrometer and some other tools which were to be used in work upon a crank shaft at the Weedall shop. It was his intention to return to the shop that evening to finish the crank shaft job. Upon arriving at his parents' house Marquez picked up these tools and then drove his car over to 1803 Oregon street where he ate dinner. He spent about a quarter of an hour eating dinner and then started to drive back to the Weedall shop and after proceeding 9 blocks was involved in this collision.

It appears from a map of the city of Bakersfield received in evidence and from other testimony that Marquez had driven his car south on Chester avenue from Weedall's garage for about 16 blocks, then he turned east on California street for about 13 blocks, then south on Union avenue for 10 blocks, and thence east on Graham street six more blocks to his parents' home where he picked up the tools belonging to him and which were to be used by him that evening in repair work at the garage. Instead of retracing his route from his parents' home to the garage, he continued in an easterly direction about three blocks, north four or five blocks, then, in order to avoid a cemetery, he turned left about two blocks to pass it, and continued northeasterly on Baker street about 17 blocks to the corner of Nile street. He then turned easterly on Nile street, went about 11 blocks and turned north one block to the place where he roomed and boarded. Leaving there to return to the garage, he drove one block south to Nile street and turned west along his original course on Nile street, on which he proceeded 8 blocks to the point where the accident happened. The general course of the route taken and contemplated was described as similar to an equilateral triangle. The distance from the garage to the place where the tools were obtained was about two or three miles. It was a like distance from there to the boarding house and a similar distance from there to the garage.

It was customary for Marquez to use his own car while transacting his employer's business. It was also customary for him to work in the shop at night when work remained to be done. He worked in the general capacity of a mechanic, bookkeeper, collector and solicitor of business and was next in charge of the shop under the owner, Al Weedall, with general authority. He had no stipulated hours of employment but his duties required him to get the work out expeditiously.

At the conclusion of plaintiff's case the defendant Al Weedall moved for a nonsuit on the ground that at the time of the accident the defendant Marquez was not acting in the scope of his employment. The motion was granted. Counsel for plaintiff then dismissed the action as to the defendant Phil Marquez only. From this judgment of nonsuit the plaintiff appeals.

The issue upon which appellant bases this appeal can be clearly defined. Appellant claims that a perusal of the record shows evidence to the effect that the defendant Marquez was acting in the scope of his employment at the time of the accident and that the granting of a judgment of nonsuit upon the ground that the evidence established that Marquez was not acting in the scope of his employment constituted reversible error.

The evidence bearing upon whether defendant Marquez was acting in the scope of his employment at the time of the accident may be found in the testimony of Marquez, called by plaintiff and appellant under section 2055 of the Code of Civil Procedure. A summary of the pertinent portions of this testimony is related in the facts above disclosed.

On this particular evening, it became necessary for Marquez to use a micrometer to test the roundness of the crank shaft and to use certain other tools which were not available to him in the shop. He proceeded to secure the tools at the home of his parents for the completion of the work that evening. On his return he deviated from the course as described for the purpose of having his dinner at his customary boarding house.

There seems to be but little doubt that had the accident happened between the location of the garage and the home of Marquez' parents, where the tools were secured, the relationship of master and servant would have existed. The evidence would likewise have supported a finding that Marquez was acting in the scope of his employment. Had the accident happened between his parents' home and the boarding house, a question might have arisen as to whether Marquez had departed from the business of the master and engaged in some matter solely for his own pleasure or convenience or pursued some object which related to an end or purpose which may be said to be the servant's individual and exclusive business. The question presented is this: At the time of the accident and after Marquez had finished his dinner and was on his return trip to the garage with the tools, was there sufficient evidence, viewed in a light most favorable to appellant, to leave to the jury for determination the question whether, under the circumstances, the evidence established only a deviation, rather than a departure from the scope of employment on the part of the servant?

It is clear from the record that Marquez combined his own business with the master's business during this journey, but the evidence suggests that the controlling purpose of this journey was to serve the master, particularly so as to the intended trip from the boarding house to the shop.

Appellant contends that if any deviation took place, it was incidental to the main purpose of the journey, which was to serve the master; that there was only a slight deflection from the pursuit of the master's business; and that there was no purpose or intent on the part of Marquez to depart from the pursuit of the master's business and go on a trip to carry out a purpose purely and solely connected with his own business as distinguished from that of his employer, citing Hiroshima v. Pacific Gas & Electric Co., 18 Cal.App.2d 24, at page 31, 63 P.2d 340; Kruse v. White Bros., 81 Cal.App. 86, 253 P. 178; Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 15 P.2d 217; Adams v. Tuxedo Land Co., 92 Cal.App. 266, at page 268, 267 P. 926; Martinelli v. Stabnau, 11 Cal.App.2d 38, 40, 52 P.2d 956; Helm v. Bagley, 113 Cal.App. 602, at page 605, 298 P. 826; Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894; Aubel v. Sosso, 72 Cal.App. 57, 236 P. 319.

Appellant further advances the contention that this aspect of the question would have been a proper question of fact for the jury, and cites in support thereof Waack v. Maxwell Hardware Co., 210 Cal. 636, at page 641, 292 P. 966; Dennis v. Miller Automobile Co., 73 Cal.App. 293, 297, 238 P. 739; Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945; Tuttle v. Dodge, 80 N.H. 304, 116 A. 627, and Riley v. Standard Oil Co. of New York, 231 N.Y. 301, 132 N.E. 97, 22 A.L.R. 1382.

Respondent contends with equal force that the servant was acting in his own behalf and not on behalf of his master and that therefore he was not within the scope of his employment and the master was not liable; that when the employee in this case turned aside from the route back to the shop, he departed on an errand (to eat his dinner) which he claims has been clearly stated to be one personal to the employee and not within the scope of his employment.

[1] It has been decided in California and is the general rule elsewhere, that an employee *on his way to lunch,* even though he is driving an automobile which is the property of the master, is not engaged in furthering any end of the employer, and that therefore under such circumstances the servant is not acting within the scope of his employment. Carnes v. Pacific Gas & Electric Co., 21 Cal.App.2d 568, 571, 69 P.2d 998, 70 P.2d 717; Kish v. California S. Automobile Ass'n, 190 Cal. 246, 212 P. 27; Adams v. Tuxedo Land Co., supra; Helm v. Bagley, supra.

In order to escape the force of this reasoning, appellant urges that Marquez still had these tools in the car; that he ultimately would have arrived back at the garage with them, and that therefore his controlling purpose at all times during this trip was to carry out the master's business, and at no time was he engaged solely upon his own separate business.

In support of the judgment of nonsuit, respondent relies principally upon the case of Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538, 539. In that case Flaherty was employed by the Union Oil Company as a service station attendant in San Jose. As a part of his duties, he was occasionally required to go into town and get change and also to turn money into the branch office of the company. There was no route prescribed for these errands. Just before noon on the day of the accident Flaherty took his own automobile, drove to the bank to get change, intending thereafter to proceed to the branch office of the company to leave the money. While he was stopping at the bank, Mrs. Franz, mother of a friend and fellow employee, asked him to take her to her home in Santa Clara, a few miles away from San Jose. He agreed, and after assisting her into the car with her parcels, he proceeded to drive toward the company office. Instead of stopping there, he proceeded on toward her home and the collision occurred three blocks past the office. The jury's verdict for plaintiff against the Union Oil Company was reversed on appeal. In reversing the judgment the court said: "It seems perfectly clear that at the time of the accident Flaherty had departed from his employment and was performing services for another, outside its scope. This is not a case of a choice of different possible routes, or minor or immaterial deviations in the course of business errands. If Flaherty had taken Mrs. Frantz as a passenger, and driven her to some point between the bank and the branch office, or had even deviated by a short distance from the most direct route, it might still be held that he was within the general scope of his employment at the time of the accident. * * * But it was not a mere deviation *when he actually passed the company office and proceeded in the direction of a place which had no relation to the company business.* [Italics ours.] This was a real departure from the employment, despite the fact that he intended subsequently to return to his employer's business; and during such departure the employer was not liable for the employee's tort."

The Supreme Court has thus determined that, as a matter of law, where the servant was proceeding in a direction and on a trip diametrically opposed to that dictated by his master's business, he was not within the scope of his employment, even though the trip started, and would have terminated, in a delivery of the master's property to the master's offices. The Flaherty case cited Sauriolle v. O'Gorman, 86 N.H. 39, 163 A. 717, to the same effect. In support of the general rule claimed, respondent cites Humphry v. Safeway Stores, 4 Cal.App.2d 589, 41 P.2d 208.

Respondent further argues that the servant was upon his own trip until his return to the point of departure or to a point where, in the performance of his duty, he ought to be, citing Gousse v. Lowe, 41 Cal.App. 715, 183 P. 295; Hiroshima v. Pacific Gas & Electric Co., supra; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651, and Hanchett v. Wiseley, 107 Cal.App. 230, 233, 290 P. 311. Respondent maintains that upon the facts established, only a question of law was presented and it was therefore the duty of the trial judge to remove the question from the consideration of the jury and grant a nonsuit, citing Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Wagnitz v. Scharetg, 89 Cal.App. 511, 265 P. 318; Gousse v. Lowe, supra; and Kruse v. White Bros., supra.

Appellant in her brief submits that a perusal of the above testimony establishes the proposition that had Marquez not gone over to get dinner but had been involved in this accident during a trip back to the Weedall shop with the micrometer and other tools, there would be no question that he was acting in the scope of his employment. On the other hand, if Marquez had gone directly to dinner upon leaving the Weedall shop and at the time of the accident was not carrying the micrometer and tools but was only returning to the shop to resume his work, it is clear that he would not have been acting within the scope of his employment. It is the contention of appellant that the principal case cannot be brought under those authorities that hold that a servant is not acting within the scope of his employment while going to or returning from meals.

An examination of authorities that break the scope of the employment while the employee is going to or returning from a meal will reveal a limitation on the rule. In the leading case of Adams v. Tuxedo Land Co., supra, there is this language: "He was not going to the pumping plant on any mission for the company, nor was he transporting any property belonging to the company, but was going there to eat his own lunch, * * *." [92 Cal.App. 266, 267 P. 927.]

The above language was quoted and emphasized in italics in Carnes v. Pacific Gas & Elec Co., supra.

In Martinelli v. Stabnau, supra, the court said: "The case presents the sole question whether the employee, while on his way home to lunch, was acting in the service of his employer and not solely in his own behalf, while he was doing no act or thing which pertained to the business of his employer." [11 Cal.App.2d 38, 52 P.2d 957.]

There would appear to be implied in the above cases the limitation that going to and coming from meals breaks the scope of agency only when the sole purpose of the servant is to obtain the meal and he is doing nothing at the time which pertains to the business of the master. It would seem that the cases should be interpreted as establishing the above as a definite rule of law to be applied only to a specific situation. If, at the time of his trip, the servant combines some purpose of serving the master with the trip to obtain food, it would be an invasion of the province of the jury to hold as a matter of law that the scope of his employment is broken.

The court in Helm v. Bagley, supra, page 603, 298 P. page 827, gave cognizance to a limitation of the rule as above suggested by its treatment of the point that some of the employer's property was in the car. It was there said: "At this time he had in his car some vacuum cleaner attachments which belonged to his employer. He did not know how long they had been in the car and was not taking them to any particular place as it was his habit to carry samples of the merchandise handled by his employer."

[2] The distinction made by the court as to the property in the car suggests forcibly that had the property been carried to fulfill some immediate purpose connected with the employment, it would have been a material factor in establishing the cause of action as to the scope of the servant's employment. The analysis of the evidence must be made under the ordinary rules as to what constitutes a departure from the scope of employment. Those rules are not to be applied mechanically but look rather to the purpose of the servant while acting. A deviation from the strict course of duty does not necessarily take him out of the scope of employment if meanwhile his main purpose is still to carry on the business of his master.

It was aptly stated in Kruse v. White Bros., supra:

[3, 4] "To exonerate the master, however, it is essential that the deviation be for purposes entirely personal to the servant * * * and a deviation will be regarded as immaterial if the latter combines his own business with that of the master or attends to both at substantially the same time (Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894). A mere deviation from the strict course of his duty does not release the master from liability. In order to have that effect it must be so substantial as to amount to an entire departure. * * * As the rule has been stated: 'One does not cease to be acting within the course of the master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be the controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably expected, to which, therefore, the master's assent may be fairly assumed; or they are in many instances the mingling with the pursuit of the master's business some purpose of the servant's own.' * * *

[5] "Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact." [81 Cal.App. 86, 253 P. 181.]

In the above case the employee was held to be acting in the scope of his employment when his purpose was to call upon a customer of his employer, although in proceeding to the home of the customer the employee detoured in order to pick up and take home a lady friend, and at the time of the accident had driven at least 1600 feet beyond the point where he could have turned to reach the home of the customer.

It was held in Dennis v. Miller Automobile Co., supra, that it was proper to leave to the jury the determination of the fact whether the employee was acting in the scope of his employment at the time of the accident. In that case it was found to be merely a deviation when the employee, who was taking packages to the express office for his employer in a delivery truck, departed from his usual route in order to take two fellow-employees to lunch. The court said: "It is evident that the driver of the appellant's automobile had not abandoned his purpose of taking the packages to the express office, but was simply accomplishing a double purpose—he was taking both the two packages and the two boys. There would be no return to the point of departure. * * *" [73 Cal.App. 293, 238 P. 740.]

In that case the court distinguishes Gousse v. Lowe, supra, and Kish v. California State Automobile Ass'n, supra.

The case of Gordoy v. Flaherty, supra, on which respondent relies so strenuously, may be distinguished from the principal case on the fundamental principle that it dealt with an abandonment of employment rather than with acts which constituted a mere deviation from the scope of employment. Here the factual distinction is to be noted that in the Gordoy case the servant had passed his destination and was proceeding directly away from it, whereas, in the principal case the servant was proceeding generally toward his master's shop to finish his task for his employer. That this factual distinction gives rise to a legal distinction is strongly suggested in Waack v. Maxwell Hardware Co., supra.

In that case a truck driver was authorized to take the company truck from his home to a garage to secure a recharged battery. Instead of going to the garage he assisted his brother-in-law in moving a cabinet from a clubhouse, a distance of 2.5 miles from his home, to his brother-in-law's home. It was a distance of 4.1 miles from the clubhouse to the garage and 1.1 miles from the garage to the brother-in-law's home. En route they passed the garage. The defendant driver then started in the truck to the garage with the intention of leaving it there for repair. The brother-in-law followed in his car to assist the driver in returning home. When the truck was an even mile from the house of the brother-in-law and .1 mile from the garage the accident occurred. In passing on the same question here involved, and after reviewing many of the cases cited by the respondent, our Supreme Court held that where a truck driver employed by a company deviated from his route to a garage to which he was going to have repairs made to the truck, in order to do an errand for a relative which took him nearly five miles out of his course, and after performing said errand and while he was on his way to the garage met with an accident, *the question of whether the driver was acting in the scope of his employment at the time of the accident was one of fact for the jury to determine under proper instructions from the court.* The court then said: "The question seems to be reduced then to this proposition: In this case, when did a question of fact arise as to the time and place when the servant re-entered the service of the master? If the servant had gone first to the brother-in-law's residence for the purpose of having the brother-in-law assist him in reaching home after depositing the truck at the garage, would not a question of fact arise as to whether he had abandoned his master's service, and would not this be true even though in so doing he passed en route the garage? If so, does not a similar question arise as to whether or not, on reaching his brother-in-law's home, he there resumed his master's business? * * * If, therefore, the servant might have passed the place of the accident while en route from his home to the garage, even though in so doing he might have deviated slightly from the most direct route, would not a question of fact have arisen as to whether or not he had abandoned his master's service? If this be so, does not an issue of fact arise as to whether or not at this point again the servant re-entered the employment of his master?" [210 Cal. 636, 292 P. 968.]

In Ryan v. Farrell, supra, this rule was established: "that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master. [Citing cases.]" [208 Cal. 200, 280 P. 946.]

[6] Upon a judgment of nonsuit, the presumptions upon appeal are not strong for the correctness of the trial court's ruling; but the evidence must be construed as strongly as possible the other way, since the plaintiff is entitled to a judgment upon the merits if there is any substantial evidence in his favor. Vermont Marble Co. v. Declez etc. Co., 135 Cal. 579, 67 P. 1057, 56 L.R.A. 728, 87 Am.St.Rep. 143.

[7, 8] It seems to be firmly established that a master is liable for the result of a servant's negligence when the servant is acting in the course of his employment. It is not the rule itself but its application that ever causes a doubt. The servant may be acting for himself. He may be engaged in an independent errand of his own. He may abandon his master's service permanently or temporarily. While still doing his master's work, he may be also serving a purpose of his own. He may be performing his master's work but in a forbidden manner. No formula may be stated that will enable us to solve the problem whether at a particular moment a particular servant is engaged in his master's business. We recognize that the precise facts before the court will vary the result. We realize that differences of degree may produce unlike effects. But whatever the facts, the answer depends upon a consideration of what the servant

was doing and why, when, where and how he was doing it. He may be so distant from the proper scene of his labor, or he may have left his work for such a length of time, as to evidence a relinquishment of his employment. Or the circumstances may have a more doubtful meaning. That the servant is where he would not be had he obeyed his master's orders in itself is immaterial, except as it may tend to show a permanent or a temporary abandonment of his master's service. Should there be such a temporary abandonment the master again becomes liable for the servant's acts when the latter once more begins to act in his business. Such a reentry is not affected merely by the mental attitude of the servant. There must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged. No hard and fast rule on the subject either of space or time can be applied. He may choose a different way back.

[9] We are not called upon to decide whether the respondent might not have been responsible had this accident occurred while Marquez was on his way from his parents' home to his boarding house. That would depend on whether this trip was to be regarded as a new and independent journey on his own business, distinct from that of his master or as a mere deviation from the general route from the parents' home to the garage. Whether the detour made by the driver in the instant case and at the time of the accident under the circumstances amounted to an abandonment of the employment was, in view of the evidence, a question for the jury.

The accident did not happen on the journey from the parents' home to the boarding house where Marquez had his evening meal. It did happen after that meal had been consumed and when the servant was on the return journey to his place of employment. Even though it might be held that he had departed from his employment in going to his meal, it would not follow that he had not returned to the service of his employer when he resumed his journey to the garage with tools necessary for his work. From the evidence before us, the above-mentioned questions cannot be determined as a matter of law. We are of the opinion, in the light of the decisions and reasoning expressed that these questions should have been presented to the jury under proper instructions.

The judgment of nonsuit is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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31 Cal.App.2d 374

PEOPLE v. MANGUM.

Cr. 1657.

District Court of Appeal, Third District, California.

March 9, 1939.

Rehearing Denied March 24, 1939.

1. Rape 🔑4

In prosecution for rape by force, the chastity of prosecuting witness is not an issue.

2. Rape 🔑40(2)

In prosecution for rape by force, evidence tending to show prior unchaste acts of prosecutrix either with defendant or other men is admissible to disprove allegation that act charged was committed by force and against will of prosecutrix.

3. Witnesses 🔑269(12)

In prosecution for rape by force, objections to cross-examination questions propounded to prosecutrix regarding prosecutrix' intoxication in public places were properly sustained where questions were not connected with direct examination. Code Civ.Proc. § 2048.

4. Witnesses 🔑269(1)

In prosecution for rape by force, objections to cross-examination questions propounded to prosecutrix regarding whether she had not accused certain other men of attempting to have sexual intercourse with her and whether prosecutrix had not been out at night with another man after prosecutrix was married were properly sustained where the questions were not connected with the direct examination. Code Civ.Proc. § 2048.

5. Witnesses 🔑268(1)

In prosecution for rape by force, unusual liberality should be allowed in connection with the scope of the cross-examination of the prosecutrix.

6. Rape 🔑40(2)

In prosecution for rape by force, objections to cross-examination questions propounded to prosecutrix regarding whether she had been intoxicated in public places and whether she had accused certain other men of attempting to have sexual intercourse with her and whether she had not been out at night with another man after she was married were properly sustained, since questions would not have brought out any facts proving or tending to prove that the witness had engaged in prior acts of sexual intercourse.

7. Criminal law 🔑304(2)

Appellate court may take judicial knowledge of customs and ordinary affairs of life.

8. Witnesses 🔑267

In the matter of the extent of cross-examination, the trial judge is vested with wide discretionary powers.

9. Witnesses 🔑268(1)

In prosecution for rape by force, the fact that direct examination of prosecutrix took up 23 pages of reporter's transcript, whereas cross-examination covered over 108 pages, tended to indicate that trial court did not unduly restrict defendant in cross-examination of prosecutrix.

10. Criminal law 🔑670

In prosecution for rape by force, objection to question propounded to defendant's wife relating to remarks made by prosecuting witness to wife prior to alleged offense was properly sustained, where no offer of proof was made, since on face of record question called for hearsay testimony.

11. Criminal law 🔑419(10)

In prosecution for rape by force, objections to questions propounded to witnesses and calling for conversation between witnesses and prosecutrix were properly sustained, since questions called for hearsay testimony.

12. Criminal law 🔑1036(1)

Appellate court could not determine whether court's exclusion of evidence was prejudicial, where no specific offer of proof was made in respect to evidence excluded.

13. Rape 🔑57(1)

In prosecution for rape by force, question regarding resistance made by prosecutrix was for jury.

14. Rape 🔑51(4)

Evidence sustained conviction for rape by force and violence.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Ross Mangum was convicted of the crime of rape by force and violence, and he appeals.

Affirmed.

R. A. Ferrario and Leo A. Sullivan, both of Oakland, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

Defendant was convicted before a jury of the crime of rape, by force and violence, and he now appeals from the judgment of conviction and from an order denying a motion for a new trial.

The defendant is forty-four years of age and resides in the city of Tracy, California; he works in the southern part of the state; his wife and he have their home in Tracy. The victim, Janice Amos, is a married woman, thirty years of age, has a nine-year-old child; and also lives with her husband in Tracy. The victim is the niece by marriage of defendant, the defendant's wife and the victim's mother being sisters.

The testimony of the prosecutrix is substantially as follows: On Saturday night, August 13, 1938, defendant and his wife and a third party went to a carnival, which was right off one of the main streets in Tracy. The victim, Janice Amos (whom we will call Janice), and her husband went to the carnival to look for their young son. The victim and her husband had been drinking during the afternoon from about 4 o'clock on, and had consumed about a pint of gin. The parties met at the carnival about 9:30 or 9:45 p. m. and Janice and defendant's wife went on the "Loop-the-Plane". While the women were in this machine, the men and the third party went away somewhere, so that Janice and defendant's wife were left by themselves. They then walked over to defendant's home, a matter of a few blocks, and waited for the men. Shortly thereafter, the defendant came to the house. It was then between 10 and 10:30 p. m. All three, the victim, the defendant and his wife (the victim's aunt), then talked about going for a ride, and they drove to a place called the "Shady Inn", located on the west side of the main highway near the city limits of Tracy, towards Oakland. The defendant and Janice went in, had a couple of bottles of beer, and danced for about a half hour. Mrs. Mangum did not go in but sat outside. While dancing, Janice's skirt became unpinned, but did not fall down. She asked the defendant, her uncle, to pin it for her, and as he did not have a pin, they went outside and defendant's wife pinned it for her. The three then rode around in defendant's coupe and went back to the Shady Inn the second time. This time only the defendant went in and came out with two bottles of beer and a coca cola. Defendant and Janice each drank a bottle of beer sitting out front in the car with Mrs. Mangum. After another half hour or so the three went back to defendant's house. The victim, Janice, was somewhat intoxicated by this time, and was asked by defendant's wife to spend the night. The victim said no, she wanted to go home. Defendant's wife went in the house and defendant and Janice drove off, defendant driving. Instead of taking her home, defendant drove back to the Shady Inn, went in to buy more liquor, and was refused, it being now after 2 a. m. Defendant then drove on towards Oakland about three miles to a place called the "Cottage Inn". He there purchased six bottles of beer; they drank one and proceeded to the scene of the crime, which is located about three miles in a southwesterly direction off of the main road, approximately seven-tenths of a mile west of the Cottage Inn, which would make it almost five miles out of the city of Tracy on the main road, and then turning off nearly two and a half miles back into a hilly country where there are no houses, and there is no habitation at all within at least a distance of a mile. That is also an indirect route by which a person could take that road and return to the city of Tracy. They were riding along this deserted roadway when defendant stopped the car; he got out of the car, taking a mat therefrom, and placed the mat upon the ground near the car. Against her protests, and while prosecutrix was struggling to resist him, he dragged her from the car and pulled her down on the ground. She managed to break away from him and started to run away, but he ran after her and caught her, and taking her by the arm, pulled her back to the car. During this time she was pleading with him to desist and let her alone, but he simply laughed at her. He thereupon pulled up her skirt, pulled off her pants, and while she was struggling and doing all within her power to resist him, consummated an act of sexual intercourse. Soon thereafter he got up from the ground and went around toward the front of the car. The prosecutrix attempted to get in the car again, and he came back and seized her and started to pull her out, and in doing so made some vile and disgusting references as to what he proposed to do. He then accomplished the second act of sexual intercourse, and attempted to make her promise not to tell what happened, under the threat "you won't go home". He then proceeded to get into the car while the prosecutrix was with him. He drove her to her home at approximately 4 o'clock in the morning, and she woke her husband, and while still crying, told him what had happened. Her husband then dressed, summoned her father, and subsequently notified the police.

This is not a case where the guilt of the defendant is established entirely by the uncorroborated testimony of the prosecuting witness. There is ample corroboration. Her husband testified that her jaw was swollen; that there were scratches and bruises on her body; that her dress was torn, her shoes broken at the ankle strap and her stockings torn; that there were finger-nail scratches on her face, her legs, and around her waist; that her cheeks were caked with mud; and that she was in an hysterical condition. The chief of police testified that he noticed the bruises and marks, and the torn clothes in the morning. A doctor testified that he found fresh semen on the defendant's trousers. Another doctor testified that the prosecutrix had several scratches on her left elbow, and bruises on her right cheek, and several small bruises on both wrists, a scratch over the right eye and over the right collar-bone region; that there were several scratches over her entire back; and that she had six bluish scratches over her back and buttocks. These were approximately two inches in diameter. There were a number of bluish bruises over both legs, on both thighs, both in front and behind. When the garments of the prosecutrix were found the next morning at the scene of the crime, they were in a torn condition.

Defendant took the witness stand, and while he testified that he was with the prosecuting witness a portion of the evening, he denied that he ever attacked her or was ever present at the scene of the crime. He stated that after riding around with her and visiting several bars where beer was procured, he took her home at about 2 o'clock in the morning, and that he did not molest her in any way. The wife of the defendant corroborated his story with respect to the time he arrived at his home. Another witness, who was the owner of a resort, testified that defendant was in his place of business from 1:30 to 2 a. m. on the morning in question, and that defendant left said place of business at about ten minutes of 2 o'clock, and that his car was headed towards Tracy.

The chief ground urged for a reversal is alleged error committed by the trial court in sustaining objections to certain questions propounded to the prosecutrix by the defense on her cross-examination. These questions were as follows:

"Now, I will ask you, Mrs. Amos, if you have not been taken home from the town of Tracy to your home, by police officers, while you were in a highly intoxicated condition?"

"Now, Mrs. Amos, I will ask you if it is not a fact that you frequently take your child into public bars and remain there with the child during a period of time while you yourself become intoxicated?"

"Now, I will ask you if it is not a fact that you accused a doctor by the name of Powers of attempting to have sexual intercourse with you?"

"I will ask you if it is not a fact that you accused a man by the name of Merton Bill or Bell, the owner of a pharmacy, of having attempted to have sexual intercourse with you?"

"I will ask you if you did not accuse a man by the name of Arthur Stormer of going out with you and desiring to leave his wife and children and elope with you?"

"I will ask you, Mrs. Amos, if you know a man by the name of Glenn Stewart? I will ask you whether or not you have not been out with him at night when you were married?"

The foregoing questions were addressed to the witness after the jury had been excluded from the courtroom. It was stipulated that if the same questions were asked in the presence of the jury, the court would sustain an objection to each of said questions.

The following questions were asked in the presence of the jury, and objection thereto was sustained:

"Now, I will ask you if it is not a fact, Mrs. Amos, that you are frequently intoxicated in public saloons in the town of Tracy?"

"I will ask you, Mrs. Amos, if it is not a fact that you have solicited money from men in public bars in the town of Tracy?"

"Mrs. Amos, I will ask you if it is not a fact that you have come home to your own home at 5:00 or 6:00 o'clock in the morning in an intoxicated condition?"

The only case which would appear to bear out the contention of appellant that he had the right to pursue such cross-examination is that of People v. Biescar, 97 Cal.App. 205, 275 P. 851, 853. In that case the trial court refused to permit the defense to cross-examine the prosecuting witness in respect to a "party" which she attended about a week prior to the date of the alleged crime of rape by force and violence. The opinion states that "on direct examination she had given no testimony whatever concerning the party which occurred at appellant's home on March 17 and 18. * * * Notwithstanding that fact, the witness was asked, on cross-examination, several questions concerning occurrences on that occasion, for the purpose of showing the unchaste conduct of Pats [the complaining witness] with other men. Objection was made to each of these questions on the ground that they were not proper cross-examination, and the objections were sustained." The appellate court there held that the questions were proper, and that the ruling mentioned was reversible error. This is the first instance in the history of California jurisprudence, which has been called to our attention, where such a cross-examination has been permitted in a case involving rape committed by force or violence—in fact it is the first instance where the prevailing rule respecting the right of cross-examination has not been followed. This rule is purely statutory, and is set forth in section 2048 of the Code of Civil Procedure as follows: "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination."

[1-5] It is not contended here that the questions propounded arose or were connected with the direct examination. In a case of this character the chastity of the prosecuting witness is not an issue. If it were, the legislature, in defining the crime, would have so provided, and it would be incumbent upon the prosecution to prove that fact. Such, of course, is not the law. The protecting arm of the law is placed around the unchaste with just as much potency as the chaste, so far as the prosecution of this crime is concerned. Even if chastity were an issue, this has no bearing upon the question as to what is proper cross-examination. It is true that in England and several states of this country, the right of cross-examination is extended to include questions bearing upon any of the issues, but in this state a different limitation is clearly set forth in the section of the Code of Civil Procedure mentioned above. The only manner in which unchastity can be introduced is upon the part of the defense, under the rule that "where the defendant is charged with the crime of rape alleged to have been committed on the person of a woman over the age of eighteen years, accomplished by means of force or violence, it is error to exclude evidence which tends to show prior unchaste acts of the prosecutrix either with the defendant or with other men". People v. Pantages, 212 Cal. 237–262, 297 P. 890, 901, citing numerous authorities. Such evidence "may be shown for the purpose of disproving the allegation that the act charged against the defendant was perpetrated through the exercise of force, and despite the unwillingness of the prosecutrix". People v. Degnen, 70 Cal.App. 567, 234 P. 129, 138. See, also, People v. Shea, 125 Cal. 151, 57 P. 885. The questions propounded in the Biescar case are not set forth in that opinion, but we assume that they called for evidence which would support a finding that the prosecutrix had, prior to the alleged offense, committed an act of sexual intercourse. In any event, we are of the opinion that the questions here propounded were not proper cross-examination, and that the objections thereto were properly sustained. In arriving at this conclusion we are not unmindful of the general rule in cases of this character, which is to the effect that unusual liberality should be allowed in connection with the scope of the cross-examination of the prosecutrix. In People v. Degnen, above, such a rule was stated, with the qualification that the examination should be "limited by the very broad lines of the direct examination". It is obvious that there must be a reasonable limit to such an examination, and that the contention of the appellant here would far transcend such limit.

[6, 7] Such questions are also inadmissible for the reason that they would not bring out any facts proving, or tending to prove that the witness had engaged in prior acts of sexual intercourse. A very similar group of questions was held inadmissible by this court in the case of People v. Burrows, 27 Cal.App. 428, 429, 150 P. 382. The cases which are the basis for the rule contended for by appellant arose seventy or more years ago. In one of those cases the defense was allowed to prove, in attacking the moral character of the prosecuting witness, that she chewed tobacco. In another case the alleged "lewd act" was drinking intoxicating liquor in a public place. These are typical of the acts which the courts, many years ago, held to be evidence of unchastity, and which laid the foundation for the rule in the Biescar case, now sought to be invoked by appellant. Suffice it to say, that we are permitted to take judicial knowledge of customs and the ordinary affairs of life. It must be conceded that habits and social customs have altered since the origin of the rule mentioned, so that, in many respects, its application, as set forth in the earlier cases, would be a grotesque anachronism.

[8, 9] Attention is called by appellant to five instances in which it is contended that the trial court erred in excluding testimony. None of these questions is set forth in appellant's brief; neither is the line and page in the transcript given, where the particular question was asked. The first two were propounded during the cross-examination of the prosecutrix. It is a familiar rule that in the matter of the extent of cross-examination, the trial judge is vested with wide discretionary powers. While it is true that in a case involving the charge of rape, a wider range than usual should be afforded the defendant in the matter of cross-examination, we are of the opinion that the trial court fully complied with the law in this respect, and that, in the rulings of which complaint is made, there was no abuse of discretion. The record before us would indicate the

comparative time taken on the direct and cross examination of the prosecuting witness. The direct examination takes up *twenty-three* pages of the reporter's transcript, while the cross-examination is spread over *one hundred eight* pages. This would tend to refute the contention that the trial court unduly restricted defendant in such cross-examination.

[10] The third question was addressed to alleged error committed in sustaining objections to questions asked of the wife of defendant, and relating to remarks made by the prosecuting witness to her while the parties were in a resort prior to the alleged offense. When the objection was sustained, no offer of proof was made. On the face of the record the question called for hearsay testimony, which was inadmissible.

[11] The fourth and fifth rulings which are questioned were proper for the same reason. The questions were addressed to the wife of defendant, and called for conversation between her and the prosecuting witness in one instance, and with police officers in another.

[12] Finally, as to the last three questions, we are unable to say that the ruling in these matters would be prejudicial, for the reason that no specific offer of proof was made in respect to any of them.

[13, 14] It is contended that the evidence is insufficient on the question as to the resistance made by the prosecutrix. This question was one for the jury to decide. The record shows that there was ample evidence to justify an implied finding that the attack was resisted with all reasonable means. The law provides no specific formula for such resistance, and the fact that the prosecutrix did not adopt certain tactics which appear appropriate to defendant, is of no consequence.

In spite of the somewhat heated attack made upon the attitude of the trial judge in the brief of appellant, we are of the opinion that under the stress and strain of the proceedings, he acted fairly and impartially throughout; that there is ample evidence to support the verdict; and that the record is free of error.

The order denying a motion for new trial, and the judgment, are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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31 Cal.App.2d 515

PEOPLE v. MEYERS et al.

Cr. 1659.

District Court of Appeal, Third District, California.

March 18, 1939.

Hearing Denied by Supreme Court April 17, 1939.

1. Robbery ⚿17(1)

An information, charging that defendants took stated sum from named person's possession against his will by means of force and by putting him in fear, was sufficient to justify conviction of first-degree robbery, though not specifically charging that either defendant was armed with deadly weapon. Pen.Code, §§ 211, 969c; § 1168, subd. 2.

2. Robbery ⚿2

The statutory provisions that, if defendant was armed with firearm under circumstances bringing him within statute providing for increased penalties, charge of such fact shall be added to count of information charging offense, are cumulative in effect and do not repeal or amend other Code sections providing for punishment and accomplishing like result, such as that fixing punishments for first and second degree robbery. Pen.Code, §§ 211, 969c; § 1168, subd. 2.

3. Criminal law ⚿1208(9)

The indeterminate sentence provided for by statute is in legal effect a sentence for maximum term. Pen.Code, § 1168.

4. Robbery ⚿26

The sufficiency of evidence of identity of one of two defendants to convict him of first-degree robbery was for jury. Pen.Code, § 211.

5. Criminal law ⚿741(3)

Defendants' denial of their confession and voluntary character thereof merely raised conflict with evidence that confession was freely and voluntarily made without promise of immunity, hope of reward, or use of force or fear, so as to present question for jury.

◆

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Marian Meyers and Harold Laccombe were convicted of robbery in the first degree, and they appeal.

Affirmed.

Marian Meyers, in pro. per.

Harold Laccombe, in pro. per.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal taken by the defendants from a judgment of conviction of robbery in the first degree, and from the order denying a new trial.

The complaining witness, H. Braun, was the proprietor of a liquor store in Sacramento. About 10:30 o'clock on the night of June 30, 1938, it is charged that defendant Laccombe entered the store with a gun in his hand and pointed it at the complaining witness, compelled him, and later a customer who came into the store, to raise their hands, and while in that position, defendant Meyers entered and took the money from the cash register and also from the person of the complaining witness, amounting in all to approximately $200, and then escaped. Some time thereafter, both Laccombe and Meyers were apprehended in Denver, Colorado, and returned to Sacramento, where they signed a joint statement admitting the foregoing facts.

[1] In the information filed against these men it is therein charged: "* * * did then and there wilfully and unlawfully and feloniously and forcibly take from the possession and immediate presence of H. Braun, the sum of approximately $210.00 * * *, which said taking was then and there without the consent and against the will of said Braun, and was then and there accomplished by means of force used upon and against the said H. Braun, and by then and there putting the said H. Braun in fear, * * *."

Upon this appeal it is urged by appellants that this information is insufficient in that it does not contain the specific charge that either of these defendants were armed with a deadly weapon. They contend that this is a violation of section 969c of the Penal Code, which provides that "Whenever a defendant is armed with a firearm * * *, under such circumstances as to bring said defendant within the operation of subdivision 2 of section 1168 of the Penal Code * * * the fact that the defendant was so armed shall be charged in the * * * information. * * * This charge shall be added to and be a part of the count * * * of the * * information * * * which charge the offense * * *." Upon this omission these appellants contend they were found guilty of a crime, i. e., robbery of the first degree, which was not charged in the information. In this they are in error.

Robbery is defined by section 211 of the Penal Code as a felonious taking of personal property in the possession of another from his person or immediate presence and against his will accomplished by means of force or fear. A robbery perpetrated by a person armed with a deadly weapon, is robbery in the first degree. The punishment for robbery is fixed at not less than five years for robbery in the first degree, and not less than one year for robbery in the second degee.

[2, 3] Section 969c of the Penal Code has to do with the fixing of minimum sentences, and provides for an additional charge which shall be included in an indictment or information, whereby the penalties against the defendant shall be increased as such penalties are provided in subdivision 2 of section 1168 of the Penal Code. The provisions of this section are cumulative in effect and do not nor were they intended to repeal or amend other code sections where, as here, the punishment is already provided for and accomplishes a like result. A reading of the whole of section 969c of the Penal Code makes this plain. "The indeterminate sentence under said section 1168 of the Penal Code is in legal effect a sentence for the maximum term." In re Lee, 177 Cal. 690, 171 P. 958.

The jury within their province and upon ample evidence in the record found that the defendants were, at the time, armed with a deadly weapon, and fixed the crime of robbery as of the first degree.

[4] Appellants make a further point that the evidence as to the identity of defendant Laccombe was insufficient to convict him. That is a matter, however, which was properly presented to the jury, and upon that point they found against the contentions of appellant Laccombe. As to the evidence against Meyers, the record discloses that he not only, in his own statement, connected himself with the commitment of the offense, but is amply supported by other evidence in the record. Furthermore, he was arrested in Denver in the company of Laccombe, and had in his possession the gun which Meyers ad-

mitted was the one used in the robbery, and which was identified by an eye witness as one very similar in appearance to that used by Laccombe during the robbery.

[5] Some objection was also made to the admission of the written confession given by appellants to the police officers of Sacramento. The record is clear that this confession was freely and voluntarily made without any promise of immunity, hope of reward, and without the use of force or fear. This confession was later denied by Laccombe, and denied by Meyers that it was made voluntarily, but these denials merely raised a conflict in the evidence, which the jury decided against them.

The record discloses that these appellants were fairly tried and justly convicted, and no error of law appearing, the judgment and order must be affirmed. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

31 Cal.App.2d 497

KILLIAN v. CONSELHO SUPREMO DA UNIAO PORTUGUEZA DO ESTADO DA CALIFORNIA.

Civ. 10811.

District Court of Appeal, First District, Division 2, California.

March 16, 1939.

Rehearing Denied April 15, 1939.

Hearing Denied by Supreme Court May 15, 1939.

1. Insurance 🔑755(2)

A fraternal benefit association was not estopped to deny liability on life insurance policy by its local agent's acceptance of payment of premiums in arrears after insured's suspension and forfeiture of policy, where such agent had no authority to waive forfeiture, as insured knew, and latter's widow, suing on policy, knew facts.

2. Estoppel 🔑53, 54, 58

A party relying on plea of estoppel must have been ignorant of true state of facts and intentionally misled to his injury by other party's act.

3. Estoppel 🔑53, 54

The primary essentials of waiver are knowledge of facts and intent.

4. Insurance 🔑755(3)

A fraternal benefit association did not waive conditions of life insurance policy because of its local agent's acceptance of payment of premiums in arrears after insured's suspension and forfeiture of policy, where neither such agent nor persons paying premiums knew of insured's inability because of illness to present medical certificate required for reinstatement and association's supreme council did not know of such arrears, suspension, illness, or noncompliance with policy conditions in seeking reinstatement.

5. Insurance 🔑819(2)

Insured's widow could not recover on fraternal life insurance policy, forfeited for nonpayment of premiums, where there was no evidence that insured performed all contract conditions, that insurance association accepted payment of arrears in premiums and that insured was never notified of his suspension, and finding that he did not present medical certificate and procure reinstatement by required vote was supported by substantial uncontroverted evidence.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Alma Killian against Conselho Supremo Da Uniao Portugueza Do Estado Da California on a fraternal life insurance policy. Judgment for plaintiff, and defendant appeals.

Reversed.

Louis B. De Avila, of Oakland, and C. W. White, of Hayward, for appellant.

Raymond Salisbury, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff's deceased husband was insured in the defendant organization holding a fraternal life policy calling for monthly payment of premiums, or dues. For many months prior to his death the deceased was in arrears in his payments due to illness and lack of employment. Some of these payments were voluntarily advanced by the secretary of the local lodge or "subordinate council", apparently without the knowledge of the deceased. As late as October, 1932, the deceased deemed himself automatically suspended from the order and the consequent forfeiture of his insurance by reason of the provision of the constitution reading: "Every member that will not pay his respective contributions and dues up to the last day inclusive of the month in which they are levied or must be paid, becomes ipso facto suspended of all the benefits of the U. P. E. C."

On December 23, 1932, deceased was taken to a hospital suffering a serious illness from which he died on the 27th of that month. On December 24th his sister-in-law and son appeared at the office of the secretary of the local council and left a check with him covering all dues owing by deceased. The appropriate amount was transmitted to the supreme council, which refused to accept it on the ground that the deceased had forfeited his rights in the order by reason of the conditions in the constitution reading: "Any member suspended for debt may be reinstated within the period of three months, counting from the date of the suspension, by the majority of the votes of the assembly in regular meeting of the Council, by paying to the Council not only everything that he was owing before the suspension, but also the assessments and dues which accrued during suspension. After three months, and not exceeding six of said suspension, he must present a medical certificate which shall be submitted to the Supreme Medical Examiner; he must pay fifty cents for the examination of the Medical Certificate by the Supreme Medical Examiner; and must also receive two-thirds of the vote present at a regular meeting. After all these requisites have been complied with, he will be reinstated."

It is conceded here, and was so found by the trial court, that the deceased was automatically suspended from all benefits of the contract by reason of the terms of the constitution, that he was in arrears for more than three months, that he was not reinstated by a majority, or any vote, of the local council, and that he did not tender a medical certificate or pay the required fee for a medical examination.

It is the contention of the appellant that the conditions of the contract are clear and unambiguous, and that they can be waived only in the manner therein provided; that the secretary of the local council was an agent for collection only, and was without power to waive any of these conditions. They rely upon Valentine v. Head Camp, P. J. W. O. W., 180 Cal. 192, 180 P. 2, 3 A.L.R. 380; Marshall v. Grand Lodge, A. O. U. W., 133 Cal. 686, 66 P. 25; 19 Cal.Jur. 472.

[1, 2] Respondent contends in support of the judgment that the appellant is estopped because its agent accepted payment of premiums after the suspension and forfeiture. There are two equally sound answers to the argument—first, the agent had no authority to waive the forfeiture, and this was well known to the insured, and, second, the essential elements of an estoppel are lacking. "One relying on a plea of estoppel must have been ignorant of the true state of facts and must have been intentionally misled by the act of the other to his injury. 10 Cal.Jur., pp. 636, 637; 10 R.C.L., pp. 696, 697; Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.2d 263." Moss v. Underwriters' Report, Inc., Cal.Sup., 83 P.2d 503, 506; Rice v. California-Western S. L. I. Co., 21 Cal.App.2d 660, 669, 70 P.2d 516.

[3, 4] For the same reasons the contention that appellant waived the conditions of the contract must fall. The primary essentials of a waiver are conclusively found to have been lacking—knowledge and intent. Even if we assume that the local agent had authority to waive these conditions, the undisputed evidence is that, at the time of the payment of the arrears, neither he, the son of deceased, nor the sister-in-law who paid the premiums had knowledge of the deceased's inability to present a medical certificate because of his serious illness. The undisputed evidence is that the supreme council did not at any time know that the deceased was in arrears in his premiums, that he had been automatically suspended, that there had been an attempt to reinstate him, that he was at that time in a hospital with a fatal illness, or that he had failed to comply with the conditions of the contract in seeking reinstatement. With no knowledge of these facts there could be no waiver, and because of this the essential element of intent in the waiver is lacking. It is said in Alden v. Mayfield, 164 Cal. 6, 11, 127 P 45, 48: "But waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. Silva v. Campbell, 84 Cal. [420], 422, 24 P. 316."

[5] The findings that all conditions of the contract had been kept and performed by deceased, that the supreme council accepted the payment of arrears in dues and entered them as paid on its books, and that the deceased had at no time been notified

of his suspension, are all contrary to all the evidence in the record and are not supported by any evidence, direct or indirect. These findings are not defended by respondent. The finding that the deceased had not presented a medical certificate as required by the constitution and that he was not reinstated by vote of the organization is supported by substantial evidence which is not controverted. Respondent's case rests upon a futile attempt to reinstate deceased after his voluntary forfeiture of his rights under the contract, and is not supported by any evidence which would sustain a judgment.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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31 Cal.App.2d 476

DREESEN v. RICHARDS.

Civ. 12117.

District Court of Appeal, Second District, Division 2, California.

March 14, 1939.

Hearing Denied by Supreme Court May 13, 1939.

1. Judgment 🔑944

In action on Pennsylvania judgment, plaintiff, who introduced certified copy of record of all proceedings in the Pennsylvania court, complied sufficiently with statutory requirements to entitle plaintiff to judgment. Code Civ.Proc. §§ 1904, 1905.

2. Judgment 🔑944

In action on Pennsylvania judgment, exhibits introduced in evidence supported finding of trial court that judgment in sum of $25,000 was rendered in court of common pleas of Pennsylvania.

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Ella B. Dreesen against Helen Richards on a judgment rendered against defendant in the State of Pennsylvania. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 82 P.2d 950.

Wayne Compton and William H. Wylie, both of San Diego, for appellant.

Joseph S. Campbell, of San Diego, for respondent.

WOOD, Justice.

This is an appeal by defendant from a judgment based upon a judgment which had been obtained by plaintiff in Allegheny county, Pennsylvania. Plaintiff offered in evidence a document entitled "Exemplification of Record" and containing copies of various proceedings in the court of common pleas of Allegheny county. No other evidence was offered by either party and it is now contended by defendant that the document admitted in evidence was insufficient to justify the judgment which was thereafter entered in the superior court.

The document presented by plaintiff was certified under the seal of the court by William H. Frasher, clerk of the court of common pleas, called the prothonotary, as being "a full and correct copy of the whole record of the case". The document also bears the certificate of Ambrose B. Reid, "President Judge" of the court of common pleas, that said Frasher was at the date of the certification prothonotary of said court, and that the attestation is in due form of law and made by the proper officer. It is also certified by the prothonotary that Ambrose B. Reid was at the date of the certificate duly commissioned and acting president judge of the court. The document covers many pages and sets forth in detail the various proceedings in the court of common pleas, including copies of the complaint and answer on file, called respectively "statement of claim" and "affidavit of defense", the verdict of the jury set forth in full as rendered April 30, 1935, by which plaintiff was awarded $15,000 compensatory damages and $10,000 punitive damages, and a judgment docket entry showing that judgment was entered on May 6, 1935, in favor of Ella B. Dreesen and against Helen Richards in the sum of $25,000.

[1, 2] We are satisfied that plaintiff has made sufficient compliance with our statutory requirements to justify the judgment in favor of plaintiff. Section 1904 of the Code of Civil Procedure is as follows: "A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceed-

ing." Section 1905 of the Code of Civil Procedure is as follows: "A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form." Plaintiff offered in evidence a certified copy of the record of all the proceedings in the Pennsylvania court. We see no merit in defendant's contention that the exhibits introduced in evidence do not support the finding of the lower court that a judgment in the sum of $25,000 was rendered in the court of common pleas of Pennsylvania.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

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31 Cal.App.2d 524

PEOPLE v. RODRIQUEZ et al.

Cr. No. 382.

District Court of Appeal, Fourth District, California.

March 18, 1939.

1. Robbery ⚷24(1)

Circumstantial evidence *held* sufficient to support conviction for robbery in the first degree.

2. Criminal law ⚷404(4)

Mask found in defendant's pocket at the time of his arrest for robbery was admissible as against objection that such masks were sold in stores and frequently worn at Hallowe'en parties, shortly before the robbery, since objection went to weight only of the evidence.

3. Criminal law ⚷829(1)

It is not error to refuse requested instructions the subject matter of which has been covered by other instructions.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Carnation Rodriquez and Raymond Cayoza were convicted of robbery in the first degree, and they appeal.

Affirmed.

Albert D. Trujillo, of San Bernardino, for appellants.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from an order denying a motion for new trial and from the judgments pronounced on defendants after a verdict finding them guilty of robbery in the first degree.

Defendants urge as grounds for reversal of the order and judgments (1) that the evidence is insufficient to support the verdict and judgments, (2) an error of law in admitting evidence, (3) errors in refusing to give instructions to the jury requested by them.

Defendants were convicted on circumstantial evidence.

[1] On the evening of November 21, 1938, Pete Gallato, the victim of the robbery, went to the home of Rodriquez and collected rent. Rodriquez was in the house and knew of this collection. Gallato lived near the Rodriquez residence.

At about 9:15 o'clock on the same evening, Gallato, hearing a noise outside his house, opened his back door. He was beaten over the head and robbed of fifty-six or sixty-six dollars. His wounds bled profusely and required about thirty-four stitches to close them. A neighbor saw two men running from the scene of the robbery.

Blood was found on the clothing of both defendants and on the shoes of Rodriquez. The blood on Rodriquez's clothing was of the same type as that of Gallato and of a different type from his own. A mask was found in the pocket of Rodriquez's clothes at the time of his arrest.

After their arrest both defendants made admittedly false statements concerning their whereabouts at the time of the robbery, and statements proved false in attempting to explain the blood on their clothing. When accusatory statements were made to Cayoza he did not deny, but evaded them.

This evidence, while circumstantial, supports the verdict and judgment. See People v. Barnett, 87 Cal.App. 243, 261 P. 1068; People v. Costello, 87 Cal.App. 313, 262 P. 75; People v. Crittenden, 14 Cal. App.2d 589, 58 P.2d 680.

[2] Defendants complain of a ruling of the trial judge admitting in evidence the mask found in Rodriquez's pocket at the time of his arrest. They argue that such masks were sold in stores and frequently were worn at Hallowe'en parties shortly before the robbery. This argument goes to the weight and not the admissibility of the evidence.

[3] Complaint is made of the refusal to give a number of instructions requested by defendants. The subject matter of all these instructions was fully covered by other instructions given by the trial judge. Where instructions given are correct it is not error to refuse other instructions covering the same subject matter. People v. Costa, 137 Cal.App. 617, 31 P.2d 248.

The judgments and order are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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31 Cal.App.2d 559

PEOPLE v. DURAZO.

Cr. 1658.

District Court of Appeal, Third District, California.

March 20, 1939.

1. Criminal law 🔑519(3)

Accused's statement taken by stenographic reporter in presence of deputy district attorney and two other officers, which statement was voluntarily made without promise of reward, inducement, threats or coercion, and accused fully understood every question and answer, was properly admitted.

2. Criminal law 🔑409

Voluntary statements of accused containing damaging admissions but not constituting confession of guilt were properly admitted without preliminary proof that admissions were voluntarily made where accused had full opportunity to show that statements were involuntary.

3. Criminal law 🔑409

Statements of facts or admissions not amounting to a confession made by an accused are competent without first showing that they were voluntarily made.

4. Criminal law 🔑736(2)

Whether admissions or confessions are voluntarily made by defendant is primarily question for the court.

5. Criminal law 🔑1153(6)

In absence of an abuse of discretion in determining whether admissions or confessions are voluntarily made, admission or rejection of such evidence will not be disturbed on appeal.

6. Abortion 🔑11

Criminal law 🔑409, 494

Admissions of accused together with testimony of medical experts and nurse, and proof of incriminating circumstances sustained conviction of administering drugs with intent to produce miscarriage. Pen.Code, § 274.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Angelina Durazo was convicted under section 274 of the Penal Code of administering drugs with intent to produce a miscarriage, and she appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was charged under the provisions of section 274 of the Penal Code with abortion committed on the person of a young married woman, resulting in her death.

The sufficiency of the evidence to prove the crime charged is not challenged. The appellant, however, contends that the court erred in admitting in evidence the statements of the accused person in the nature of admissions without adequately showing that they were made voluntarily; that the defendant is not bound by her statements since she possessed insufficient knowledge of the English language to understand the questions propounded to her, and that she was precluded from introducing evidence, independently of the proof adduced by the prosecution, to show that the statements were not made without accompanying threats or an offer of reward.

[1] There is no merit in the contention that the necessary preliminary proof of the voluntary nature of the admissions of the defendant was not adequately adduced before her statements were received in evidence. Her statements were taken by the stenographic reporter in the presence of the deputy district attorney and two other officers. The record shows without conflict that the deputy district attorney, in company with the two other officers, visited the defendant and introduced himself as the deputy district attorney, and identified the other men as public officers, stating that they had come to interview her "concerning an abortion" which she was charged with having committed. He then told her that she was not compelled to answer any questions, and warned her that her statements must be "freely and voluntarily" made, and that they were likely to be used against her. He also told her "We are not making any promise of immunity or offer of reward to you." She then replied, "If I understand that, I will be more than glad to answer the questions."

[2-5] The statements were taken in shorthand, transcribed into longhand, and subsequently received in evidence. The document contains some twelve pages of testimony. A careful examination of the statement convinces us that it was voluntarily made without promise of reward, inducements, threats or coercion, and that the defendant fully understood every question and answer. She volunteered many important statements with relation to procuring and administering drugs to aid the abortion, which were not solicited by questions propounded. The statements of the defendant contain many damaging admissions, but they do not constitute a confession of guilt. It was therefore not necessary to make preliminary proof that they were voluntarily made to entitle them to be admitted in evidence. Statements of facts or admissions not amounting to a confession, made by an accused person, are competent evidence without first showing that they were voluntarily made. People v. Shannon, 203 Cal. 139, 143, 263 P. 522; 8 Cal.Jur. 99, sec. 195. The question as to whether admissions or confessions are voluntarily made by a defendant is primarily one to be determined by the trial court. In the absence of an abuse of discretion in that regard, a ruling of the court admitting or rejecting such evidence will not be disturbed on appeal. People v. Cowling, 6 Cal.App.2d 466, 471, 44 P.2d 441.

[6] In the present case the defendant was not restricted in her right to fully cross-examine the prosecution's witnesses on their preliminary showing that the statements were voluntarily made, nor was she prohibited from adducing evidence independently of the prosecution to show, if possible, that the statements were not made without coercion or inducement therefor. When the prosecution asked the stenographic reporter if the statements were freely and voluntarily made by the defendant, her counsel objected to the question and asked that the jury be dismissed to enable him to "offer certain legal objections to the introduction of this statement for the purpose of laying a foundation". The court said, "You can do that by voir dire, that I will permit you to avail yourself of before the statement comes in." The defendant fully cross-examined the prosecution's witnesses on their preliminary showing of the voluntary nature of the declarations. She offered no evidence in rebuttal of that showing. The statements were properly admitted in evidence, and when construed in connection with the testimony of medical experts, a nurse and the proof of other incriminating circumstances, conclusively establishes her guilt of the crime with which she was charged.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

31 Cal.App.2d 537

JENSEN v. BERRIS.

Civ. 11725.

District Court of Appeal, Second District, Division 1, California.

March 20, 1939.

1. Sales ⚷274

The transactions between a restaurant keeper and his guest to whom he furnishes a meal for immediate consumption constitutes a "sale" within statute which imposes on the restaurateur the duty to furnish to patrons food reasonably fit for human consumption. Civ.Code, § 1735, subd. (1).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

2. Sales ⚷274

Negligence on the part of restaurant keeper is not a necessary ingredient of a cause of action upon warranty that food served to patron is reasonably fit for human consumption. Civ.Code, § 1735, subd. (1).

3. Sales ⚷255

Where members of club met at restaurant, each member individually ordered luncheon which was served by restaurant keeper, the selection made by different members varying, and the hostess for day paying bill for entire group, restaurant keeper could not defeat liability to member of club for breach of implied warranty that food served was reasonably fit for human consumption on ground that such member did not individually and personally offer restaurant keeper purchase price in payment of meal. Civ. Code, § 1735, subd. (1).

4. Appeal and error ⚷996

Where four members of club became ill after eating food at defendant's restaurant, inference, drawn by trial court, that food served by defendant was unfit for human consumption, was not opposed to human experience and reason, and therefore it could not be disturbed by appellate court. Civ.Code, § 1735, subd. (1); Code Civ.Proc. §§ 1958, 1960.

5. Sales ⚷441(3)

Where four members of club became ill after eating food at defendant's restaurant, evidence sustained trial court's finding and judgment that food served to plaintiff member was not reasonably fit for human consumption. Civ.Code, § 1735, subd. (1).

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Personal injury action by Florence Jensen against George Berris. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. Douglass Smith, of Long Beach, for appellant.

Russell H. Pray, of Long Beach (Roy J. Brown and Preston W. Johnson, both of Long Beach, of counsel), for respondent.

YORK, Presiding Justice.

The respondent Florence Jensen brought the instant action to recover damages suffered by her as the result of ingesting a meal served by appellant restaurateur, it being claimed that the food so served was infected with bacillus aertrycke. The complaint contained two causes of action, the first based upon the implied warranty under subdivision 1, section 1735 of the Civil Code, that the food served was reasonably fit for human consumption, and the other upon negligence. The court found in favor of appellant on the negligence count, and against him on the implied warranty, assessing damages for $700 in favor of respondent. This appeal is prosecuted from such judgment.

The record herein discloses that on October 20, 1936, respondent and five other women, all members of a pinochle club, met for luncheon at appellant's restaurant in the city of Long Beach. Mrs. Gearhart, one of said members, was the hostess for the particular event, the club having adopted the custom for each member alternately to furnish and pay for the fortnightly entertainment and club luncheon. At the time and place in question each member individually ordered the luncheon which was then being served by appellant, the selection varying, the designated hostess for the day paying for the entire group when the bill was presented at the conclusion of the meal. Shortly thereafter respondent and three other members of the club became violently ill, respondent and two of said members requiring medical attention. Respondent was taken to a hospital and remained there four days, during which period a culture of the feces disclosed the presence therein of bacillus aertrycke.

Appellant here urges that there was no privity of contract between him and the respondent for the reason that the latter did not pay for the meal she ate and therefore is not a buyer as that term is used in subdivision 1, section 1735, supra.

[1, 2] It is now settled law in this state that the transaction between a restaurant keeper and his guest to whom he furnishes a meal for immediate consumption constitutes a sale under said section 1735, which imposes on the restaurateur the duty to furnish to patrons food reasonably fit for human consumption. Mix v. Ingersoll Candy Co., 6 Cal.2d 674, 680, 59 P.2d 144; Goetten v. Owl Drug Co., 6 Cal.2d 683, 687, 688, 59 P.2d 142. Negligence on the part of the defendant is not a necessary ingredient of a cause of action upon such a warranty. Gindraux v. Maurice Mercantile Co., 4 Cal.2d 206, 47 P.2d 708.

In the case of Dryden v. Continental Baking Co., 11 Cal.2d 33, 77 P.2d 833, the respondent's husband (respondent being present) purchased a loaf of bread at a neighborhood grocery store for consumption by himself and his family. While eating the bread respondent swallowed ground glass which was contained therein and became ill. In objecting to the finding of the trial court in that case that there was a breach of implied warranty, the appellant baking company urged that it is indispensable to such an action that there be privity of contract, and as respondent's husband was the actual purchaser, there was no such privity and therefore there was no implied warranty to respondent as to the character or quality of the bread sold. It was there stated by the court at page 37, 77 P.2d at page 835: "In view of our conclusion that the evidence supports the finding that appellants were negligent, we do not find it necessary to determine whether a wife may recover in an action ex contractu for breach of an implied warranty in the sale of foodstuffs made to her husband. Assuming that privity is an essential element of such an action, it might well be urged that the wife, under the circumstances here disclosed, was a third party beneficiary of the contract."

In the case of Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305, cited by respondent, one Mrs. Lyons accompanied by her friend, Mrs. Jackson, parked their automobile in front of a drug store and ordered drinks to be brought to them. A clerk brought two bottles of coca-cola which they proceeded to drink and plaintiff, Mrs. Lyons, swallowed a quantity of broken glass which was in the bottle from which she drank. Mrs. Jackson ordered the drinks and paid for them, but a bottle was delivered to each of them. Plaintiff recovered judgment upon an implied warranty that the bottled drink was pure and wholesome. On appeal it was contended that there was no privity of contract between plaintiff and the retailer, and therefore no warranty arose in favor of the plaintiff. In affirming the judgment, the court, among other things, stated (page 307): "* * * the purchase of two bottles of coca-cola by Mrs. Lyons and Mrs. Jackson was a joint purchase; that is, that the sale by the drug clerk was to both of these ladies, regardless of which one ordered or paid for the drinks, the idea being that it would make no difference which one of the parties ordered the drinks, they were sold to both of the ladies, and it would not be material which one paid for them, because the contract of sale had already been made between the seller and the two purchasers, and the payment for the drinks was merely the settlement of the obligation or debt incurred by both."

[3] From this it would appear that a separate contract was made between each member of the club and appellant restaurateur when the meal was ordered and served, and that the mere making of the contract was sufficient to give rise to the warranty of reasonable fitness. So far as payment is concerned, each member of the club entertained alternately and by so doing, paid her proportionate share of the cost of the fortnightly luncheon given by and for the members. Having taken an order from respondent and pursuant thereto having served the food, it does not lie in the mouth of appellant to deny privity between himself and respondent because she did not individually and personally offer him the purchase price in payment of the meal.

Appellant also contends that the evidence is insufficient to sustain the finding, and the court erred in holding, that the food eaten by respondent was in an impure and noxious condition, was tainted, diseased and infected with bacillus aertrycke, and was not fit for human consumption.

The court's findings in this regard were as follows:

"III. On or about October 20th, 1936, at or about the hour of 1 o'clock P. M., plaintiff ordered and purchased a meal for immediate consumption at said restaurant so owned, operated and maintained by defendant George Berris individually and doing business under the fictitious name and style of Imperial Cafe, consisting of the following foods, to-wit: clam chowder, crackers, lettuce and tomato salad, salad dressing, salami, ravioli and spaghetti, cheese, celery, relishes, pork chops, potatoes, apple sauce, squash, Spanish sauce, bread, butter, spomonia ice cream, cake, coffee, cream, sugar, spices and condiments. At said time and place said defendant warranted that said food was reasonably fit for human consumption and that it contained no foreign substances and that it was not in an impure or noxious condition and that it was not tainted or decayed or diseased or infected in any manner whatsoever.

"IV. Plaintiff, pursuant to said warranty, ate said food and said food was not reasonably fit for human consumption and was in an impure and noxious condition and was tainted and diseased and infected with the bacillus aertrycke organism, and as a direct and proximate result thereof plaintiff was made sick, sore and lame and suffered food poisoning, abdominal pains, nausea, vomiting, diarrhea and nervous shock. By reason thereof plaintiff was generally damaged in the sum of Six Hundred Dollars ($600.00.)"

Appellant's contention with respect to this assignment of error appears to be predicated upon the fact that since the bacillus aertrycke is transmitted to a victim through a process of contamination and there was no evidence that the food eaten by respondent was contaminated at the time it was served, the basis for the finding objected to is nothing more than an inference founded upon conjecture.

While it is true that no analysis was made of the food served to respondent because of its unavailability after the illness of respondent developed, the evidence adduced at the trial indicates that this particular organism is transmitted by contamination; that its habitat is the gastrointestinal tract of men and animals, from which source it is transmitted in fecal matter which, either by direct contact or through a carrier, is transferred in food to the intestinal tract of the victim. Its usual incubation period is any period under twenty-four hours.

It was shown in evidence that each member of the club maintained her own home and that the group of members had not partaken of a common meal for several days prior to the one eaten in appellant's restaurant; that within twenty-four hours after said meal was eaten, four of these women suffered symptoms of food poisoning. Respondent testified that she drank only a cup of coffee for breakfast on the day of the said luncheon. Respondent's doctor testified that a bacteriological culture of the feces of respondent, as well as of Mrs. Bope another member of the club, whom said doctor also attended, revealed the presence of bacillus aertrycke in the intestinal tracts of both; that he diagnosed their illness as acute enteritis (food poisoning) due to bacillus aertrycke, and gave as his expert opinion that such illness was caused by food eaten by them at the time and place in question.

That each of the four women who became ill shortly after eating luncheon at appellant's restaurant could so contaminate her hands by contact with dishes or articles of furniture in said restaurant, as is suggested by appellant, and that she thereby transferred the bacillus to the food which she was then eating, is to say the least highly conjectural. To the contrary, the fact that the four women became ill under the facts and circumstances, herein referred to, is a strong circumstance in support of the trial court's finding.

[4] Under the conditions existing herein, the reasonable inference to be drawn from the evidence is that the food served by appellant to respondent was unfit for human consumption. Such inference is not opposed to human experience and reason and, therefore, it cannot be disturbed by an appellate court. Rideout v. City of Los Angeles, 185 Cal. 426, 434, 197 P. 74; secs. 1958 and 1960, Code Civ.Proc. See, also, Barham v. Widing, 210 Cal. 206, 291 P. 173, in which it is stated at page 215, 291 P. at page 177: "After the verdict of a jury has been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof."

[5] The evidence is amply sufficient to sustain the findings and judgment.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

31 Cal.App.2d 479

DREESEN v. DREESEN.

Civ. 12118.

District Court of Appeal, Second District, Division 2, California.

March 14, 1939.

Hearing Denied by Supreme Court May 13, 1939.

1. Divorce ⇨331

Generally, where a decree is rendered for alimony and made payable in future installments, right to such installments becomes absolute upon becoming due, and is protected by full faith and credit clause of Federal Constitution, provided no modification of decree has been made prior to maturity of installments, unless by law of state in which decree was rendered its enforcement is so completely within discretion of court of that state that it may annul or modify the decree, even as to overdue and unsatisfied installments. U.S.C.A.Const. art. 4, § 1.

2. Divorce ⇨245(1)

Installments of alimony become vested when they are due and the court has no power to modify the decree retroactively as to installments past due.

3. Divorce ⇨245(1)

The power to modify decrees allowing alimony extends only to future installments and not to alimony already accrued in the absence of clear language manifesting contrary intent.

4. Divorce ⇨331

Where judgment of a Pennsylvania court for amount of accrued and unpaid installments due under an order directing payment of alimony pendente lite had become final, such judgment was within protection of full faith and credit clause of Federal Constitution, and hence action could be maintained thereon in California, notwithstanding that action for divorce was still pending in Pennsylvania. U.S.C.A.Const. art. 4, § 1.

5. Divorce ⇨331

In action brought in California on a Pennsylvania judgment for amount of unpaid installments due under decree ordering payment of alimony pendente lite, defendant's contention that by agreement of parties he had been relieved from liability for such payments was without merit since Pennsylvania court had, in effect, passed upon such contention by dismissing defendant's appeal from judgment.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action on a judgment by Ella B. Dreesen against William Dreesen. From a judgment for plaintiff, defendant appeals. Affirmed.

Wayne Compton and William H. Wylie, both of San Diego, for appellant.

Joseph S. Campbell, of San Diego, for respondent.

WOOD, Justice.

Plaintiff commenced an action in the court of common pleas in Allegheny county, Pennsylvania, in 1932, whereby she sought a divorce a mensa et thoro. An answer was filed by defendant and thereafter upon the customary proceedings in Pennsylvania an order was made by the court directing defendant to pay to plaintiff the sum of $30 per week as alimony pendente lite. After making certain payments defendant fell in arrears. He thereafter established a residence in the state of California. On August 5, 1937, the Pennsylvania court ordered judgment entered in favor of plaintiff and against defendant in the sum of $5,235, the amount then accrued and unpaid on the alimony order. On September 21, 1937, defendant filed a petition in the court of common pleas to reopen the matter of the judgment therein entered on August 5, 1937. This petition was denied and an appeal was taken by defendant but the appeal was dismissed for failure of defendant to comply with a court order to pay the alimony due or furnish a bond to secure the payment. Defendant prosecutes this appeal from a judgment obtained by plaintiff in the superior court in the sum of $5,235, the amount of the judgment ordered by the Pennsylvania court on August 5, 1937.

[1] It is the contention of defendant that since the action for divorce is still pending in Pennsylvania the judgment in that state is not such a final judgment as to entitle plaintiff to sue upon it in California under the full faith and credit clause of the Constitution of the United States, U.S.C.A.Const. art. 4, § 1. It is argued that the Pennsylvania court may in its final disposition of the proceedings modify the judgment heretofore entered. The rule applicable is stated in the leading case of Sistare v. Sistare, 218 U.S. 1, 16, 30 S.Ct. 682, 686, 54 L.Ed. 905, 28 L.R.A.,N.S., 1068, 20 Ann.Cas. 1061: "Generally speaking, where a decree is rendered for alimony and is made payable in future instalments, the right to such instalments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the instalments, since, as declared in the Barber Case [21 How. 582, 16 L.Ed. 226], 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the instalments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due."

[2-4] It is the rule in the majority of the states, and in our opinion the better rule, that instalments of alimony become vested when they are due and the court has no power to modify the decree retroactively as to the instalments past due. California is among the states which follow this rule. Parker v. Parker, 203 Cal. 787, 266 P. 283; Keck v. Keck, 219 Cal. 316, 26 P.2d 300. In 94 A.L.R. at page 332 the states are listed which follow the majority rule. We have been furnished with no authority from Pennsylvania, and we can find none, which determines that the rule in Pennsylvania is different from the majority rule. In 19 C.J., at page 272, it is said that the power to modify decrees allowing alimony extends only to future instalments and not to alimony already accrued "in the absence of clear language manifesting contrary intent". We find no language manifesting a contrary intent in the laws of Pennsylvania. In the section providing for alimony pendente lite we find the following: "In case of divorce from the bonds of matrimony or bed and board, the court may, upon petition, in proper cases, allow a wife reasonable alimony pendente lite and reasonable counsel fees and expenses." Purdon's Pennsylvania Stats.Ann., title 23, § 46. The orders made by the court of common pleas were appealable and defendant did in fact enter an appeal but his appeal was dismissed. The orders and judgment in Pennsylvania have long since become final. We conclude that the Pennsylvania judgment is within the full faith and credit clause of the Constitution.

[5] Defendant further contends that by an agreement made with plaintiff on December 24, 1936, reduced to writing and signed by both parties, he was relieved from paying the past and future instalments ordered by the Pennsylvania court. The trial court found that this agreement "was never executed and that the plaintiff never received anything on account of said agreement". A complete answer to defendant's contention is disclosed by an examination of the proceedings in the Pennsylvania court. In his petition to reopen the judgment entered in Pennsylvania on August 5, 1937, defendant set forth the agreement in full and his petition was answered on this point by plaintiff. The matter was judicially passed upon when the court denied defendant's petition to reopen. The dismissal of the appeal which was subsequently taken by defendant finally disposed of the claim that defendant was relieved from his obligation to comply with the alimony order by the execution of the agreement.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

31 Cal.App.2d 527

In re SULLIVAN'S ESTATE.

Civ. 10941.

District Court of Appeal, First District,
Division 1, California.

March 20, 1939.

Hearing Denied by Supreme Court
May 18, 1939.

1. Wills ⚷523

If words which, standing alone, would create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, devisees will take individually and as tenants in common, and not as a class, descriptive portion of clause being intended merely as matter of identification. Probate Code, § 92.

2. Wills ⚷523

A gift is not one to a class where will designates takers by name or identifies them by their number, in absence of anything showing a contrary intention. Probate Code, § 92.

3. Wills ⚷523

The rule in avoidance of intestacy does not overcome presumption that devisees designated by name or number are intended to take as individuals and not as a class. Probate Code, § 92.

4. Wills ⚷523

Where testator devised residue equally to four named sisters and brothers and stated that another brother and all other heirs were intentionally omitted, named parties took individually and not as a class, and hence child of a named brother who predeceased testator took deceased brother's share by right of representation. Probate Code, § 92.

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Alfred F. Sullivan, deceased, by Angela May Pendergast, executrix. From a first and final account and order of final distribution, Ralph Timothy Sullivan, a minor, through his guardian ad litem, Evelyn V. Raymond, appeals.

Reversed.

William A. Lahanier, of San Francisco, for appellant.

Dean Cunha, of San Francisco, for respondent.

TYLER, Presiding Justice.

This is an appeal from a first and final account and order of final distribution. The sole question presented is the construction to be given the terms of a will. The decedent executed his will October 25, 1928. Thereafter, on September 9, 1930, Ralph Timothy Sullivan was born. The decedent, after making provision for a nephew and niece, devised the residue of his estate, share and share alike, among four kindred, one of whom was appellant's father Ralph Timothy Sullivan. The father died December 27, 1929, and deceased testator on April 21, 1937.

It was contended by the administratrix at the hearing on distribution that section 92 of the Probate Code would not apply to permit the appellant to succeed to the share of the estate his father would have received had he survived the testator. It was contended by the appellant that section 92 would apply, thereby entitling him to receive his father's devise by right of representation. The trial court concluded that the devise in question was one to a class and ordered distribution to the surviving members as residual devisees. The pertinent portion of the will in question reads as follows:

"Fifth: All the rest, residue and remainder of my property real and personal, and wheresoever situate, I give, devise and bequeath, share and share alike to the following: My sister, Angela May Pendergast, formerly Angela May Sullivan; my sister, Claire Josephine Harding, formerly Claire Josephine Sullivan; my brother, Vincent Matthew Sullivan, and my brother, Ralph Timothy Sullivan.

"Sixth: I have intentionally omitted my brother, Arthur J. Sullivan, for reasons which he himself will understand; I have intentionally omitted all my heirs who are not particularly mentioned herein, and I hereby generally and specifically disinherit each, any and all persons who may make any claim to any portion of my estate, and to such person or persons I hereby give and bequeath the sum of One Dollar ($1.00) and no more, in lieu of any other share or interest in my estate."

Section 92 of the Probate Code provides as follows: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

[1-3] Unless, therefore, the gift is to a class, as held by the trial court, the decree of distribution must be reversed. If words, which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take, that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause is intended merely as a matter of identification. Estate of Murphy, 157 Cal. 63, 106 P. 230, 137 Am.St.Rep. 110. The rule or presumption is that the gift is not one to a class where the will designates the takers by name, or identifies them by their number; and this inference will be given effect in the absence of anything to show a contrary intention. Thus, where property is expressed to be given to four named devisees, the survivors do not take the share of one who predeceased the testator. Nor does the rule in avoidance of intestacy overcome the presumption that the devisees or legatees were intended to take as individuals and not as a class. Estate of Pence, 117 Cal.App. 323, 4 P.2d 202.

[4] Here there is nothing on the face of the devise indicating any uncertainty in the number of persons who are to take the property, or that they are to be ascertained at a future time, or that the share of the residuary estate which the devisees are ultimately to have is to be determined by the number of those who survive the testator. In fact it is not only quite apparent that under the rule this devise can not be said to contain any of the elements which would characterize a gift to a class, but the plain impression which one receives by reading the above portion of the will is that the testator intended to give to each individual an equal portion of his estate.

It is expressly held in Estate of Hittell, 141 Cal. 432, 75 P. 53, that where the will of a deceased person bequeaths all of his real and personal property to two devisees named, no joint tenancy is created or devise made to a class, with any right of survivorship, but the will creates a tenancy in common in the devisees; and where one of the devisees named dies prior to the death of the testator the bequest to such devisee lapses, and the half-interest devised to such person should be distributed to the heirs at law of the testator.

Respondent argues that the testator had figured out a complete scheme for the disposition of his estate. She urges that, having left one nephew and one niece specific bequests, and eliminated appellant herein, who is also a nephew, he thereby intended to leave him no portion of his estate. Appellant, however, was not born until nearly two years after the will was executed, and no change was made by the testator in his will.

The question is not one of first impression in this state and it would be a matter of supererogation to discuss the question further as Estate of Murphy, 9 Cal.App.2d 712, 50 P.2d 828, 829 contains reasoning which controls the decision. In that case Josephine Murphy executed her last will on August 4, 1927. Her son Louis Murphy executed his last will six days later. The mother died on March 15, 1932, and the son five days later. The mother left her entire estate to Louis and purposely omitted to provide for another son, William L. Murphy, he having theretofore received certain advances from her. In Louis' will the entire estate was left to the mother, and he expressly omitted to provide for his brother William. Because the sole legatee under Louis' will predeceased him, the brother, as next of kin to Louis, claimed the entire estate under section 92 of the Probate Code. The three minor children of William appeared by their mother as guardian and petitioned for the entire estate upon the ground that William could not take under the statute because of the expressed intention of the testator to eliminate him as an heir to the estate. It is there stated: "We are faced with these inescapable facts: The devisee died during the lifetime of the testator, and the will does not show an intention to substitute another in her place. The estate would therefore go to her lineal descendant, the appellant herein, by operation of the statute. Thus, in effect, the statute substitutes the appellant for the deceased devisee, and it is immaterial whether we say he takes by reason of the will or by operation of the statute. The controlling point is that the will did not provide for the contingency of the death of the devisee and the statute supplies that omission." See, also, Estate of Kunkler, 163 Cal. 797, 127 P. 43.

We conclude, therefore, that appellant, who was born after the execution of the will, took by right of representation the specific devise to his father who predeceased the testator, notwithstanding the clause omitting all other heirs not mentioned in the will.

For the reasons given the judgment is reversed.

We concur: KNIGHT, J.; WARD, J.

ENGLAND v. HOSPITAL OF THE GOOD SAMARITAN.*

Civ. 12113.

District Court of Appeal, Second District, Division 2, California.

March 16, 1939.

Rehearing Denied April 13, 1939.

Hearing Granted by Supreme Court May 15, 1939.

1. Appeal and error 🔑1099(9)

Where, on former appeal, court determined that superior court had erred in declining to give a requested instruction, the law contained in the instruction became the "law of the case."

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Charities 🔑45(2)

In action for personal injuries sustained by patient while in defendant hospital, finding that patient was received as a patient paying minimum rate of $25 per week, that such amount was less than defendant's average cost, that no charity was extended to patient, and that at time he applied for admission he had no knowledge of alleged charitable character of defendant hospital, sustained judgment against hospital.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Personal injury action by A. E. England, special administrator of the estate of Charles E. England, deceased, against the Hospital of the Good Samaritan. From a judgment for plaintiff and from an order denying defendant's motion to vacate and set aside the judgment, defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher, by Norman S. Sterry, and Phillip C. Sterry, all of Los Angeles (Ira C. Powers and Frederic Sturdy, both of Los Angeles, of counsel), for appellant.

William K. Young, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff and from an order denying the motion of the defendant to vacate and set aside the judgment and enter one in its favor.

The action was for personal injuries which were sustained by the plaintiff in 1935 while he was a patient in the defendant hospital as the result of the negligence of one of defendant's nurses.

[1] The case has been before this court on two prior appeals. In the first appeal the court reversed a judgment in favor of the defendant. England v. Hospital of Good Samaritan, 16 Cal.App.2d 640, 61 P.2d 48. The case was retried, resulting again in a verdict and judgment for the defendant. The trial court granted a new trial on the ground of error in giving and refusing instructions. When the matter came before this court on appeal the court affirmed the order upon the ground, among others, that the superior court had erred in declining to give an instruction requested by the plaintiff to the effect that the defense of nonliability because of the charitable character of the defendant was unavailing if the jury should find that the plaintiff at the time of entering the hospital had no knowledge or belief that the defendant claimed to be a charitable institution, and further that he paid the regular rates from which the defendant derived a profit. England v. Hospital of Good Samaritan, 22 Cal.App.2d 226, 70 P.2d 692, 693. The law contained in this instruction became the law of the case. The instruction to which we refer reads

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*For subsequent opinion see 97 P.2d 813.

as follows: "You are instructed that the defense of nonliability because of its charitable character is unavailable to defendant, if you find from the evidence that plaintiff had no knowledge or belief that defendant claimed to be or was a charitable institution, and further provided you find that plaintiff paid its regular rates to defendant from which it derived a profit." Thereafter the case was tried a third time—the last time before the court and without a jury, the court making findings of fact and conclusions of law upon which the judgment was based.

It is the contention of the defendant on appeal that the facts found do not sustain the judgment, but, on the contrary, require a judgment in favor of the defendant for the reason, it is claimed, that under the facts found the patient was received at a rate of 56.13 per cent of the actual cost of accommodations and services furnished.

The only findings of fact and conclusions of law which it is necessary to set out in order to obtain a fair understanding of the question are as follows:

"The court finds that the *average cost* per day per patient to the defendant in the operation of its said hospital from 1931 to 1935, inclusive, was as follows: 1931, $8.70; 1932, $8.80; 1933, $8.09; 1934, $7.06; and 1935, *$6.49;* that at the time the plaintiff entered the hospital he was offered a rate of $25 per week for room, board, hospitalization and nursing services, which rate he paid; the court finds that the cost to defendant in furnishing the plaintiff with said room, board, hospitalization and nursing services was the sum of $45.43 per week and that the difference between the rate paid by plaintiff and the *average cost* to the defendant in rendering the aforesaid services was the sum of $20.43 per week.

"The court finds that from 1931 to 1935, inclusive, within the limits of its facilities and within the limit of the revenue derived from the aforementioned endowment fund the defendant furnished free hospitalization to indigent patients applying therefor; during said period the rates established by defendant for the various classes of accommodations furnished to patients ranged from a minimum of $25.00 per week to a maximum of $175.00 per week, *which rates were based upon the class of accommodations furnished the patient.*

"The court finds that during the period from 1931 to 1935, inclusive, patients financially able to pay the same were charged rates for the services rendered and accommodations furnished to them from which the defendant derived a profit and a portion of the profit thus realized was used by the defendant to defray the cost of rendering hospital treatment to those patients financially unable to pay a rate sufficient to cover the cost of hospitalization furnished them, and to defray the cost of rendering hospital treatment to patients gratuitously; a portion of said profits so realized was used by defendant in reducing its mortgage indebtedness, which said indebtedness was created by defendant in the construction and acquisition of its hospital building and facilities, and in this connection the court finds that said mortgage indebtedness had been reduced from the sum of $1,450,000.00 in 1931 to the sum of $1,424,662.03 in 1935.

"It is true that for the year 1935 defendant earned a net profit of $62,767.00 from the operation of said hospital. It is true that the earned surplus of defendant at the end of 1935 was $65,470.00, and that the capital surplus was $282,578.10. * * * It is true that at the time plaintiff applied for admission to said hospital that plaintiff had no knowledge and was not aware of the alleged charitable character of defendant hospital and it is further true that plaintiff had no knowledge at any time that defendant claimed to be free from liability from negligence on the part of its employees, by reason of its alleged charitable character or otherwise. It is true that plaintiff applied for admission to defendant hospital and was received as a patient, paying the minimum rate of $25 per week, *which rate included the furnishing of nursing care and attendance by defendant to plaintiff,* and that no charity was ever extended to plaintiff."

"Conclusions of Law

"The defendant is not entitled to exemption from liability because of its charitable character. That plaintiff had no knowledge, information or belief respecting the charitable character of the defendant hospital at the time he was received nor during the time he remained as a patient therein; that he paid the usual and customary rates required thereat, and no charity was requested by nor extended to him."

The only part of the findings upon which defendant relies to sustain its contention is the phrase contained in the first paragraph of the above-quoted findings which reads: "the court finds that the cost to defendant in furnishing the plaintiff with said room, board, hospitalization and nursing services was the sum of $45.43 per week". It will be observed that in such paragraph the court inserted the word "average" before the word "cost" in two different places, and when the whole paragraph is read fairly no interpretation may be given to the clause upon which defendant relies other than that the court was speaking of the average cost to defendant. The court makes this clear by going right along with the same sentence and saying "that the difference between the rate paid by plaintiff and the average cost to the defendant in rendering the aforesaid services was the sum of $20.43 per week". In order to maintain the defendant's contention the phrase upon which it relies must be picked up and carried entirely out of its context—which is in regard to average costs. The plaintiff was not only not paying average costs but was not getting average services, as stated in the findings the fee being "based upon the class of accommodations furnished the patient". Under the defendant's contention in this appeal the cost of maintaining a patient paying the usual weekly rate of $25 in a two-bed ward, who is served by one nurse along with 30 other patients, is the same as the cost of a patient paying the $175 weekly rate, who is housed in a luxurious suite and attended continuously by day and night nurses. Furthermore, in fixing the average cost figure of $6.49 per day for 1935, there was taken into account the sum of $25,697.30, which represented the amount charged on the hospital books for free care. This free care was certainly no part of the plaintiff's cost to the defendant.

[2] It will thus be seen that in our view the defendant misconstrues the findings and that when the findings are properly interpreted they sustain the judgment.

It will be observed that the court did find that the defendant earned a net profit of $62,767 for the operation of its hospital during 1935; that the plaintiff applied for admission to the defendant hospital and was received as a patient paying the minimum rate of $25 per week; and that no charity was extended to plaintiff; and that at the time the plaintiff applied for admission to said hospital he had no knowledge of the alleged charitable character of defendant hospital, and that plaintiff had no knowledge at any time that defendant claimed to be free from liability for negligence on the part of its employees by reason of its alleged charitable character; and that the plaintiff paid the usual and customary rates required and no charity was requested by nor extended to him.

The defendant's second contention on appeal is based upon the same misconstruction of the findings and needs no further discussion by us.

Finally, the defendant contends that if we will abandon the law of the case and take up the question on the general law, it will be necessary to enter a judgment in favor of the defendant. But the defendant does not urge us to abandon the law of the case and we see no reason for discussing it.

Judgment affirmed.

I concur: WOOD, J.

McCOMB, J., deeming himself disqualified, took no part in the decision.

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31 Cal.App.2d 508

PEOPLE v. HARRIS.

Cr. 380.

District Court of Appeal, Fourth District, California.

March 16, 1939.

Criminal law 🔑1182

Under statute providing that judgment may be affirmed but cannot be reversed without argument, conviction would be affirmed on motion of people, where no briefs were filed and no appearance was made for defendant on date upon which case was placed on calendar for argument. Pen.Code, § 1253.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Theo. J. Harris was convicted of an offense, and he appeals.

Affirmed.

Ralph D. Paonessa, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., by Norman F. Main, Deputy Dist. Atty., of Bakersfield, for the People.

GRIFFIN, Justice.

The clerk's and reporter's transcripts in this action were filed in the office of the clerk of this court on February 15, 1939, and the case was regularly placed on the calendar for argument on March 14, 1939. No briefs have been filed and no appearance has been made for the defendant. The people moved to affirm the judgment under the provisions of section 1253 of the Penal Code. It is evident that the motion must be granted. People v. Whelan, 13 Cal.App.2d 274, 56 P.2d 960.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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31 Cal.App.2d 549

MARVIN v. MILLS ALLOYS, Inc.
Civ. 11203.

District Court of Appeal, Second District, Division 2, California.
March 20, 1939.

Rehearing Denied April 14, 1939.

Hearing Denied by Supreme Court
May 18, 1939.

1. Patents ⚷26(1)

A patent may not be secured on a single element by inclusion of the element in a patentable combination.

2. Patents ⚷218(2)

Where contract provided that inventor's right to royalties for use of invention relating to wear-resisting lining for sand-blast nozzles was contingent upon inventor's success in obtaining patent, inventor whose patent was denied because of priority of other patents, and who succeeded in obtaining patent on a combination structure which contained as one element, the invention referred to in contract, was not entitled to royalty for use of such element in the combination.

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by Orrin F. Marvin against Mills Alloys, Incorporated, for royalty upon manufacture of sand-blast nozzles by the defendant. From an adverse judgment, the defendant appeals.

Reversed.

Clyde R. Burr and Philip Grey Smith, both of Los Angeles, for appellant.

Fred Utterback, of Huntington Park, and Freston & Files and James A. McLaughlin, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff seeks to recover upon a contract whereby defendant agreed, upon certain conditions, to pay a royalty upon the manufacture of sand blast nozzles. By the agreement, which was in writing and dated January 28, 1930, plaintiff became an employee of defendant and assigned to defendant all of plaintiff's developments and inventions with the exception of "an invention heretofore made by me in connection with the lining of nozzles with tungsten carbide". The contract provided: "With respect to the exception above noted, which refers to a wear resisting nozzle, it is agreed that I shall, at any own expense, file a patent application thereon, and that Mills Alloys, Inc., and its successors are hereby granted an exclusive right and license to make and sell throughout the world wear-resisting nozzles embodying my said excepted invention; and I am to receive a royalty for each such nozzle sold at the rate of 50 cents, from Mills Alloys, Inc. Said nozzle is characterized by the use of a wear-resisting lining preferably made from tungsten carbide; and I understand that in the event of my being finally unsuccessful in obtaining a patent for said device, all royalty payments shall cease. I understand there may be an interference contest on priority between myself and others, who have granted an exclusive license under their application to Mills Alloys, Inc.; and my right to a continuation of said royalty is contingent upon my success in any such interference proceeding." The trial court found that plaintiff obtained a patent in accordance with the terms of the contract and rendered judgment for plaintiff. It is the contention of defendant that plaintiff failed to obtain the patent referred to in the contract and that the trial court's findings in plaintiff's favor are not sustained by the evidence.

Shortly after the making of the contract between the parties plaintiff applied for the patent. His application was denied by the United States patent department on November 15, 1930, on the ground that patents on the same invention had been issued to one Jacobovics. Plaintiff was paid royalties up to January 14, 1931, at which time he was notified by defendant that no further royalties would be paid. Plaintiff persevered in his efforts with the patent office and finally obtained a patent on July 23, 1935, on a certain structure consisting of a sand blast nozzle and a holder with an inset or adapter feature. Defendant continued manufacturing the nozzle for which a patent had been denied but did not manufacture any of the instruments for which plaintiff succeeded in obtaining a patent except for the purposes of experimentation. It will be noted that according to the terms of the contract royalties were to cease in the event of plaintiff's being finally unsuccessful in obtaining a patent on the "device" referred to in the contract. The question for determination, therefore, is whether plaintiff obtained a patent upon the nozzle referred to in the contract or upon some different article.

In addition to various proceedings before the patent office, including claims there presented on behalf of the Jacobovics patents and arguments on behalf of the various applications, we have before us two original exhibits, exhibit E being a sample of articles which defendant manufactured both before and after the making of the contract between the parties, and exhibit F being a sample of the instrument upon which plaintiff obtained a patent on July 23, 1935. From these exhibits and from the descriptions contained in the various claims on file in the patent office the only reasonable conclusion to be reached is that exhibit F, the instrument upon which plaintiff obtained a patent, is not the device mentioned in the contract. The contract covers an invention which had been "heretofore made" by plaintiff, "which refers to a wear-resisting nozzle", which was "characterized by the use of a wear-resisting lining preferably made from tungsten carbide". Plaintiff agreed to apply for a patent on the invention which he had previously made. He was unsuccessful, however, because of the priority of the Jacobovics patents, in one of which the applicant filed the claim: "Nozzle according to patent claim, characterized thereby, that the part containing the tungsten carbide is enclosed by a jacket of softer material than that of this part." Exhibit E, a sample of the articles manufactured by defendant, is a simple device which corresponds accurately to the description of the Jacobovics patent. It is a nozzle containing tungsten carbide enclosed by a jacket of softer material.

In the instrument, exhibit F, upon which plaintiff bases his demand for royalties, the simple nozzle referred to in the contract between the parties is only one element in a combination structure upon which plaintiff obtained his patent, the structure containing an exchangeable inset or adapter, together with a nozzle holder and a nozzle. When plaintiff's application was denied on November 15, 1930, no patent could be obtained by him except upon a different invention since his first device was rejected because of the priority of the Jacobovics patents. He finally worked out a different and patentable instrument concerning which he filed in the patent office the following claim: "In a nozzle structure, tungsten carbide means for forming a discharged orifice, a nozzle support engaging said means, a shoulder on said support, a nozzle holder having threads thereon, an interchangeable inset adapted to be wedged in said holder and also adapted to be a continuation of said discharge means, said inset being wedged in said holder at an end of the holder nearest said discharge means and said insent extending through said holder in a direction receding from said discharge means, and a nut cooperating with said shoulder and said threads to urge said holder and said support together, thus wedging the inset tightly in said holder and holding it tightly against said means."

[1, 2] It is apparent that plaintiff has included the single element referred to in the contract in the combination for which he ultimately obtained a patent. He had not been able to secure a patent on this element before placing it in the combination and he may not now successfully claim a patent on this element by reason of its inclusion in the combination. "A patent may not be secured on a single element by inclusion." Radio Corp. v. Lord, 3 Cir., 28 F.2d 257, 260. Plaintiff is entitled to protection for the combination for which

he obtained a patent but he is not entitled to collect royalties for the use of the single element in the combination, the element for which he was denied a patent. Prouty and Mears v. Ruggles et al., 16 Pet. 336, 10 L. Ed. 985.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, J.

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31 Cal.App.2d 451

INGRAM et al. v. CITY OF DELANO et al.

Civ. 2241.

District Court of Appeal, Fourth District, California.

March 13, 1939.

1. Automobiles 🔑245(81)

Where evidence was conflicting regarding whether driver of overtaking automobile sounded horn when automobile was somewhere from 16 to 32 feet back of overtaken truck, or whether horn was not sounded until front wheels of automobile were opposite rear wheels of truck, question whether driver of automobile was guilty of contributory negligence was one of fact. St.1935, p. 182, § 528(b).

2. Automobiles 🔑244(44)

Where evidence was conflicting regarding whether driver of overtaking automobile sounded horn when automobile was somewhere from 16 to 32 feet back of overtaken truck, or whether horn was not sounded until front wheels of automobile were opposite rear wheels of truck, evidence sustained finding that driver of automobile was not guilty of contributory negligence. St.1935, p. 182, § 528(b).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action for damages resulting from a collision between an automobile and a motortruck, by Floyd T. Ingram and others, minors, through Floyd T. Ingram, guardian, against the City of Delano and others. From judgment for plaintiffs, defendants appeal.

Affirmed.

Borton, Petrini & Conron, of Bakersfield, for appellants.

Harvey, Johnston & Baker and T. H. Werdell, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

The defendants have appealed from a judgment in favor of the plaintiffs in an action for damages resulting from a collision between an automobile driven by Mrs. Thelma Ingram and a truck owned and operated by the defendants.

At the time of the collision, which occurred in February, 1937, both vehicles were traveling north from Delano on an oiled road, the oiled surface of which was about eighteen feet in width, the Ingram car traveling behind the truck and at a higher speed. Mrs. Ingram pulled to her left to pass the truck and shortly thereafter the driver of the truck turned the same toward the left side of the road and into her path, at a place where there was no road leading to the left. A collision occurred, although Mrs. Ingram then turned her car further to the left in an effort to avoid the truck. The case was tried without a jury and the court found that the driver of the truck was guilty of negligence, that Mrs. Ingram was not guilty of negligence, and that no negligence on her part proximately caused or contributed to any resulting injury or damage.

The appellants, admitting that the driver of the truck was guilty of negligence in failing to give any signal of his intention to turn to the left, contend that Mrs. Ingram was guilty of contributory negligence in failing to sound her horn before overtaking the truck, as required by subdivision (b) of section 528 of the Vehicle Code (St.1935, p. 182); that both parties were guilty of negligence per se; and that the evidence is insufficient to support either a finding that Mrs. Ingram was not guilty of negligence, or a finding that her negligence was not a proximate cause of the accident.

The appellants contend that it conclusively appears that Mrs. Ingram did not sound her horn soon enough, and that such negligence must be held to have been a proximate cause of the accident. This is based upon the contention that a portion of the testimony given by Mrs. Ingram establishes the fact that she did not sound her horn until the front wheel of her car was opposite the rear wheel of the truck and that under the decision in Duncan v. J. H. Corder & Son, 18 Cal.App.2d 77, 62 P.2d 1387, 1390, her failure to give audible warning before attempting to pass the truck constitutes such negligence as must be held to have been a proximate cause of this accident. It was pointed out in that case, however, that the evidence therein was conflicting and that "the responsibility to place their own value on contradictory evidence rests upon the jury, and their decision thereon will not be disturbed in an appellate court when the evidence is reasonably susceptible to contradictory inferences being drawn therefrom".

The record before us contains the following evidence relating to the point in question. Mrs. Ingram testified that as she approached the truck "I pulled it over to the left to go around him". When asked what she did she replied: "Well when I got to about the back end, I honked my horn, and by that time he had swung out in front of me and I grabbed the steering wheel and * * * tried to go to the left." When asked where her car was in reference to the truck when the truck swung or turned into her path, she replied: "The front end of my car was in the back end of his." Later, she testified that she pressed the horn as she started to go around the truck, that immediately after she pressed the horn she "saw him pulling in front of me" and "I pulled to the west". On cross-examination she testified that she had come to "maybe sixty or seventy feet" behind the truck before she attempted to turn over to the west side of the road. She then admitted that the point where she commenced to swing out to pass the truck was not less than sixteen feet and not over thirty-two feet behind the truck. She then testified:

"Q. And the point when you noticed he was himself swinging to the left was when you had the front of your car about even with the rear end of the truck. A. Yes.

"Q. Had you at that time got your car over on the west side of the road, or were you just crossing over? A. No, I was on the west side.

"Q. Then between the time that you spoke of, not less than sixteen and not more than thirty-two feet, you had crossed clear over from the east side to the west side of the road? A. Yes sir.

"Q. When you first noticed him commencing to swing his truck to the west, where was the front wheel of your car in reference to the hind wheel of the truck? A. Well it was along about the back.

"Q. The front wheel of your car was about even with the hind wheel of the truck? A. Yes.

"Q. Don't let me mislead you, because there is a projection on your car beyond the front wheel, and the truck beyond the rear wheel. I would like to get the relative positions of the front wheel of your car and the hind wheel of the truck at the time you first noticed him swing over? A. I was along at the back end of his truck.

"Q. And you can't tell us about where the wheels were, the front wheel of your car in reference to the hind wheel of the truck? A. Well they were along about the same.

"Q. About opposite each other? A. Yes.

"Q. And that was the time you sounded your horn and grabbed the brake, and grabbed the wheel? A. Yes.

"Q. Had you sounded your horn before that? A. No."

Shortly thereafter she testified:

"Q. And with the truck proceeding fifteen miles an hour, and you with your car at forty, the front wheels of your car were opposite the hind wheels of the truck? A. Somewhere along in there."

Three employees of the appellant city were riding in the cab of the truck at the time. The one who sat in the middle testified: "Just as we swung across the highway I looked out and saw the front end of her car coming." When asked whether the truck swung over quickly, he replied: "Well, he pulled right over." He then testified that at the time the truck swung to the west he heard the brakes of the Ingram car "squeaking". On cross-examination he testified that he looked through the rear window of the cab and saw the Ingram car, that when he first saw that car "the end of her radiator was somewhere—about the back end of it, of the truck". When asked if this is where the Ingram car was when he first heard the squeaking of its brakes, he replied: "Well, just an instant afterward."

[1, 2] While there is some evidence that the horn of the Ingram car was not sounded until the front wheels thereof were opposite the rear wheels of the truck there is also evidence that Mrs. Ingram sounded the horn as she started to go around the truck; that she was somewhere from sixteen to thirty-two feet back of the truck when she commenced to swing out to pass it; and that she had gotten entirely on the west side of the road when she noticed the truck swinging over toward her path. Assuming that a part of the evidence justifies the inference that the horn was not sounded as soon as it should have been there is also evidence justifying a contrary inference. The question was entirely one of fact and it cannot be said that the court's findings are entirely without support in the evidence.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

31 Cal.App.2d 501

In re MARTIN'S ESTATE.

MARTIN et al. v. McMULLAN et al.

Civ. 12179.

District Court of Appeal, Second District, Division 2, California.

March 16, 1939.

Rehearing Denied April 13, 1939.

Hearing Denied by Supreme Court May 15, 1939.

1. Wills 🔑293(6)

Where there is a reference in a will to another written document described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it.

2. Wills 🔑293(6)

In will contest, parol evidence was admissible to identify the last will of testator's wife, which was referred to and incorporated in testator's holographic will.

3. Wills 🔑179

Where a will purports to dispose of all of decedent's property, a will previously executed is wholly revoked. Probate Code, § 72.

4. Wills 🔑179

As respects which of two wills executed by testator's wife was referred to by testator whose holographic will provided that executors should carry out terms of wife's will, the will last executed by wife, which purported to dispose of all her property, was construable as revoking wife's prior will. Probate Code, § 72.

5. Wills 🔑384

On appeal from judgment admitting holographic will to probate, the District Court of Appeal had duty only to determine of what the will consisted and had no duty to interpret the will.

6. Wills 🔑98

The fact that testator referred to and incorporated in his holographic will, will of testator's wife which was not in testator's handwriting, did not render testator's will invalid.

7. Wills 🔑98

The principle of incorporation by reference applies to holographic wills, the extraneous writing being considered to be incorporated in such will although not in decedent's handwriting.

8. Executors and administrators 🔑34

Alleged fact that executors named by testator did not file will of testator's wife which was incorporated in testator's will, within time prescribed by law for filing of wife's will, would not disqualify the executors.

9. Executors and administrators 🔑34

Statute providing that if executor named in will fails to timely petition for probate of will and for issuance of letters testamentary, he may be held to have renounced right to letters and court may appoint an administrator unless good cause for delay is shown, is discretionary and not mandatory. Probate Code, § 324.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Proceeding in the matter of the estate of Patrick S. Martin, deceased, wherein William Martin and others filed a contest to the probate of the will of deceased, which was offered for probate by Edith McMullan and another, coexecutors of the estate of the deceased, wherein Peggy Pollock and others were purported legatees. From a decree admitting the will to probate and incorporating therein as a part thereof a will executed by the deceased wife of deceased, the contestants appeal.

Affirmed.

Faries & McDowell and Samuel Schwartz, all of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, and Catlin & Catlin, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a decree admitting to probate the will of Patrick S. Martin, deceased, and incorporating therein as a part thereof exhibit 2, hereinafter set out.

There is no contention that the will was not properly executed. The contention is that, "Patrick S. Martin in his will refers to one will executed by May Martin, whereas she executed two separate and distinct instruments, each of which differs from the other in many respects", and that "parol evidence is inadmissible to identify an extrinsic instrument or its terms, not clearly identified in the will itself".

Patrick S. Martin died on January 29, 1938, and left the following will:

"11776 Chenault Str
Brentwood Hts L A
November 9th 35

"In case of my death I want my Brother in Law George C. McMullan & Sister in Law his wife Edith McMullan to be executors of the Estate I leave. Real & personal & to carry out the terms of the will left by my wife May Martin.

"Signed
"Patrick S. Martin".

Respondents filed said will for probate and filed therewith the following instruments (exhibit 1):

"19th July 1935
11776 Chenault St
Brentwood Hgts
Los Angeles Cal

"Last Will & Testament:

"I want all money in bank sent to my sister in Australia Mrs. George Peele Davis. All properties in my name & those in partnership with my Husband to be left to her after death of my Husband. He must not sell any of them without giving up my share. He is to enjoy income from these investments until his death. I do not think him capable of making his living so leave him provided for after my death, as I did in life. I want my Dear Sister Edith & her Husband George to be Executors of my estate. If my Husband marries again all property belonging to me to be taken from him & given at once to My Sister Mrs Geo Peele Davis. I do not propose to keep another woman on my earnings. I trust to Patrick S. Martin honestly to fulfill my wishes in this matter.

"May Martin

"Witness
"Marion B. Bates".

(Exhibit 2)

"19th July, 1935
"11776 Chenault St
Brentwood Hgts
Los Angeles Cal

"My Will & Testament

"I bequeath money in bank $1150.51 to my sister Mrs. George Peele Davis at once. All property in my own name & property in partnership with P. S. Martin my half of same at the death of said P. S. Martin to be sold & proceeds to be given to sister Mrs. Geo Peel Davis & $500 dollars each to my brother Robert Pollock's two daughters Edith & Peggy. The revenue from these properties to go to P. S. Martin during his lifetime. If he marries again all my property & my half in partnership with him to be sold at once & given to above mentioned heirs. I have worked to keep him & myself ever since I met him and even in death will be doing the same. My Sister Mrs. George McMullen and her Husband I appoint executors of my estate and I hope will have no trouble with P. S. Martin. He entered this Country with me as a Canadian without one dollar of his own. He has since become an American citizen & has not given me one dollars or contributed to my support, so there is no such thing as Community property with us. But I think he will be satisfied as long as he is provided for as long as he lives. In case my sister should die (Mrs. G. P. Davis) her share before P. S. Martin my estate to be divided equally among her four children.

"May Martin".

The appellants thereupon filed a contest to the probate of the will. The trial court after hearing the evidence admitted the will of Patrick S. Martin and included as a part of said will exhibit 2.

May Martin died on November 11, 1935. She left two wills dated July 19, 1935. Both were entirely written, dated and signed in her own handwriting, except that her first will, exhibit 1, contained a signature of a witness. She handed exhibit 1 to respondent Edith McMullan about noon of July 19, 1935, and stated that she was leaving her whole estate to respondent Mrs. George Davis. May Martin gave to respondent Edith McMullan exhibit 2 in the evening of the same day in an envelope marked, "To be opened after my death." Patrick S. Martin was present in the room at the time. At the time she delivered exhibit 2 she stated that she did not think exhibit 1 was legal because of the witness' name attached to it, and so she had made a second will. Edith McMullan took exhibit 2 home and put it with exhibit 1, and two days after May Martin's death and on or about November 13, 1935, she put exhibits 1 and 2 in a safety deposit box with Patrick S. Martin's will. Edith McMullan and Patrick S. Martin had a conversation about four or five days after May Martin had handed Edith McMullan exhibits 1 and 2 and about three months before May Martin died, at which time Edith McMullan told Patrick S. Martin of the contents of May Martin's wills and told him that Mrs. George Davis was to get May Martin's estate. Edith McMullan and Patrick S. Martin about one day after May Martin's death read May Martin's wills, exhibits 1 and 2, and Patrick S. Martin did not like the things May Martin had said about him and stated that the said wills should be torn up, but Edith McMullan stated to him that she could not do that, and Patrick S. Martin said nothing more. He then handed the wills back to Edith McMullan and she put them in the safe deposit box. Edith McMullan had a conversation with Patrick S. Martin about one month before his death, at which time Martin stated that he had broken into some of the capital but there was money in the bank which would take care of that. Patrick S. Martin gave Edith McMullan his will on November 10, 1935, in the living room of his home and she kept it in a safety deposit box until offered for probate. When May Martin found that she was going to die in three months she had substantially all of her property transferred to Patrick S. Martin, which transfer was made on July 29, 1935.

Appellants rely upon Estate of Young, 123 Cal. 337, 55 P. 1011, a case in which the testatrix in an holographic will states "two deeds shall go to Katarina Muhr", and the testatrix executed two deeds to Katrina Muhr which were wrapped in a package with the will itself, and the Supreme Court on page 342, 55 P. on page 1012, states, "* * * an existing writing may by reference be incorporated into, and made a part of, a will. But, before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt. The identification of the paper must be had from a description given in the will itself; otherwise, the will is not wholly in writing, as our law requires, but rests partly upon a writing and partly in parol."

[1, 2] However, in more recent cases the authorities seem clearly to establish that where there is a reference to any written document described as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it and the only question is whether the evidence is sufficient for the purpose.

In the Estate of Plumel, 151 Cal. 77, 90 P. 192, 194, 121 Am.St.Rep. 100, the Supreme Court said: "It is true that there is some language in Estate of Young, 123 Cal. 337, 55 P. 1011, which, taken literally, tends to sustain the view that the identification of the paper to be incorporated must be possible from the face of the will or codicil alone. * * * But it is to be remembered that no reference, however explicit on its face, can identify a separate paper without the production of evidence to show that the particular paper offered does correspond to the descriptive particulars named in the will. * * * 'But the authorities seem clearly to establish that, where there is a reference to any written document, described as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question is, whether the evidence is sufficient for the purpose.' Similarly, in Brown v. Clark [77 N.Y. 369], the court of appeals of New York said: 'It is established by a long line of authorities that any testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct and clearly identifies, or renders capable of identification, by the aid of extrinsic proof, the document to which reference is made.' See, also, Dickensen v.

Stidolph, 11 C.B. (N.S.) 341." See, also, Estate of Miller, 128 Cal.App. 176, 17 P. 2d 181. The parol evidence, the admission of which was objected to by appellants, was admitted solely for the purpose of identifying and ascertaining the last will and testament of May Martin, which was referred to and incorporated in the will of Patrick S. Martin, and therefore the admission of the parol evidence in question was clearly proper.

Appellants next contend that there are two wills, and that the evidence, even if admissible, fails to support the finding that exhibit 1 was revoked by exhibit 2.

[3] Section 72 of the Probate Code provides, "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will; * * *." It will be observed from examining exhibit 2 that its purpose is not to make supplemental provisions consistent with the former will in whole or in part, nor to dispose of other property, nor to amend and alter the prior dispositions, but on the contrary, it undertakes to make complete disposition of all of decedent's property. It is the law of California that if the later writing purports to make disposition of all of decedent's property, the earlier instrument is deemed to be wholly revoked. 26 Cal.Jur. 812; Estate of Siemers, 202 Cal. 424, 261 P. 298; Estate of Bassett, 196 Cal. 576, 238 P. 666, 668; Estate of Marx, 174 Cal. 762, 764, 164 P. 640, L.R.A. 1917F, 234; Estate of Scott, 141 Cal. 485, 75 P. 44.

[4] The court was justified in finding that exhibit 2 revoked exhibit 1. There was no other will of May Martin produced.

[5] Appellants' next contention is that the will of Patrick S. Martin does not dispose of any property and therefore is not a valid will. The will provides, "& to carry out the terms of the will left by my wife May Martin". Exhibit 2, which was thereby incorporated into his will, provides, among other things, as follows: "All property in my own name & property in partnership with P. S. Martin my half of same at the death of said P. S. Martin to be sold & proceeds to be given to sister Mrs. Geo Peel Davis * * *." The will contains dispository clauses and also appoints executors, but it is not our duty at this time to interpret the will and we are not attempting to do so. It is our duty only to determine of what the will consists.

The appellants next contend that, "A testator must have knowledge of the contents of his will at or prior to the time of making same, and likewise if he disposes of his property by an extrinsic instrument he must have knowledge of the contents of same at or prior to the time of making his will." May Martin turned over practically all her property to her husband about the time she made her will, and it would be hard to convince the court that she had not discussed with him the contents of her will. In our view there is substantial evidence that Patrick S. Martin knew the contents of his wife's will at the time he wrote his own. But we are not finding, and it is not necessary to find, that in order to make the incorporation of his wife's will valid it was necessary for him to know its contents.

[6, 7] The appellants next contend that the will of Patrick S. Martin is not a valid holographic will if he expressly or impliedly incorporated matter not in his own handwriting. This contention is not the law of California and is without merit. The principle of incorporation by reference applies to holographic wills, the extraneous writing being considered to be incorporated in such a will although not in decedent's handwriting. In re Soher, 78 Cal. 477, 480, 21 P. 8; Estate of Skerrett, 67 Cal. 585, 8 P. 181; Estate of Atkinson, 110 Cal.App. 499, 294 P. 425; Estate of Sullivan, 94 Cal.App. 674, 271 P. 753.

[8, 9] Finally, the appellants contend that the executors are disqualified to act because they did not file the will of May Martin within the time prescribed by law for the filing of her will. In arguing this contention appellants seem to proceed on the impression that this proceeding is for the probate of the will of May Martin. It is not; it is one for the probate of the will of Patrick S. Martin. In this case the executors complied with the statutory requirements as to filing for probate the will of Patrick S. Martin. If they had not it should be further noted that section 324 of the Probate Code is not mandatory but is discretionary.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

31 Cal.App.2d 562

PEOPLE v. JEFFERSON et al.

Cr. 1663.

District Court of Appeal, Third District, California.

March 20, 1939.

1. Criminal law 🔑742(1)

Prosecuting witness' credibility and reasonableness of her story were for jury in robbery trial. Pen.Code, § 211.

2. Criminal law 🔑1159(5)

An appellate court is not warranted in reversing judgment of conviction on ground of falsity or inherent improbability of prosecuting witness' testimony, though evidence is susceptible of different inferences.

3. Criminal law 🔑1159(2), 1160

Appellate court justices should not substitute their judgment for jury's and trial judge's conclusions and reverse judgment of conviction on ground that prosecuting witness' testimony is inherently improbable, unless it is so clearly false and unbelievable that reasonable minds may not differ.

4. Criminal law 🔑1159(4)

To reverse judgment on verdict of conviction on ground that prosecuting witness' testimony was inherently improbable, it should clearly appear that verdict was result of passion and prejudice.

5. Criminal law 🔑1159(2)

The District Court of Appeal may not assume on appeal from judgment on verdict of conviction that evidence was inherently improbable merely because it was unusual in nature.

6. Criminal law 🔑1114(1)

The District Court of Appeal cannot speculate on motive, not disclosed in record, for perpetration of crime of which appellants were convicted.

7. Robbery 🔑24(1)

Evidence *held* sufficient to support convictions of first degree robbery. Pen.Code, § 211.

8. Criminal law 🔑824(2)

The trial court did not err in failing to instruct jury on subject of theft as distinguished from robbery in trial for latter offense, where no such instructions were offered by defendants. Pen.Code, § 211.

9. Robbery 🔑7

The snatching of property from owner's person or procurement thereof by threats of bodily harm or under circumstances reasonably creating grave apprehension of bodily injury at thief's hands on owner's part amounts to "robbery." Pen.Code, § 211.

[Ed. Note.—For other definitions of "Robbery," see Words & Phrases.]

10. Criminal law 🔑824(1)

Where evidence in robbery trial clearly shows that property involved was seized from prosecuting witness' person by means of force or fear, defendant may not complain of failure to charge jury that he might be convicted of theft, in absence of request for such instruction. Pen.Code, § 211.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Harrison Jefferson, Mary Ashley, and Ada Albert were convicted of first-degree robbery, and they appeal.

Affirmed.

Ray Manwell, of Marysville, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants were jointly tried and convicted of robbery of the first degree. It is contended the story of the prosecuting witness is inherently improbable, that the verdicts and judgment are not supported by the evidence, and that the court erred in failing to instruct the jury with respect to the crime of theft incident to the charge of robbery.

Mrs. Alma Robinson, the prosecuting witness, is a young negro woman who worked as a maid at a rooming house called "Cozy Rooms" in Marysville. The afternoon of October 5, 1938, she walked down D street to a store, and soon returned toward her home. She then carried a purse containing only a few cents in cash and a savings bank book showing a credit in the Bank of America of $80. On her way back she was accosted by the defendant, Mary Ashley, another colored woman whom she had never before met. This stranger also carried a handbag. She introduced herself as Mrs. Smith. She said she was a widow with three children and that she was working for a family who lived five miles in the country. After a few moments' conversation she said she would like to introduce her friends. The two women crossed the street to an automobile which was parked near the Bank of America and Mary Ashley introduced the prosecuting witness to the other defendants. Ada Albert was introduced as Mrs. Maydell. The witness did not remember the name by which the defendant, Jefferson, was introduced. He sat at the wheel in the front seat of the machine. They were all colored people. Mrs. Robinson and the defendant, Mary Ashley, stood in the street near the sidewalk by the automobile. Mary Ashley stood at her left side. Suddenly, without warning, Mary Ashley snatched the purse from Mrs. Robinson which she promptly opened and examined. At the same time she took a revolver from her own handbag and pointed it at the witness' left side. After hastily examining the purse, Mary Ashley said she found the bank book. Jefferson then commanded Mrs. Robinson to "Do what she [Mary Ashley] says to do, else you will be bumped off, sister. * * * Come on. * * * We are going to get the money." Mrs. Robinson said she was frightened; that she didn't know what might happen. There were pedestrians in sight, but she made no outcry. She went with Mary Ashley to the machine and upon command got in and sat in the back seat. As they reached the curb, Mary Ashley replaced the revolver in her handbag. They drove to the Bank of America. Mary Ashley entered the bank and stood close by the left side of Mrs. Robinson while she withdrew $79 of her account. During that transaction the defendant, Jefferson, stood outside the bank looking in through the window.

The cashier testified that while Mrs. Robinson was withdrawing her money a colored woman stood close by her side. He recognized Mrs. Robinson, but did not know Mary Ashley. He had never before seen her. He said there was nothing unusual in their appearance or conduct to attract his attention. He did not know a hold-up was being carried out in his presence. The women left the bank and entered the machine. As they got into the vehicle Mary Ashley took the money from Mrs. Robinson. After they entered the machine the defendants also demanded of Mrs. Robinson her jewelry. They took from her two small diamond rings, a wedding ring and her wrist watch. They drove out of the city some distance, and stopping near a bridge ordered the prosecuting witness to get out. She did so. The defendants drove away. Mrs. Robinson walked back to town and told her friend, a man by the name of Curley, about the robbery. Together they presented the case to the sheriff. A complaint was filed and warrants were issued.

The following day the defendant, Jefferson, was arrested in Sacramento. The other defendants were apprehended in New Mexico two weeks later. They were all returned to Marysville. Mrs. Robinson identified each of them. Neither the money nor the jewelry was recovered. The defendants denied their guilt and told the sheriff they had never before been in Marysville. At the trial the defendants failed to take the witness stand in their own behalf. The jury found each of them guilty as charged. Judgments were rendered accordingly. Motions for new trial were denied. From the judgments and orders this appeal was perfected.

[1-4] We are unable to hold, from the record, that the testimony of the prosecuting witness was false or that her story was inherently improbable. It does not appear to be improbable that the defendants, being colored people, should have attempted to hold up a woman of their own nationality. Nor is it strange that, having discovered she possessed a small bank account in a bank near by, that they should have sought to compel her, under threats of bodily harm, to withdraw the funds. It is true that pedestrians were passing along the sidewalk as the parties to this affair stood in the street by the side of the machine while the revolver was displayed and the threats to "bump her off" were made. But the defendant Ashley stood close by the left side of Mrs. Robinson, and they may have been concealed from the view of the pedestrians behind the machine. The other defendants were sitting in the machine in a very innocent manner. It is also true that other persons were in the bank while the money was being withdrawn, and that Mrs. Robinson might have successfully given a warning of the hold-up, but Mary Ashley then stood close by her side with the revolver in her handbag, and Jefferson stood on the sidewalk looking into the bank. Mrs. Robinson testified that they had threatened to "bump her off" if she didn't do what they demanded of her. She said she was frightened and feared they would carry out that

threat. It is not unreasonable to assume she believed the loss of the small sum of $79 was not worth endangering her life by defying her captors and giving an alarm. She did not know how lawless or desperate they were. A brave and determined person might be likely to give a warning under such circumstances. A timid, frightened colored person might not do so. The defendants did not take the witness stand to contradict her story. The credibility of the witness and the reasonableness of her story were matters for the determination of the jury. Even when the evidence may be susceptible of different inferences, an appellate court is not warranted in reversing the judgment. People v. Hennessey, 201 Cal. 568, 258 P. 49; People v. Tom Woo, 181 Cal. 315, 184 P. 389; 8 Cal.Jur. 585, secs. 580, 581. The justices of an appellate court should not substitute their judgment for the conclusions of the jury and the trial judge and reverse a cause on the ground that the evidence of the prosecuting witness is inherently improbable, unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard. To justify a reversal of a judgment on that ground it should clearly appear that the verdict is the result of passion and prejudice. People v. Lewis, 18 Cal.App. 359, 123 P. 232; People v. Antunez, 28 Cal.App. 740, 153 P. 963; 8 Cal.Jur. 590, sec. 582. In the Lewis case, supra, at page 364, 123 P. at page 234, it is said in that regard: "We must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. Cases have occurred—some are cited—where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury."

[5] We may not assume that evidence is inherently improbable merely because it is unusual in its nature. People v. Ralls, 21 Cal.App.2d 674, 70 P.2d 265.

[6] Able counsel for the appellants has forcefully suggested a purpose on the part of the defendants different from that of robbery, as a motive for the perpetration of the crime, which is not unreasonable. But that theory does not appear in the record on appeal. It should have been presented at the trial or upon the motion for a new trial. This court may not be permitted to speculate upon a motive of the defendants which is not disclosed in the record.

[7] For the reasons assigned, we are also of the opinion the verdicts and judgments are adequately supported by the evidence.

[8-10] The court did not err in failing to instruct the jury upon the subject of theft as distinguished from that of robbery. No such instructions were offered by the defendants. The snatching of property from the possession of another has been held to constitute robbery when it is seized by means of force or fear. People v. Church, 116 Cal. 300, 48 P. 125; sec. 211, Penal Code. In the present case the snatching of the purse by means of force and fear perpetrated by the use of a deadly weapon and a threat to "bump off" the prosecuting witness if she refused to comply with the defendants' demands was followed by forcibly stealing her jewelry and procuring her money from the bank under a continuation of the same threats and fear. Where property is snatched from the person of another or procured by threats of bodily harm or under circumstances reasonably creating grave apprehension on the part of the owner of receiving bodily injury at the hands of the thief, the crime amounts to robbery. People v. Dahl, 113 Cal.App. 224, 298 P. 59; Tipton v. State, 23 Okl.Cr. 86, 212 P. 612, 31 A.L.R. 1074; Routt v. State, 61 Ark. 594, 34 S.W. 262; People v. Anderson, 59 Cal.App. 408, 211 P. 254. Under the circumstances of this case, where the evidence clearly shows that the property was seized from the person of another by means of force or fear, the crime of theft is not involved and the defendant may not complain of a failure to charge the jury that the accused might be convicted of theft, in the absence of a request for such an instruction. People v. Modina, 146 Cal. 142, 79 P. 842; People v. Welsh, 7 Cal. 2d 209, 60 P.2d 124; People v. Montezuma, 117 Cal.App. 125, 132, 3 P.2d 370, 4 P.2d

285; People v. Church, supra; 22 Cal.Jur. 886, sec. 42.

The judgments and orders denying the motions for new trial are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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31 Cal.App.2d 482

DE TRAY v. HIGGINS et al.

Civ. 2211.

District Court of Appeal, Fourth District, California.

March 14, 1939.

1. Appeal and error 🔑1047(2)

Whether the reserving of rulings on admissibility of evidence with a subsequent failure to rule thereon will be ground for reversal ordinarily depends upon the particular circumstances of case.

2. Appeal and error 🔑1047(2)

Where substantial injury to litigant results from court's practice of reserving rulings on admissibility of evidence with subsequent failure to rule thereon, the error is considered to be of sufficient gravity to require a reversal.

3. Appeal and error 🔑1047(2)

Where court received defendants' evidence subject to reserved rulings of court on plaintiff's objection to evidence, court's failure to decide the reserved rulings did not require reversal of judgment for plaintiff on theory that trial court's action amounted to sustaining of plaintiff's objection to evidence offered by defendants.

4. Appeal and error 🔑1047(2)

A showing that failure of trial court to rule on reserved rulings regarding admissibility of evidence before conclusion of trial deprived losing party of right to put in other evidence or to rebut testimony is necessary before the failure to make rulings would justify holding that prejudice resulted.

5. Appeal and error 🔑989

The duty of the District Court of Appeal is to determine whether trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion arrived at by trial court.

6. Bills and notes 🔑516

In action on note whereby makers agreed to pay payee $6,000 at end of five years, but that in case buildings were sold during that period the amount of money received should be divided but not to exceed the amount named, and where evidence indicated that buildings had been sold for $30,000, evidence sustained judgment for payee.

7. Bills and notes 🔑516

In action on note where defendants contended that payee had brought wrong form of action because business relationship between defendants and payee's deceased husband had raised reciprocal rights and obligations which required an accounting, record justified finding that defendants had not intended an accounting to payee, that books were deliberately destroyed, and that further accounting under different pleadings would be unnecessary and unjustifiable.

8. Bills and notes 🔑493(1)

A note is presumed to have been given for a sufficient consideration. Civ.Code, § 1614.

9. Bills and notes 🔑516

In an action on a note, the introduction of the note in evidence establishes a prima facie right to recover according to its terms. Civ.Code, § 1614.

10. Bills and notes 🔑493(3)

In action on note, the burden of showing want of consideration is cast upon the party seeking to avoid it, and if he fails to make such showing, the presumption of sufficient consideration prevails. Civ.Code, §§ 1614, 1615.

◆

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action on a note by Ruth B. De Tray against George P. Higgins and others. From an adverse judgment, defendants appeal.

Affirmed.

Borton, Petrini & Conron, of Bakersfield, for appellants.

Brittan & Mack, of Bakersfield, for respondent.

GRIFFIN, Justice.

This is a case in which Ruth B. DeTray, formerly Mrs. Newcomb, obtained judgment against George P. Higgins and Edith Cross Higgins individually, and George P. Higgins and Edith Cross Higgins doing business as Higgins & Higgins, formerly known as Cross Brothers, a copartnership. The judgment is for $5,800. This judgment is based upon a purported promissory note reading as follows:

"June 23, 1931.

"We, the undersigned agree to pay to Ruth B. Newcomb or her heirs, Whitfield and Maxine Newcomb, at the end of five years, the sum of Six Thousand ($6000.00) Dollars.

"In case buildings are sold during this period (in which all parties concerned agree to said sale to be a just one) the amount of money received shall be divided but not to exceed the above amount.

"Cross Brothers
"By: (signed) Edith Cross Higgins
"By: (signed) George P. Higgins
"ECH/gh."

The background of the above instrument goes back to April, 1925, when, after the death of Mr. Cross, Edith Cross, the widow (now Mrs. Higgins), secured the services of Mr. Verne Newcomb. Mr. Newcomb and a Mr. Dettra were employed by the present Mrs. Higgins under an arrangement whereby, in addition to a fixed salary, Newcomb and Dettra each received one-third of the net profits. From their two-thirds of the profits $1,200 per year was deducted and credited to a building fund. A written agreement between Newcomb and Mrs. Cross to such effect was entered into on October 11, 1928. In March of 1929 Dettra withdrew from the business. Thereafter, the original agreement between Mrs. Cross and Newcomb was superseded by an arrangement whereby he was to receive one-half of the net profits in addition to his salary, and the $1,200 credit to the building fund was deducted from his share of the profits.

At the time of Mr. Newcomb's death in March of 1931, there was a $6,000 credit to the aforesaid building fund. The arrangement between Newcomb and Mrs. Cross had been set up in the form of instructions to the firm's bookkeeper, written in the firm books. Within ten days after Newcomb's death, Mrs. (Cross) Higgins informed Mrs. Newcomb, the present Mrs. DeTray, that Mr. Newcomb had had an investment in the firm and buildings and offered her the money in cash.

Thereafter, in June, 1931, Mr. and Mrs. Higgins, defendants herein, made, executed and delivered the promissory note on which this suit is brought. Due to the fact that Mrs. Newcomb's interest was to protect her children, the children were made alternate payees in the note. At the maturity of the note no payment was made thereon, and, in fact, Mrs. Higgins had informed the payees that the note would not be paid when it matured. Mrs. Higgins continued to operate the business known as Cross Brothers until 1933, when she turned the business over to her new husband and his son, who have since continued to operate the business under the name of Higgins & Higgins, occupying the buildings and using the equipment formerly belonging to Cross Brothers.

No accounting of any sort has ever been made of the profits of Cross Brothers nor of the value of the buildings and equipment belonging to it, nor has any of the $6,000 been paid. The books of the business have been destroyed by the appellants and no accounting at the time of trial was possible.

Before going into a detailed relation of the evidence and questions presented, it is well to consider the issues as made by the pleadings. The verified first amended complaint alleged: "That on or about the 23rd day of June, 1931, the defendants for a valuable consideration made, executed and delivered unto the said plaintiff herein a certain promissory note in writing, wherein and whereby the said defendants promised and agreed to pay to the plaintiff, five (5) years after June 23, 1931, the sum of Six Thousand Dollars ($6,000.00)."

The verified answer to this allegation denies that the defendants "received any consideration for the note described in said paragraph," but does not deny its execution and delivery.

The remainder of the amended complaint alleged (in paragraph II) a demand on defendants, a failure to pay, and that "the sum of Six Thousand Dollars ($6,000.00), together with interest thereon from the 23rd day of June, 1936, at the legal rate, is now due, owing and unpaid". The answer does not deny any of this paragraph except the demand.

The answer further sets up a lack of consideration and in a special defense it is alleged that Mrs. DeTray and Mrs. Higgins agreed to share losses from the business by an oral agreement of April, 1931, that Mrs. Higgins also agreed to give Mrs. DeTray one-half the profits out of that business conducted by Mrs. Higgins and Mr. Newcomb, prior to his death, and that no profits ever existed. The last defense is that "said note" was given to plaintiff to secure any debt which might arise out of the business done by Newcomb and Mrs. Higgins.

In the amendment to the first amended complaint respondent alleges: "That in said promissory note it is further provided that in case buildings are sold during this period (in which all parties concerned agree to said sale to be a just one), the amount of money received shall be divided but not to exceed the above amount. That said buildings have not been sold by the defendants herein during any of the times herein mentioned." In answer to this, appellants allege that the building was sold in "1930" for the sum of $4,000.

The trial court in this case adopted a plan throughout the trial of reserving his rulings and allowing the appellants to introduce into evidence all of their testimony which they had available for the purpose of making out any of their defenses, and apparently disregarded all of the objections of the respondent under the tacit understanding had by the court and both counsel that this procedure would be adopted towards all evidence of this nature offered during the trial.

The record reveals that when appellants offered certain evidence respondent's counsel objected thereto and the evidence was tendered into the record subject to the reserved ruling of the court upon respondent's objections. The evidence in point, in addition to other matters, bore upon the issue of delivery and consideration for the note upon which judgment has been rendered.

Appellant now contends that the court committed error by not deciding reserved rulings upon the admission of evidence showing absence of delivery and consideration. The findings of fact of the court are to the effect that the note had been properly executed and founded upon a consideration. Appellant claims that the action of the court in reserving rulings amounted to a sustaining of respondent's objections to the evidence offered by appellants to show an absence of delivery and of a consideration for the note sued upon by respondent, citing Van Haaren v. Whitmore, 2 Cal.App.2d 632, 38 P.2d 829; Clopton v. Clopton, 162 Cal. 27, 32, 121 P. 720; Citizens' Bank v. Jones, 121 Cal. 30, 33, 53 P. 354.

[1-3] Whether the uncommendable practice of reserving rulings with a subsequent failure to rule thereon will be ground for reversal in any given case ordinarily depends upon the particular circumstances of that case. Ebner v. West Hollywood Transfer Co., 45 Cal.App. 186, 191, 187 P. 114. Such practice of reserving rulings may work substantial injury to a litigant and when it can be shown that such result follows, the error is considered to be of sufficient gravity to call for a reversal. (24 Cal.Jur. 776.) Analyzing the situation in the case at bar, the appellants have suffered no prejudice. Did the court decide the case on any evidence improperly admitted against the losing party? We think not. The appellants, who were the losing parties in this case, are not complaining of any evidence which the respondent offered in this case on which the ruling was reserved, but they are asking this court to assume that their own evidence was stricken out and not considered by the trial court.

The failure to rule upon the objection did not deprive the losing party of the right to put in evidence. It will serve no useful purpose to relate in toto the objections made by respondent to the testimony of appellants and the wording of the reserved rulings of the court. Suffice it to say that, in general, they are as follows: The Court: "I am going to hear it subject to motion to strike it out of the record." Mr. Mack: "Just to be sure my record is complete, that will be true of all this testimony that comes in?" The Court: "Yes."

Appellants now ask this court to make the assumption that none of the appellants' evidence was received and that the entire line of testimony of the appellants, competent and incompetent, was stricken by the court when it decided the case in favor of the respondent. We do not believe this to be a proper assumption nor is it supported by the authorities cited. In each of those cases cited it was applied only to inadmissible testimony. The trial court stated at the time the evidence was admitted, that he was going to admit all of it, and consider it, and from the result of the findings it apparently did so.

The holding in Estate of Wempe, 185 Cal. 557, 564, 197 P. 949, 951, is quite applicable to the instant case, wherein the court said: "The testimony was admitted only tentatively, and subject to a motion to strike out to be argued later. Such motion was not made. The failure to make it under the circumstances was a waiver of the objection."

Volumes of evidence were received, under the above ruling, touching all phases of the defenses claimed, and the trial court was particularly careful to indulge the appellants in fully and fairly hearing all they desired to offer. No motion to strike any of the evidence was ever made. We are not prepared to hold that any such error in failing to rule upon the objection of respondent resulted in prejudice to appellants. We believe the facts recited bring the principal case within the rule laid down in Clopton v. Clopton, supra, wherein it is said: "Complaint is made that the court failed to rule on defendants' objection to testimony given by plaintiff. * * * The court reserved its ruling, receiving the evidence subject to the objection. Apparently it has never formally ruled on this objection, except in so far as a ruling against the objection is to be inferred from the fact that the court has found upon the facts so testified to in favor of plaintiff. The matter must here be regarded as though defendants' objections had been formally overruled and exceptions noted to such rulings." [162 Cal. 27, 121 P. 722.]

Also, in Ames v. Employers Casualty Co., 16 Cal.App.2d 255, at page 263, 60 P.2d 347, at page 350, we find this expression: "During the trial certain objections to the admission of evidence were made and rulings thereon were reserved; but the evidence was admitted. Thereafter the trial court did not expressly rule on said objections. The defendant assigns the failure of the trial court to rule as prejudicial error. As just stated, the evidence was admitted. As it was not later excluded, it is now in the record. The defendant does not specify any single piece of evidence that was so admitted and also specify its objection thereto except as will hereinafter be duly noted. The mere fact that the trial court did not make a specific ruling on each objection was not prejudicial error. * * * As intimated above, if the admission of any part of the evidence was a prejudicial error, such fact should have been specially called to our attention, but the defendant has not made any assignments to that effect."

In Ebner v. West Hollywood Transfer Co., supra, it was held that "Where the reservation of a ruling is a mere irregularity, and does not result in any real injustice to the appellant, the judgment will not be disturbed upon appeal for this reason." [45 Cal.App. 186, 187 P. 116.]

[4] Divorced from other circumstances, the failure of the court to rule before the conclusion of the trial did not deprive the losing party of any right to put in any other evidence or to rebut testimony. It is indubitably necessary to make such a showing before a contrary holding would be justified. Stanwood v. Carson, 169 Cal. 640, 147 P. 562.

Appellants next advance the argument that the instrument sued upon was not intended to be a promissory note but only an acknowledgment of the amount respondent's deceased husband had put into a certain building fund. As between the parties, the face of the note itself contains language which characterizes the intent of the parties to the transaction.

The appellants admit in their answer that the promissory note sued on was made, executed and delivered as alleged in the complaint, and that it was due, owing and unpaid, but allege lack of consideration and that it was payable out of the profits arising from the liquidation of the business venture between Newcomb and Mrs. Higgins. It will thus be seen that there was injected into the pleadings two conditions on which appellants attempted to defeat the respondent. First, that the note was to be paid out of a sale of certain buildings and that such a sale had taken place, netting only $4,000. Second, that the note was payable out of a particular fund, i. e., profits out of the business venture mentioned, and that no profits arose. Under a written agreement between Mr. Newcomb and Mrs. Higgins a credit was set up on the books of the company to which was paid $1,200 a year for five years. This was known as a building fund. This $1,200 a year came out of Mr. Newcomb's share of the profits under the above-mentioned agreement. It was Mrs. Higgins' contention at the trial that any bad debts of the business were to be charged back against this $1,200 fund and that seems to be her main defense in this action, i. e., that sufficient bad debts existed so that this fund was entirely exhausted.

Mrs. DeTray testified that at the time Mrs. Higgins came down to see her she offered her $6,000 in cash; that she did not need the money then because she had just received her husband's insurance money; and that Mrs. Higgins told her that the money could be left in the buildings until the children needed it.

The evidence in reference to the intentions of the parties as to the nature of the business relationship of the various parties involved and as to the many transactions and book accounts is replete with inconsistencies and conflicts and sets forth an inexhaustible enumeration of items claimed to be chargeable against this particular fund and which, if allowed, would entirely cancel the indebtedness under the note. Suffice it to say that after thorough and painstaking consideration of the entire record and without relating the testimony at length, we are convinced that the evidence produced adequately supports the court's finding that such claimed deductions were not allowable and that the clear intention of the appellants was to pay to respondent or her heirs the sum of $6,000 at the end of five years for such interest in the business as she or her deceased husband may have had, with the exception that in case the buildings were sold in the meantime (with their mutual consent) instead of the amount above specified, respondent would receive one-half of the proceeds of the sale, not exceeding $6,000.

Apparently, it was upon this theory that the trial court considered the evidence and found that there was due from appellants the sum of $5,800. It further appears from the record that on June 8, 1935, an advancement in the sum of $200 was made by appellants to a minor daughter of respondent. Credit was allowed on this note for this payment.

[5, 6] This court's duty begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion arrived at by it. We see no reason to disturb this finding. It appears from the testimony that Mrs. Higgins transferred the "buildings, equipment, etc.", to George P. Higgins, her husband and co-signer of the note, and George S. Higgins, step-son of Mrs. Higgins, by bill of sale dated June 16, 1933. Under this purported sale Mrs. Higgins was to receive the sum of $30,000 on the surprisingly low terms of $1 down and the balance to be paid at the rate of one-half the net profits, at the end of each and every year, of the firm of Higgins & Higgins, who thereafter took over the entire business. Title was not to pass until the full purchase price was paid. All parties testified that this alleged "sale" was never called to Mrs. DeTray's attention at any time either before or after it was made. She was neither consulted about the price nor informed about the deal, nor was any attempt made to account to her for the profits thereof. It was claimed at the time of the trial that this agreement or bill of sale was for the large sum of $30,000 because it included inventory in addition to the buildings and equipment; that the value of the buildings referred to in the note only amounted to $4,000. However, Mrs. Higgins testified that she did not know what the amount of the inventory was in 1933 and never produced figures to show what it actually was.

George S. Higgins, the step-son of Mrs. Higgins, also testified that the amount of the inventory at the time the business was purchased by him was beyond his ken.

Even assuming that this transaction can be raised to the dignity of a legitimate sale, the trial court was justified in holding that respondent was entitled to the sum of $6,000 as her proportionate share under the sale. If it assumes the reverse character (and we may pause to remark it seems to have been the proper one) no bona fide sale was made and most certainly the attempted sale was never consented to or ratified by respondent. We see no merit to this claim of appellants.

The remaining contention is that respondent brought the wrong form of action, claiming that the business relationship between appellant Edith Cross Higgins and the deceased husband of respondent had raised certain reciprocal rights and obligations which required that an accounting be had before it could be determined whether the appellant was indebted to respondent, citing Johnstone v. Morris, 210 Cal. 580, 292 P. 970; Mosher v. Helfend, 7 Cal. App.2d 48, 44 P.2d 1050; Quackenbush v. Sawyer, 54 Cal. 439, 441.

Whether the facts and circumstances of this case and the agreements between the parties above mentioned constituted a partnership is problematical. In order that we may be forgiven for our failure to attach the proper cognomen to this relationship, we will quote a colloquy between counsel for the appellant and the court:

"The Court: In other words, the partnership ceased on his (Newcomb's) death. Mr. Petrini: Well, of course we contend there wasn't a partnership; we don't know whether it is a partnership, at least that is off the record. * * *

"Mr. Mack: Do you claim now Mr. Newcomb and Mrs. Cross had a half interest in all of the business?

"Mr. Petrini: No, no. I really don't know what I contend in that respect; we will simply have to let all the facts go in and then decide whether this is a partnership or not. * * *

"Mr. Mack: In other words, you have no definite theory on the case at all.

"Mr. Petrini: I don't know whether there was a partnership or not; my opinion is there was not. * * *

"The Court: I don't know what you would call it, Mr. Petrini, if you wouldn't call it a partnership, so far as the evidence has now gone; you can call it any kind of a baby if you want to, it still remains the same baby.

"Mr. Petrini: Yes, frankly, I am not satisfied myself that it is or is not a partnership; in any event, I think the results will probably be about the same, but not in this particular action, however."

We do not believe it is essential to the issues presented to make a determination of this fact. The accounting was apparently had under the pleadings as they were framed. The evidence discloses no outstanding demands against the claimed partnership and no outstanding debts to be collected or that could be collected. In many cases it has been held that an accounting is not necessary. Wilson v. Brown, 96 Cal.App. 140, 273 P. 847; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; Sturges v. Swift, 32 Miss. 239; Case v. Maxey, 6 Cal. 276; 20 Cal.Jur. 763, sec. 71.

Clark v. Fowler, 57 Cal. 142, was a case in which one partner gave another his note for the seller's interest in the business. The court found that the note was given by defendants to plaintiffs in consideration of the purchase by the former from the latter of all the plaintiffs' interest in and to all the partnership property and stock on hand undisposed of. The court further found that said promissory note was executed at the time of the dissolution of said copartnership and was not any part of said copartnership affairs and transactions, and held that the suit on the promissory note was proper. In that action appellant contended that an action at law would not lie on a note given by a partner to his copartner when there had been no final settlement of the partnership dealings. The court held that it was a sufficient answer to that objection to say that defendant instituted the inquiry as to the partnership transactions and therefore he was not prejudiced by it. Partnerships may be dissolved by retirement of one of the partners (Ross v. Cornell, 45 Cal. 133) or by agreement of the partners. Wagner v. Wagner, 50 Cal. 76.

[7] We believe from the record before us that the trial court would be fully justified in finding that the appellants never intended accounting to the respondent for anything; that they had taken over the business in its entirety; that the books were deliberately destroyed or secreted; that all of the money collected was used for appellants' benefit; and that a further accounting under different pleadings would be unnecessary and unjustifiable.

[8–10] A promissory note is presumed to have been given for a sufficient consideration under section 1614 of the Civil Code, and in an action thereon, the introduction of the note in evidence establishes a prima facie right to recover according to its terms. The burden of showing a want of consideration, under section 1615 of that code, is cast upon the party seeking to avoid it, and if he fails to make this showing, the presumption prevails and furnishes sufficient evidence to support a finding that the note was given for a good and valuable consideration. The trial court resolved this issue against appellant. We find no reason to disturb the finding.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

31 Cal.App.2d 509

PACE v. THREEWIT et al.

Appeal of SAN JOAQUIN COTTON OIL CO.

Civ. 2236.

District Court of Appeal, Fourth District, California.

March 17, 1939.

1. Chattel mortgages ⟹47

A crop mortgage must sufficiently describe property to be hypothecated so as to bring instrument within meaning of statute defining a mortgage. Civ.Code, §§ 2920, 2955, 2956.

2. Chattel mortgages ⟹47

Description of mortgaged property in chattel mortgage, as against third person, must be definite enough to enable him, aided by inquiries which instrument itself suggests, to identify property.

3. Chattel mortgages ⟹47

A statement as to location of chattels mortgaged is one of most important elements in description.

4. Chattel mortgages ⟹48

Mere statement in crop mortgage of county in which crop is to be raised is not sufficient to put third persons on inquiry. Civ.Code, §§ 2920, 2955, 2956.

5. Chattel mortgages ⟹47

Parol evidence may aid but not make description in chattel mortgage.

6. Chattel mortgages ⟹48

Description in crop mortgage covering specific land and purporting also to cover any other land in county that might be farmed by mortgagors was not sufficient to extend lien thereof to crops raised upon adjoining lands not described in mortgage, and to create valid lien on crops as against claim of attaching creditor of mortgagors. Civ. Code, §§ 2920, 2955, 2956.

7. Chattel mortgages ⟹150(1)

Requirement that chattel mortgage be recorded has double purpose of giving notice to interested third parties and of enabling them to identify and locate property.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Tom Pace, as assignee of certain labor claims, against D. K. Threewit and Roland Holiday, wherein plaintiff attached cotton crop of defendants. The San Joaquin Cotton Oil Company filed a third party claim asserting title to attached cotton crop under provisions of a crop mortgage. From a judgment that crop mortgage was not valid as to attaching creditor with respect to property attached, the third party claimant appeals.

Affirmed.

Borton, Petrini & Conron, of Bakersfield, for appellant.

Edwin P. Jacobsen, of Delano, and Harvey, Johnston & Baker, of Bakersfield, for respondent Pace.

BARNARD, Presiding Justice.

In October, 1936, the defendants executed and delivered to the third party claimant a crop mortgage, which was duly recorded covering all crops raised during the year 1937 on the west ½ of section 16, township 32 south, range 29 east, M. D. B. & M. This mortgage further purported to cover all crops produced "upon any other land situated in said county and state and owned, planted or farmed during said crop years by the mortgagor". The plaintiff, as assignee of certain labor claims, brought this action and attached a cotton crop produced during 1937 on 160 acres lying immediately west of the north ½ of the west ½ of section 16 and also on 160 acres lying immediately north of the west ½ of section 16, both of which parcels had been farmed that year by the defendants. The San Joaquin Cotton Oil Company filed a third party claim, asserting title to the attached cotton crop under the provisions of its crop mortgage. A petition to determine title to the property in question was then filed and, after a hearing, the court determined that the crop mortgage was not valid as to the attaching creditor with respect to the property attached. From the judgment entered the third party claimant has appealed.

The question presented is whether the above-quoted provision of the crop mortgage contains a sufficient description to extend the lien thereof to crops raised upon said adjoining lands and to create a valid lien on said crops as against the claim of an attaching creditor of the mortgagors.

[1] Section 2955 of the Civil Code provides that growing crops may be mortgaged. Section 2920 of that code defines a mortgage as a contract by which "specific property" is hypothecated for the perform-

ance of an act. The form of a crop mortgage suggested by section 2956 of that code provides for the description of the property. There can be no mortgage unless the property hypothecated is sufficiently described to bring the instrument within the meaning of the statute defining a mortgage.

[2] With respect to the sufficiency of the description of the mortgaged property the general rules are thus set forth in 10 American Jurisprudence, page 752, section 55:

"To be sufficient against a third person, the description of the mortgaged property must be definite enough to enable him, aided by inquiries which the instrument itself suggests, to identify the property. A description which may be amply sufficient as between the immediate parties to a mortgage will, in many cases, not be sufficient as against creditors of, or purchasers from, the mortgagor.

"Third parties are under no obligation to exhaust every possible means of information before they can safely proceed to treat the property of the mortgagor as unencumbered. The record of a mortgage is not constructive notice to them where it does not describe any particular property or furnish any data which will direct the attention of those reading it to some source of information beyond the words of the parties to it. In nearly all cases, however, resort must be had to other evidence than that furnished by the mortgage itself to enable third persons to identify mortgaged property, and generally where there is a description of the property mortgaged and the description is true, and by the aid of such description and the surrounding circumstances the third person would in the ordinary course of things know the property that was mortgaged, the description will be held to be sufficient."

[3] And at section 63, page 756, is to be found the following: "A statement as to the location of the chattels mortgaged is one of the most important elements in the description. Other details without this element often amount to little or nothing, whereas its presence with other slight details often makes easy the ascertainment of the property meant to be designated and may make sufficient a description which otherwise would be insufficient. There should be a designation of the property conveyed and of the place where it may be found. A description is, of course, insufficient where there is no location indicated and nothing else to identify the property."

[4] Corpus Juris, volume 11, page 469, section 98, states: "As a general rule, however, a mere statement of the county in which the crop is to be raised is not sufficient to put third persons on inquiry." One of the cases cited in support of this rule is Muir v. Blake, 57 Iowa 662, 11 N.W. 621, in which case it was held that a description was insufficient which described the property as "all the crops raised by me in any part of Jones county for the term of three years". On the other hand, the supreme court of Arkansas, in the case of Johnson v. Grissard, 51 Ark. 410, 11 S.W. 585, 3 L.R.A. 795, held a similar description to be sufficient.

In several cases in this state it has been held that crop and chattel mortgages were not void for uncertainty in the description of the property. Wilkerson v. Thorp, 128 Cal. 221, 60 P. 679; California Packing Corp. v. Stone, 64 Cal.App. 488, 222 P. 193; McCormick v. Farmers' Grain etc. Co., 51 Cal.App. 557, 197 P. 429; Ramsey v. Furlott, 14 Cal.App.2d 145, 57 P.2d 1007; Hall v. Glass, 123 Cal. 500, 56 P. 336, 69 Am.St. Rep. 77. In each of these cases the real property upon which the chattels or crops were situated was described, or it was stated that they were located upon a particular piece of real property with a known name so that it could be located.

In United Bank & Trust Company v. Powers, 89 Cal.App. 690, 265 P. 403, 406, the general rule is thus stated: "The rule is well settled that where a chattel mortgage of record contains a sufficient description, which, by putting parties upon inquiry, will enable them to identify and ascertain the property mortgaged, the mortgage will not be held void for uncertainty (Jones on Chattel Mortgages, § 64; 5 Cal. Jur., p. 54), where it is stated that a description of property is sufficient if it is such as to enable third parties, by inquiry, to identify the property covered by it. Or, as said in Cobbey on Chattel Mortgages, § 170: 'A description which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient.'"

In that case the court further said: "In Rudolph v. National Live Stock Commission Co., 76 Kan. 789, 92 P. 1103, the Supreme Court of Kansas again held that 'If a person of ordinary prudence, reading such mortgage, and making such reasonable inquiries as the mortgage * * * suggests, would identify the cattle * * * then the mortgage, being duly filed in the proper office, is sufficient to charge third persons with notice.' That case also holds that it is a question of fact for the jury to determine whether a person of ordinary prudence, reading such mortgage and making inquiries as would be suggested thereby, would be enabled to identify them. To the same effect is McConnell et al. v. Langdon, 3 Idaho 157, 28 P. 403, where the Supreme Court of Idaho held that: 'A description of property is sufficient if it will enable a third person, aided by inquiry suggested by the instrument, to identify the property.' (Citing a number of authorities.) Likewise, in the case of Ehrke v. Tucker, 99 Kan. 52, 160 P. 985, the Supreme Court of Kansas decided that: 'It is not necessary that the description of cattle intended to be included in a chattel mortgage, shall be so definite that third parties can identify the property from that alone. It is enough if the description and the inquiry suggested by it, furnish a reasonable basis for identification; but the suggestions which indicate the line of inquiry must be taken from the mortgage itself and not rest alone in the mind of the mortgagor or mortgagee.'"

In Pacific Nat. Agr. Credit Corp. v. Wilbur, 2 Cal.2d 576, 42 P.2d 314, 320, the court thus quoted the rule from 11 C.J. 457: "'As against third persons the description in the mortgage must point out the subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggests inquiries or means of identification which, if pursued, will disclose the property covered. This rule is based upon the maxim, that is certain, which is capable of being made certain. So a description is sufficient if it may be aided by parol proof and the property covered by the mortgage identified.'"

[5-7] It is a well-settled rule that parol evidence may aid but not make a description. It may first be observed that in the provision of the mortgage now under consideration there is no attempt to set forth a description of specific property which may be aided by parol evidence. The language used indicates an express intention to avoid describing any particular property and indicates an intention to leave the parties free to apply the mortgage to any land in that county which may later happen to be picked by the mortgagors as the scene of their farming operations.

It is pointed out in the rules above set forth that the description should be such that the property may be identified by it alone or that the description in itself should suggest inquiries or means of identification which, if pursued, will identify the property. But, as pointed out in some of these cases, the suggestion of a line of inquiry must appear in the mortgage itself and not rest solely in the mind of the mortgagor or mortgagee. There should be something more than merely the name of the mortgagor especially where, as here, it is not even set forth or claimed, as a matter of fact, that the mortgagor owns the land or even lives upon it. In the instant case there is no evidence that the mortgagors owned the land where the attached crop was produced, that they leased it, that they lived on it, that they had ever farmed it before, that they were farming it when the mortgage was executed, that it was farmed as a unit in connection with the land which was described in the mortgage, that they were ever personally upon the land where the attached crops were produced, or that there was anything in or about that land to enable anyone to tell who was raising the crop. It does not appear where the mortgagors lived or that they lived in this state. The land upon which the crops were raised could not be identified by anything stated in the mortgage and could be located only by following the mortgagors to see where their activities extended. Other than what existed in the minds of the parties to the mortgage there was no possible way to identify the land intended to be covered by the clause in question, except by making inquiry of the mortgagors, and there is nothing to show that they could have been found or even that anyone on the place during the time the crops were being produced knew who they were or where they were.

In the case of such a mortgage as this covering specific land and purporting to also cover any other land in the county that might be farmed by the mortgagors, it should not be necessary for an interested third party to investigate every piece of land in the county that had cotton growing upon it. This is especially true in this state where in some counties lands farmed by the same party might well be more than a hundred miles apart. If, as suggested, the precise question involved here has not heretofore been decided in this state we prefer to adopt the rule which would make the required notice mean something. The requirement that such a mortgage be recorded has the double purpose of giving notice to interested third parties and of enabling them to identify and locate the property. In many cases it would open the door to fraud to permit crops to be brought under such a mortgage months after the mortgage was recorded and after the rights of other people had accrued. In our opinion, the court's determination that this mortgage was invalid, in so far as the attached property is concerned, because that property was not sufficiently described in the mortgage, should be upheld.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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31 Cal.App.2d 532

SAMTER v. KLOPSTOCK REALTY CO. et al.

Civ. 11004.

District Court of Appeal, First District, Division 2, California.

March 20, 1939.

Rehearing Denied April 19, 1939.

Hearing Denied by Supreme Court May 18, 1939.

1. Corporations 🔑207½

An action for recovery of reasonable value of use of corporate premises by partnership composed of stockholders and directors of corporation, and for recovery of salary paid by corporate defendant to directors was in the nature of a "derivative action" on behalf of corporation, where complaint sought judgment in favor of corporation and not in favor of plaintiff.

2. Corporations 🔑204

A plaintiff in action in nature of derivative action on behalf of corporation is not entitled to redress of personal wrongs, and is merely a trustee seeking in name of corporation a recovery for wrongs that have been committed against corporation.

3. Executors and administrators 🔑453(2)

In derivative action by executor of deceased wife of deceased stockholder on behalf of corporation, judgment in favor of estate of deceased stockholder and stockholder's personal representative was void as being in favor of one not a party to action, notwithstanding rule that court of equity which has assumed jurisdiction is not limited by prayer of complaint in granting relief.

4. Corporations 🔑211(7)

The right of executor of deceased wife of deceased stockholder to maintain derivative action on behalf of corporation could be challenged by general demurrer rather than special demurrer, and was not waived by failure to interpose special demurrer, where defendants were not challenging executor's "legal capacity to sue" generally. Code Civ.Proc. § 430, subd. 2.

5. Descent and distribution 🔑89
Wills 🔑746

A derivative action on behalf of corporation cannot be brought by heir or legatee or by representative of such heir or legatee of deceased stockholder while estate of deceased stockholder is in probate and undistributed.

6. Descent and distribution 🔑89
Wills 🔑746

The rights of heir or legatee of deceased stockholder can be protected by stockholder's representative, and if stockholder's executor or administrator refuses to exercise such rights or stands in adverse position, remedy of heir or legatee is to seek removal or suspension of executor or administrator and appointment of special administrator with power to conduct litigation, and not to bring derivative action on behalf of corporation. Civ.Code, § 320b, subd. (2).

Appeal from Superior Court, San Francisco County; Warren V. Tryon, Judge.

Action in the nature of derivative action on behalf of the Klopstock Realty Company, by Samuel M. Samter, as executor of the will of Grace E. Klopstock, deceased, against the Klopstock Realty Company, Frederick Klopstock and Samuel Klopstock, for recovery of reasonable value of use of corporate premises by partnership composed of stockholders and directors of corporation, and for recovery of salary paid by corporate defendant to directors. From a part of the judgment, the defendants appeal.

Reversed.

Joseph T. O'Connor and Leo R. Friedman, both of San Francisco, for appellants.

H. U. Brandenstein, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, as the executor of the will of Grace E. Klopstock, deceased, brought this action against the defendants Klopstock Realty Co., a corporation, Frederick Klopstock, Samuel Klopstock and David Klopstock. The defendants interposed a demurrer which was overruled and the cause proceeded to trial before the court sitting without a jury. The trial court entered judgment in favor of the "Estate of Isaac D. Klopstock, deceased, and the personal representative of said deceased and said estate" and against defendants Frederick Klopstock and Samuel Klopstock for sums aggregating approximately $25,000. The trial court further entered judgment in favor of the defendant David Klopstock. This appeal is taken from all portions of said judgment except the portion in favor of defendant David Klopstock.

The facts out of which this litigation arose may be briefly stated. In doing so, we may omit any reference to defendant David Klopstock as he was never a partner in the partnership or a stockholder in the corporation hereinafter mentioned. For many years three brothers, Isaac, Frederick and Samuel Klopstock, were partners in a partnership known as Klopstock Bros. Said partnership was engaged in a manufacturing business. In 1926, they organized the defendant corporation, the Klopstock Realty Co., and transferred their joint real estate holdings to the corporation including the premises on which the partnership conducted its business. The brothers were equal owners of all of the issued stock of the corporation and constituted the board of directors thereof. The partnership and the corporation continued to do business thereafter and each of the three brothers drew a salary of $750 per month, apportioned $500 from the partnership and $250 from the corporation. The partnership was not charged any rental by the corporation for the use of the premises occupied by the partnership. Isaac became incapacitated in 1928, but his monthly salary of $250 per month was paid by the corporation until 1930. In that year, Frederick and Samuel decided that the salary payments to Isaac should cease but Frederick and Samuel continued to draw $250 per month each as salary from the corporation. In 1933, Isaac died and his will was admitted to probate. Grace E. Klopstock, the wife of Isaac, and Frederick were appointed executors of the will of Isaac D. Klopstock, deceased, and served as such until the death of Grace Klopstock in 1935. Thereafter plaintiff was appointed executor of the will of Grace E. Klopstock, deceased, and he brought this action. Frederick continued to act as executor of the will of Isaac D. Klopstock, deceased, after the death of said Grace E. Klopstock and the estate is still in probate.

The complaint alleged the dissolution of the partnership in 1933 by reason of the death of Isaac and sought recovery from Frederick and Samuel of the reasonable value of the use by Frederick and Samuel of the premises formerly occupied by the partnership. The complaint further sought the recovery from Frederick and Samuel of the money withdrawn by them as salary as above set forth. It was alleged that they had abused their discretion as directors and had acted to their own advantage in occupying said premises without rental and in withdrawing said sums and that it would be an idle act to make demand upon them or the corporation for relief. Regarding the status of the shares of the capital stock standing in the name of Isaac, it was alleged that "said shares do now constitute part of the estate of said Isaac D. Klopstock, deceased". It was further alleged that "at the time of the death of said Grace E. Klopstock, she was entitled to all or part of the estate of said Isaac D. Klopstock, deceased" including said shares. Plaintiff prayed for a judgment "that said defendants Frederick Klopstock and Samuel Klopstock do pay unto said defendant corporation" a sum alleged to be due as rental and that said defendants "restore and repay to said defendant corporation" a sum alleged to have been withdrawn by said defendants as above set forth. As above indicated, the judgment entered by the trial court was one in favor of the "Estate of Isaac D. Klopstock, deceased, and the personal representative of said deceased and said estate".

Appellants contend that the evidence was insufficient to support a judgment against appellants in favor of the corporation or any person but owing to the conclusions which we have reached on other points, it appears unnecessary to discuss the foregoing contention. We may assume, without deciding, that the pleading and proof would have been sufficient to sustain a judgment in favor of the defendant corporation in an action brought by the defendant corporation or by one entitled to institute such an action on behalf of the corporation.

[1, 2] There can be no doubt that the action was in the nature of derivative action on behalf of the corporation. Respondent's complaint sought judgment in favor of the corporation and not in favor of respondent. The nature of such actions has been extensively discussed in the authorities. See 6a Cal.Jur., p. 804 et seq.; Anderson v. Derrick, 220 Cal. 770, 32 P. 2d 1078; Whitten v. Dabney, 171 Cal. 621, 154 P. 312; Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646, 44 P. 1086; Wickersham v. Crittenden, 93 Cal. 17, 28 P. 788; Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 475, 41 P. 328; Russell v. Weyand, 5 Cal.App.2d 259, 42 P.2d 381; Thomson v. Mortgage Investment Co., 99 Cal.App. 205, 278 P. 468. As was said in Whitten v. Dabney, supra, at page 630, 154 P. at page 316, "And here again it becomes necessary to call attention to the fact that these plaintiffs have no personal wrongs for which they are entitled to seek redress in this action. 'The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his or because he is entitled to the relief sought. He is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court.' 3 Pom. Eq. (3d Ed.) § 1095. * * * What is the exact situation of a plaintiff in such an action? He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other. His position in the litigation is in every legal sense the precise equivalent of that of the guardian ad litem."

[3] Appellants contend that the judgment is void as it was entered in favor of one not a party to the action. We are of the opinion that said contention must be sustained. Respondent seeks to sustain the judgment upon the ground that when a court of equity has assumed jurisdiction, such court is not limited by the prayer of the complaint in granting relief. The statement of this general rule is not, however, a sufficient answer to appellant's contention. Respondent has cited no authority to show that a judgment for or against one not a party to an action can be sustained and we know of none. The only authorities which have been called to our attention are to the contrary, Overell v. Overell, 18 Cal.App.2d 499, 64 P.2d 483; Keck v. Keck, 219 Cal. 316, 26 P.2d 300; Stevens v. Stevens, 215 Cal. 702, 12 P.2d 432; Pennell v. Superior Court, 87 Cal.App. 375, 262 P. 48; Sullivan v. Mier, 67 Cal. 264, 7 P. 691; Bachman v. Sepulveda, 39 Cal. 688.

[4] Appellants further contend that respondent was not entitled to maintain a derivative action on behalf of the corporation. This point was raised upon argument of the general demurrer and also upon argument of appellants' motion to dismiss made at the opening of the trial. It is also raised on this appeal. Respondent replies that "the discussion is academic for no objection was made by special demurrer to plaintiff's capacity to sue". We do not believe this reply to be sufficient as appellants were not and are not challenging respondent's "legal capacity to sue" generally (Code Civ.Proc. § 430, subd. 2), but are challenging the right of respondent to maintain this particular action. We are of the opinion that the latter right could be challenged by general rather than special demurrer and that it was not waived by the failure to interpose a special demurrer. See Dixon v. Gries, 106 Cal. 506, 39 P. 857; Lefebure v. Baker, 69 Mont. 193, 220 P. 1111; 21 Cal.Jur., p. 99, sec. 64.

[5, 6] The point which appellants make is that a derivative action on behalf of a corporation may not be brought by an heir or legatee or by the representative of such heir or legatee of a deceased stockholder while the estate of the deceased stockholder is in probate and undistributed. We are of the opinion that this point is well taken. Neither appellants nor respondent have cited any authority directly in point but we can see no justification for extending the right accorded to a stockholder to bring a derivative action on behalf of a corporation to one who may never acquire the right to become a stockholder of record and whose rights as heir or legatee or as representatives of such heir or legatee of a deceased stockholder may be fully protected through the representa-

tive of the deceased stockholder. This conclusion is in harmony with the rules declared in section 320b, subdivision 2 of the Civil Code. While that section is found in the chapter of the Civil Code dealing with voting rights, it declares that shares standing in the name of a deceased person may be voted "and all rights incident thereto may be exercised * * * only by his executor or administrator". If the executor or administrator of the deceased stockholder refuses to exercise such rights or stands in an adverse position, the remedy of the heir or legatee or the representative of such heir or legatee is to seek the removal or suspension of the executor or administrator and the appointment of a special administrator with power to conduct the litigation. 11b Cal. Jur., p. 869, sec. 1343. Respondent claims, however, that the removal or suspension of the executor or administrator as above indicated is not the only remedy, and he cites and relies upon Landis v. First National Bank, 20 Cal.App.2d 198, 66 P.2d 730. That case is clearly distinguishable and it is sufficient to point out that it was not concerned with the right to maintain a derivative action on behalf of a corporation.

For the reasons stated, the portions of the judgment from which the appeal was taken must be reversed and it is so ordered.

We concur: NOURSE, P. J.; STURTEVANT, J.

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31 Cal.App.2d 518

AGRICULTURAL PRORATE CO. OF CALIFORNIA et al. v. SUPERIOR COURT IN AND FOR SONOMA COUNTY et al.

Civ. 6172.

District Court of Appeal, Third District, California.

March 18, 1939.

1. Courts ⇨91(1)

Where Supreme Court, in denying prohibition against further proceedings for injunction against lemon prorate program, stated that injunction should issue if allegations concerning defects in organization of producing district were proved, District Court of Appeal was bound by such statement and would not grant prohibition against the injunction on theory that such statement was mere dictum and that organizational defects were cognizable only in quo warranto.

2. Injunction ⇨136(1)

The superior court has power to issue temporary injunction against enforcement of lemon prorate program on ground that producing district was not legally formed and officers were acting illegally, where fact issues are involved. St.1933, p. 1969, as amended; St.1935, p. 1535, § 17; Code Civ. Proc. § 526, 2d subd. 4; Civ.Code, § 3423, subd. 4.

3. Prohibition ⇨18

The Supreme Court would not grant prohibition against issuance of temporary injunction authorized by superior court, on ground that such injunction would exceed court's jurisdiction by attempting to protect plaintiff and unnamed persons from lawful enforcement of statute, where no order had yet been made and there was nothing to which court could direct its attention. Code Civ.Proc. § 526, 2d subd. 4; Civ.Code, § 3423, subd. 4.

4. Injunction ⇨75

The statute providing that any order of Agricultural Prorate Commission substantially affecting rights of interested party may be reviewed by any court of competent jurisdiction authorizes injunction against enforcement of order. St.1935, p. 1535, § 17.

5. Agriculture ⇨2

The rule that Legislature may not authorize court to issue writ of review unless such power is conferred by the Constitution is inapplicable to statute providing that order of Agricultural Commission "may be reviewed" by any court of competent jurisdiction. St.1935, p. 1535, § 17.

6. Agriculture ⇨2

The statute providing that any order of the Agricultural Prorate Commission substantially affecting interested party's rights may be reviewed by any court of competent jurisdiction manifests intent that interested party should have right to put in issue before a superior court a question arising as result of promulgation of any order the commission might make. St.1935, p. 1535, § 17.

7. Injunction ⚷114(2)

A person, acting individually and as president of growers' protective association, could sue in representative capacity to enjoin enforcement of lemon prorate program. St.1935, p. 1535, § 17; Code Civ.Proc. § 382.

Original proceeding by the Agricultural Prorate Commission of the State of California and others against the Superior Court of the State of California, in and for the County of Sonoma, and others, for writ of prohibition against proceedings under temporary injunction issued by defendant court against the applicants.

Writ denied.

Earl Warren, Atty. Gen., W. R. Augustine and Ralph H. Cowing, Deputy Attys. Gen., Agnew & Boekel and John D. Gallagher, all of San Francisco, Edson Abel, of Sacramento, C. J. Carey, of San Francisco, and F. J. Heid, Jr., of Tulare, for applicants.

Charles DeMeo and J. N. DeMeo, both of Santa Rosa, for respondents.

Hale McCowen, Jr., of Ukiah, amicus curiæ.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This proceeding arises under a statute creating the Agricultural Prorate Commission (Stats.1933, chap. 754, p. 1969, and amended, Stats.1935, chaps. 471 and 743, pp. 1526, 2087, and chap. 6, p. 39, Ex. Session 1938).

An application was made to this court for a peremptory writ of prohibition to restrain the Superior Court of the State of California, in and for the County of Sonoma, and the respondent judges thereof, from taking any further proceedings with respect to a temporary restraining order and threatened preliminary injunction in an action bought by Dewey F. Beldocchi, individually, and as the president of the Sonoma Dry Wine Growers Protective Association, a voluntary association, against the applicants herein.

Upon the filing of the petition this court issued an alternative writ of prohibition, and the matter now comes before us upon the application for a peremptory writ after hearing on the return of the alternative writ.

On June 6, 1938, a petition was filed with the Agricultural Prorate Commission requesting an election, under the provisions of the Prorate Act in the grape-producing areas of California, to determine whether or not there should be instituted a prorated marketing program for grapes produced in this state. After a hearing an election was ordered by the Agricultural Prorate Commission, which was held July 29, 1938. After a canvass of the votes on August 8, 1938, and pursuant to the petition, the commission established Proration Zone Number Two, approved a detailed marketing plan for the zone, and appointed a program committee to manage the affairs thereof. This committee met and organized, and determined the method, manner and extent of proration, appointed C. J. Carey as zone agent, and fixed September 1, 1938, as the date for the commencement of the program.

This program briefly provided that 45 per cent of all crushing grapes were surplus and were to be delivered to a surplus pool to be converted to brandy and alcohol, under the provisions of a government loan; the remaining 55 per cent of each of the producers of grapes were free tonnage to be disposed of by the producer as he saw fit.

The applicants, in seeking this writ of prohibition, urge three grounds: First, that the temporary injunction, as authorized by the trial court, is in excess of its jurisdiction in that it is based upon issues of fact as to the organization of the grape proration zone, which facts are not cognizable by the respondent court in the present action. Secondly, that the temporary injunction authorized by respondent court is in excess of its jurisdiction in that it attempts to protect the plaintiff and other unnamed persons from a lawful enforcement of a statute, in violation of the provisions of subdivision 4 of section 526 of the Code of Civil Procedure, and subdivision 4 of section 3423 of the Civil Code, which prohibits the enjoining of the execution of a public statute by officers of a law for the public benefit, and, thirdly, the injunction authorized is in excess of the jurisdiction of respondent court as it runs in favor of unnamed persons who are not parties to the action.

Considering first the contention that the temporary injunction authorized by the respondent court is in excess of its jurisdiction, the application for the injunction does show it was based in part upon alleged defects in the creation of a zone. In regard to this point it is the contention of applicants that the respondent court is without authority to entertain issues relating to organizational defects and that such issues are cognizable only in quo warranto proceedings.

[1] In regard to this point we feel bound by the rule enunciated in Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 55 P.2d 495, 513. In that case certain lemon growers sought, as did the grape producers here, a temporary injunction against the lemon prorate program on the ground that the proceedings taken in the formation of the zone were irregular. As a result of that hearing the superior court expressed its intention of granting the temporary injunction as prayed for. Thereupon the Prorate Commission, the members of the Prorate committee and others, as applicants, instituted an action to obtain a writ of prohibition against the superior court and the judge thereof, commanding them to desist from further proceedings. In reply thereto the Supreme Court, in denying the petition said:

"In the injunction suit before the respondent court the plaintiffs therein made the claim that the prorate district in which the applicants were purporting to act as officers was never legally formed or organized in that the petition for the formation of said district was never signed by the necessary two-thirds of the lemon producers residing in said proposed district or zone, and therefore the commission had no authority to make its order organizing said district without an election being held therein to pass upon the question of the formation of said district. This claim on the part of said plaintiffs was set forth in paragraph XX of their complaint in which it is alleged, among other things, that 'said petition was not signed by two-thirds or more in number of the producers of lemons in California, nor by the owners of two-thirds or more of the producing factors of lemons in California.' If that allegation is true, then the district was not legally formed or organized, and if it was not so organized, an injunction against the applicants restraining them from executing the terms of said act would lie. On the hearing of the application for a temporary injunction, an affidavit was filed which purported to deny the allegations of paragraph XX of the said complaint. There is nothing, however, in the record before us to indicate that the respondent court has ever passed upon the issue tendered by the allegations of said paragraph XX. In fact, it would be rather unusual for the court to finally pass upon an issue of fact on an application for a temporary injunction. This issue of fact, however, was presented by the plaintiffs in the injunction suit, and the court had jurisdiction to decide it. So far, it has never done so. The injunction suit is still in the respondent court, and that court has exclusive jurisdiction to hear and determine all undecided issues of facts presented by the pleadings in said suit. Should it determine that said district was legally organized and that the orders which the plaintiffs in said action seek to restrain are valid and binding upon those to whom they are directed, then it would be the duty of said court to deny the injunction and dismiss the suit. On the other hand, should the trial court find in favor of the plaintiffs in said suit upon the allegations of said paragraph XX, then it would necessarily follow that said orders would have no legal support and the defendants in said suit should be enjoined from enforcing them. For this reason, the application for a writ of prohibition directed to respondents restraining them from proceeding in said action should be denied.

"It is therefore ordered that the petition herein be denied, and the alternative writ heretofore issued be discharged."

The applicants claim that the Supreme Court, in that opinion, was not passing upon the validity or propriety of the injunction proceedings, but were considering the constitutionality only of the statute. A reading of the case, however, does not bear out this contention. Apparently the issue before the court in that case was exactly the question that is here before us, that is, the propriety of the issuance of an injunction pendente lite. If the quoted case is to be modified, or the rule as there enunciated is to be considered as dicta, such should be declared by the Supreme Court rather than from this court. We deem ourselves bound thereby.

[2] The second point, that the order of the respondent court violated certain Code provisions, is not well taken, for if the officers were in fact acting illegally, it is, as held in the foregoing case, within the power of the court to restrain their acts. In Brock v. Superior Court, 11 Cal. 2d 682, 81 P.2d 931, the court distinguishes

Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845, and Glide v. Superior Court, 147 Cal. 21, 81 P. 225, both cited by applicants in support of their second contention by pointing out that in those cases no issue of fact was presented, the issues being legal, and in such cases the trial court had no jurisdiction to enjoin an officer when the admitted facts before it show that the officer was acting within his legal authority. Where issues of fact are in issue, as here, the court, in Brock v. Superior Court, supra, said: "To hold otherwise would be to tie the hands of the court in cases in which great and irreparable injury might be done private citizens by officers acting under a mistaken belief of their authority." [11 Cal.2d 682, 81 P.2d 934.]

To the same effect, see Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972; Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072.

[3-6] The third point urged by applicants is that the temporary injunction authorized by the respondent court is in excess of its jurisdiction in that it attempts to protect plaintiff and other unnamed persons from the lawful enforcement of a statute for the public benefit. Inasmuch, however, as no order has yet been made, there is nothing to which we can direct our attention. That the court had jurisdiction is also apparent from a reading of section 17 of the Prorate Act, St.1935, p. 1535, which specifically stated that any order of the commission substantially affecting the rights of an interested party, may be reviewed by any court of competent jurisdiction. To this, applicants reply that the legislature may not confer upon a court the right to issue a writ of review unless such power is conferred by the Constitution. That is correct, but here where the section states that, "* * * any other order of the commission substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction", the term "may be reviewed" is not to be confused with the term "writ of review". It is quite clear it was intended by the right of review that an interested party should have a right to put in issue before a superior court a question arising as a result of the promulgation of any order the commission might make.

[7] As to the fact that the plaintiff therein was suing in a representative capacity, such right is fixed by section 382 of the Code of Civil Procedure, which provides: "* * * and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

For the foregoing reasons, and upon the authority of Agricultural Prorate Commission v. Superior Court, supra, the peremptory writ of prohibition should be denied. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

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31 Cal.App.2d 463

DE FRIES v. MARKET STREET RY. CO. et al.

Civ. 10339.

District Court of Appeal, First District, Division 1, California.

March 14, 1939.

Rehearing Denied April 13, 1939.

Hearing Denied by Supreme Court May 13, 1939.

1. Negligence 🔑136(9)

If only reasonable inference to be drawn from admitted facts is a conclusion of negligence, then negligence is a question of law, but if other inferences inconsistent one with the other appear, negligence is a question of fact.

2. Street railroads 🔑118(13)

In pedestrian's action for injuries resulting when struck by street car, where pedestrian had his back to the car, evidence warranted instruction upon doctrine of contributory negligence.

3. Street railroads 🔑118(15)

In pedestrian's action for injuries sustained when struck by street car, where motorman testified that immediately prior to accident, for "considerable time," traveling about eight or ten miles an hour, three or four or five car lengths, he saw pedestrian standing with his back to the rail looking up at building, last clear chance instruction was proper.

4. Street railroads ⚿118(13, 15)

In pedestrian's action for injuries sustained when struck by street car while standing with his back to the car, instructions which permitted jury to determine first whether pedestrian was guilty of contributory negligence, and if so then under the last clear chance instruction that he could recover notwithstanding that he himself may have been negligent, were not erroneous.

5. Street railroads ⚿98(1)

A pedestrian who was struck by street car while standing with his back to the car was negligent in failing to watch and listen for approaching street car which he could not see, and could not recover.

6. Trial ⚿295(1)

Instructions are to be construed together but when by an instruction jury is restricted to certain facts in returning a verdict and a second instruction in general terms informs jury not to return such verdict, instructions are inconsistent.

7. Negligence ⚿83

The last clear chance doctrine is an exception to the contributory negligence rule.

8. Trial ⚿228(1)

In trial of a case involving doctrine of last clear chance, orderly and reasonable method of instruction is to give correct contributory negligence rules and thereafter to state the exceptions.

9. Trial ⚿260(8)

Where instruction given correctly stated last clear chance doctrine, it was not error to refuse other offered last clear chance instructions, since to do so would have been merely repetition of a correct statement of law.

10. Street railroads ⚿93(4)

A motorman may assume that a person in the vicinity of street car tracks will place himself in a position of safety, but cannot permit the car to proceed to a point where it will be impossible to give warning or prevent injury.

11. Trial ⚿296(4)

Instruction that street car motorman is not obliged to stop car when he sees a person standing or walking in vicinity of tracks but is permitted to continue operation of car until he is conscious that person is unaware of danger was incomplete but did not require a reversal in view of instruction on last clear chance.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by John De Fries against Market Street Railway Company, a corporation, and others for injuries sustained when struck by a street car of the named defendant. Verdict for the defendants and from an order granting plaintiff's motion for new trial, defendants appeal.

Reversed.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Melvyn I. Cronin and M. Mitchell Bourquin, both of San Francisco, for respondent.

WARD, Justice.

This case was tried by a jury and a verdict rendered for defendants. The appeal is by them from an order granting plaintiff's motion for a new trial. Respondent contends that the motion was properly granted on the ground of errors of law because of certain instructions given at defendants' request. To understand the pertinency of the questioned instructions it is necessary to relate some of the facts of the case.

On the date mentioned in the complaint appellant Market Street Railway Company operated a street car in a westerly direction on two rails, commonly referred to as a single track, on a portion of O'Farrell street in San Francisco. Respondent was employed as foreman for certain masonry contractors engaged in the reconstruction of the Girls' High School located on the north side of O'Farrell street and extending from Scott street easterly to a point a short distance west of Pierce street, which is not a through street but intersects O'Farrell from the south only. Bricks taken from the building were first cleaned and thereafter placed, with a gap of about fifty feet, in two piles in the street. Several air compressors were in operation, one of them located near the center of the westerly brick pile. Respondent walked from the northerly sidewalk of O'Farrell street around the westerly pile to a point opposite a compressor and stood, facing the building, with his back toward and distant, one, two or three feet from the street car track. He was occupied in attempting to attract the attention of men working near the top of the building to warn them that other employees were also at work below, when, the front portion of the car having passed, he was struck and received injuries for which this action was brought to recover damages.

Respondent and appellant Keating, the motorman, agree that respondent was standing looking up at the side of the building for a full sixty seconds immediately before the accident. The motorman testified that the accident occurred after respondent "passed out of my line of vision". A witness, working on the building, testified that he heard a scream, turned around and saw respondent's body on the ground "about three or four feet from the front" of the car. The motorman asserted that respondent was clear of the path of the car but we are nevertheless confronted with the fact that the car struck him.

[1, 2] It is appellants' theory that respondent was in a position of safety, clear of the path of the overhang of the street car, and that as the car was passing he altered his position in such a manner as to come in contact with the side of the car. It cannot be denied that such an inference may be drawn, but other reasonable inferences may likewise be reached from a consideration of the evidence. Not a single witness observed the impact. Some slight projection or the natural sway of the car could have caused the accident and such a theory would be as reasonable as the one presented by appellants. If the only reasonable inference to be drawn from admitted facts is a conclusion of negligence, then the negligence is a question of law, but if, as in this case, other inferences, inconsistent one with the other appear, negligence is a question of fact. We are not prepared to say that appellant's theory is the only reasonable theory; hence we are precluded from determining that respondent's negligence, if any, was negligence as a matter of law. Dwelly v. McReynolds, 6 Cal.2d 128, 56 P.2d 1232.

[3] The evidence warranted instructions upon the doctrine of contributory negligence. The court gave the following instruction: "If you find that the plaintiff, John De Fries, at the time and place in question, did not use reasonable care in the exercise of his faculties of sight and hearing to watch and listen for approaching cars, and by reason of such failure on his part he received the injuries which he now complains of, if any, I instruct you that he would be guilty of contributory negligence, and if you so find, your verdict must in that event be in favor of the defendants Market Street Railway Company, Ed Keating and S. N. Carr, and each of them." This instruction is one often given in similar cases and its vice, if any, was in the neglect to add to the instruction a provisional statement that it was to be considered with or was subject to other given instructions. However, the usual instruction "You are cautioned not to select a single instruction, or a portion of an instruction alone, but to consider all of the instructions in determining any issue in this case" was given, which directed that not any single instruction was determinative of any issue in the case.

The appellant motorman testified that just immediately prior to the accident for a "considerable time", traveling "about eight or ten miles an hour", "three or four or five car lengths", he saw respondent "standing with his back to the rail looking up at the building". In accord with the theory of the respondent, the jury was correctly instructed upon the "last clear chance doctrine." Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, 917.

[4] Respondent contends that the instruction quoted first herein, relative to the duty of the respondent to watch and listen, withdrew from the jury all question of appellants' conduct after discovery of respondent's situation of peril. Reading the instructions together, the jury was permitted to determine first whether respondent was guilty of contributory negligence; if so, then under the last clear chance instruction, that he could recover "notwithstanding that he himself may have been negligent". The evidence was sufficient to justify the instruction that it was a question of fact for the jury to determine whether respondent was guilty of contributory negligence and, if he was, whether the motorman had the last clear opportunity of avoiding the accident. The jury evidently concluded that respondent was negligent and that the circumstances were such that the motorman had a clear passage and was therefore justified in proceeding to and beyond the position occupied by respondent.

[5] Standing alone, the first questioned instruction does not contain a full explanation or exposition of the divergent theories advanced by appellants and respondent but, in conjunction with the last clear chance instruction, it may not be said that the jury misconceived or ignored the theory presented by respondent. It is impossible at times to state all of the law in a single instruction. The instructions must be read as a whole.

The first instruction upon its face appears to be a peremptory direction to find for the appellants, but when read in the light of the last clear chance instruction, it simply carried out the rule to present any theory upon the issues advocated in the pleadings and supported by essential and substantial evidence. By its verdict the jury determined that the negligence of respondent was not a remote but the proximate cause of the accident. Though respondent did not see the approaching car, the circumstances were such as to give reason for the conclusion that he should have watched and listened, and this negligence, being continuous and contributory, barred a recovery. Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918.

[6] Respondent relies upon certain condemned instructions given in Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 20, 63 L.R.A. 238, 98 Am.St.Rep. 85. In two of the criticized instructions the trial court used the past tense of the word "may" to express the possibility of the right to recovery had plaintiff exercised ordinary care. The instructions omitted definite causation and tested the right of recovery by what might have occurred. A third instruction was to the effect that "if the jury found that if the deceased had exercised ordinary care to have discovered the danger he would have discovered it in time to have avoided a collision". The defendant in that case was not entitled to the instructions at all. Instructions are to be construed together, but where by an instruction the jury is restricted to certain facts in returning a verdict, and a second instruction in general terms informs the jury not to return such verdict, the instructions are inconsistent. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599.

Respondent in his brief quoted two other instructions, one of them only in part. The objection to the second instruction is that it emphasized the first and indicated to the jury that a complete defense to the action was to be found in the fact that the street car could have been seen and heard by one exercising ordinary care. Upon examination we find the jury was instructed that if certain facts were found to be true, such facts might be considered as evidence tending to show negligence on respondent's part.

[7-9] The last clear chance doctrine is an exception to the contributory negligence rule. The orderly and reasonable method of instruction in such a case is to give correct contributory negligence rules and thereafter to state the exception. That is exactly the procedure adopted in this case. The last clear chance instruction was a correct statement of the rule. Respondent complains that other offered last clear chance instructions were refused. It was not necessary to dress the doctrine in other words of expression. This would have been merely a repetition of a correct statement of the law. Paulos v. Market Street R. Co., 136 Cal.App. 163, 28 P.2d 94.

[10, 11] Respondent objects to an instruction wherein the jury was informed that a motorman is not necessarily obliged to stop his car when he sees a person standing or walking in the vicinity of the tracks, but is permitted to continue the operation of the car until he is conscious of the fact that the person is unaware of the danger. This instruction should have been amended by using language similar to that found in Taylor v. Pacific Electric Railway Co., 172 Cal. 638, 158 P. 119, or Berguin v. Pacific Electric R. Co., 203 Cal. 116, 263 P. 220. A motorman may assume that a person in the vicinity of street car tracks will place himself in a position of safety, but the motorman can not permit the car to proceed to a point where it will be impossible to give warning or prevent injury. The neglect to amend the instruction was remedied by the following given instruction proposed by respondent: "When one, after discovering that I have carelessly exposed myself to danger of which I am obviously unconscious, neglects to use ordinary care to avoid injuring me and inflicts injury upon me as a result of his negligence, such person is liable to me under the doctrine of the last clear chance."

Respondent states in his brief that "the new trial was granted solely because of several wholly erroneous and frequently condemned instructions given by the trial court at the request of defendants". It is respondent's position that the instructions referred to were not subject to cure by other instructions. We find that the trial court fully and fairly presented the issues of negligence, contributory negligence and the exceptions thereto, and in addition gave to the jury the theories tendered by the respective litigants. No error appears in the instructions noted in respondent's brief and neither side had just cause for complaint.

The order is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

31 Cal.App.2d 455

ROMA WINE CO., Inc., v. HARDWARE MUT. FIRE INS. CO. OF MINNESOTA et al.

Civ. 2229.

District Court of Appeal, Fourth District, California.

March 13, 1939.

Rehearing Denied April 5, 1939.

Hearing Denied by Supreme Court May 11, 1939.

1. Appeal and error ⚿977(3)

On appeal from order granting new trial after verdict for defendants, the question presented is whether trial court abused its discretion.

2. Appeal and error ⚿979(4)

On appeal from order granting plaintiff a new trial after verdict for defendants, the trial court cannot be held to have abused its discretion where it appears that there is a substantial conflict in the evidence or where there is any substantial evidence which would support a judgment in favor of the moving party.

3. Insurance ⚿421

The word "explosion," when used in a fire policy, is that which ordinary men, not scientists, understand an explosion to be, and the parties to policy are presumed to have understood the word "explosion" in its ordinary and popular sense.

[Ed. Note.—For other definitions of "Explosion," see Words & Phrases.]

4. Insurance ⚿421

While in a technical sense an "explosion" may be merely a form of combustion, to the ordinary man an "explosion," as used in a fire policy, means something different from a mere burning.

5. Insurance ⚿668(10)

In action on fire policies, under evidence that employee starting to clean wine tank saw no fire within tank, that employee hung an electric light inside tank and proceeded to use a "squeegee" to rake lees forward toward manhole, that shortly thereafter he saw fire within tank which came out of manhole, and that a considerable interval elapsed before any explosion was heard, the question whether the combustion which existed in the tank was an ordinary fire or a "preliminary explosion," which in turn resulted in greater explosion which caused damage, was one of fact.

A "squeegee" is a kind of a rake.

6. New trial ⚿68

In action on fire policies, under evidence that employee starting to clean wine tank saw no fire within tank, that employee hung an electric light inside tank and proceeded to use a "squeegee" to rake lees forward toward manhole, that shortly thereafter he saw fire within tank which came out of manhole, and that a considerable interval elapsed before any explosion was heard, as regards question whether an ordinary fire existed in the tank or whether explosion occurred in the tank, the granting of a new trial after verdict for insurers was within trial court's sound discretion.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action on two fire policies by the Roma Wine Company, Incorporated, against the Hardware Mutual Fire Insurance Company of Minnesota and others. From an order granting the plaintiff a new trial after verdict in favor of defendants, the defendants appeal.

Affirmed.

Long & Levit, of San Francisco, and Galen McKnight, of Fresno, for appellants.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for respondent.

BARNARD, Presiding Justice.

This is an action on two fire insurance policies issued by the defendants, one covering a building used by the plaintiff as a winery and the other covering certain wines stored therein. After a verdict in favor of the defendants the court entered an order granting the plaintiff a new trial, the order reciting that the new trial was granted on the insufficiency of the evidence. From this order the defendants have appealed.

[1, 2] The rules of law applicable upon such an appeal are well settled. The question presented is whether or not the trial court abused its discretion in granting the motion for a new trial, and it cannot be held that such abuse appears where there is a substantial conflict in the evidence or where there is any substantial evidence which would support a judgment in favor of the moving party. Roberts v. Southern Pac. Co., 54 Cal.App. 315, 201 P. 958; Taylor v. Rodriquez, 10 Cal.App.2d 608, 52 P.2d 494; Peri v. Culley, 119 Cal.App.

117, 6 P.2d 86; Prout v. Perkins, 21 Cal. App.2d 343, 69 P.2d 194; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P. 1029, 1031. In the last-named case, the court said: "To justify any interference of this court with an order granting a new trial on the ground of insufficiency of evidence, the case must be such as to compel us to hold that a verdict in favor of the moving party would not have found sufficient legal support in the evidence given on the trial. If the case be one where a verdict in favor of such moving party would have had such support, the judge of the trial court is invested with absolute discretion in the matter, and, as has been heretofore said by this court, it was his duty to grant a new trial if he is not satisfied with the verdict."

In this winery was one room, known as the sherry room, which contained seven large tanks. There was but one door to this room and tank 49, with which we are here concerned, was the one farthest from this door. This tank, having a capacity of 25,000 gallons, was made of redwood staves and had an air-tight top except for an opening about 2½ inches in diameter, the purpose of which was to release the pressure by permitting air to enter the tank as the wine was drawn out. On the side of this tank and about 4 feet from the floor of the room was an opening about 10 inches by 16 inches, which we will refer to as a manhole.

On the day here in question, one Henry Miller, an employee of the respondent, was directed to clean the sediment or "lees" out of tank 49, the wine having been pumped from that tank the night before. There was about five or six inches of lees on the bottom of the tank, the temperature of which was around 130 or 135 degrees while the temperature of the sherry room was about 110 to 115 degrees. The cleaning was done by opening this manhole and inserting a long-handled "squeegee", a kind of rake, and raking the lees, which was in the form of a thick liquid, toward a bunghole on the floor of the tank, just below the manhole. Miller stuck his head through the manhole and saw no sign of fire within the tank. One Oscar Schamphan, who was helping Miller, also looked into the tank and saw no fire or flame. Miller reached in and hung an electric light, attached to an ordinary light cord, inside the tank in order that he might see to do the work. He proceeded to rake the lees forward toward the manhole, sending Schamphan for another squeegee with a longer handle. After he had been working for two or three minutes he saw fire within the tank. The fire came out of the manhole and ignited his clothes, and he ran to the door and out of the room. He was very severely burned on the whole front of his body from the waist up, his lungs were seared, and he was confined to a hospital for seven weeks.

[3] It is assumed by all parties to this action that the fire or explosion, whichever it was, occurred because a spark was introduced into a mixture of alcohol vapor and air which was present in this tank, and which was also present in the sherry room, and that this spark came from the breaking of this electric light globe, although Miller did not remember having broken it. The sole controversy here is as to whether an explosion first occurred or whether there was a preexisting fire. As stated by both parties: "There is but one primary issue or question of fact to be determined. And that question of fact is whether the combustion or oxidation which existed in sherry tank 49 from the time Mr. Miller first saw and observed it there until it reached out through the open manhole, igniting the fumes in the sherry room, which in turn resulted in the explosion with a consequent wrecking of the building was itself an ordinary fire as that term is generally understood, or whether it was a preliminary explosion which in turn resulted in the greater explosion which caused the damage in question."

In New Hampshire Fire Insurance Co. v. Rupard, 187 Ky. 671, 220 S.W. 538, 542, it is said: "The appellants insist that all the evidence is to the effect that the inflammable gas in the room was ignited by the flames of the match, and that its burning therein for a short space of time before the noise and effect of the explosion occurred was only a part of the explosion, and hence that the burning of the floor, fixtures, papers, boxes, and clothing before the culmination of the explosion was a fire subsequent, and not antecedent, to the explosion. However well this theory may accord with scientific principles as applied to such an occurrence, it is not in accord with the commonly accepted opinion of what constitutes an explosion. Ordinary people other than scientists would hold that the explosion occurred when the sudden expansion took place which wrecked the building, accompanied by a more or less loud report. In Mitchell v. Potomac Ins. Co., supra [183 U.S. 42, 22 S.Ct. 22, 46 L.Ed. 74], the word 'explosion' as used in an insurance policy was defined to be what ordinary men, not scientists, understood an explosion to be, and this view of what the term in a policy of insurance is intended to mean is concurred in generally."

In Mitchell v. Potomac Insurance Co., 183 U.S. 42, 22 S.Ct. 22, 25, 46 L.Ed. 74, the court said: "'When the word "explosion" was used in the policy, the company as ordinary men, * * * and the party insured an ordinary man, are presumed to have understood the word "explosion" in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word.'"

We will now turn to the evidence, with the above-mentioned rules in mind. Miller testified that as he was working there he "suddenly saw fire" in tank 49; that he "stood there and looked at it kind of stunned, to see a fire in such a place"; that the fire appeared to be crawling over the lees and started up along the walls of the tank, and then the whole tank filled up and the flames came out at him; that it appeared to him that the walls were burning; that he heard no explosion or sharp report; that the flames made a roaring noise like "a furnace going"; that the flames came out of the manhole toward him; that when he noticed the fire coming toward him he shut his eyes and started to run from the room; that his clothes were burning and that he felt the fire from his waist up and on his face; that he was not thrown against anything by any explosion; and that approximately a minute and a half or two minutes elapsed from the time he first saw the flame in the tank until he got out of the room. Schamphan testified that when he returned from the errand on which he had been sent "I walked back in the sherry room and I seen fire"; that the fire was in the vicinity of the manhole of tank 49; that "all I could see was all aflame"; that these flames made a loud roaring noise, "a similar sound to a furnace, when it is running at full blast"; that he heard no explosion; that when he saw the flames "I stood there dumbfounded"; that a certain amount of time elapsed but he did not know whether it was a second or a minute; that he stood there and watched the fire; that he then started back for the door; that when he reached the door it came to his mind that Miller was still in there and "I turned around and came back in the room"; that he did not know the distance he came back; that "By that time the flames seemed to roll right across in front of me and I thought it would be a good time to leave"; that as he stood within the sherry room and saw and heard the roar of the flames in the vicinity of tank 49 he did not hear or see any bricks or mortar or timber fall; that nothing fell while he had the room within his view; that the entrance way or door to the room was clear of everything when he left the room; and that the walls and roof of the sherry room were then intact as far as he could see.

The superintendent of the winery testified that he was in his office some fifty feet from the sherry room when he suddenly heard a roaring noise and thought a boiler was on fire; that for a moment he was stunned and listened to it wondering what it could have been; that immediately thereafter he heard someone shout "fire"; that he started out of the building going from his office into the general office, around the counter and into an alley way and then turning toward the alley way leading toward the sherry room; that there he met Miller whose clothes were burning; that he pulled off Miller's shirt and he and another man tried to extinguish the fire in his clothes; that he heard no noise of an explosion until just before he reached Miller, at which time he heard one; and that the roar of the fire and flames continued from the time he first heard it until he heard the explosion or report. Another witness testified that he was on the roof of the office when he heard a roaring noise which "I thought might have been a big fire"; that when he heard this noise he hesitated a minute and first intended to slide down a pipe to the ground but on second thought he climbed over a fire wall and went to a ladder on the opposite side of the office portion of the building; that while proceeding to the ladder he heard no explosion and heard nothing except the roaring sound which he had described; that he looked toward the roof of the sherry room and saw nothing unusual until he reached the ladder; that he then turned around and looked toward the sherry room at which time he "heard a loud report and the roof of the sherry room came up, it lifted up on one side and the flames shot out there about, oh, I'd say 15 or 20 feet; and bricks, part of the roof, one thing and another, was falling in all directions. I got out of there"; that as he crossed the roof toward the ladder he stopped and looked back three or four times "and the noise was getting more intense every minute"; that as he reached the ladder and turned around "I seen the roof—and I heard the report"; and that he would say it was two or two and one-half minutes from the time he first heard the roar until he heard the report. Other witnesses testified that after the fire or explosion the inside of tank 49 was "black throughout"; that the lower portion was burned and charred more than the upper portion; that on the lower portion from one-sixteenth of an inch to an eighth of an inch of the wood was charred and burned; that this tank and its top were intact except that two or three of the planks in the top were broken where a timber from the roof had fallen upon it; and that there was a pile of debris in the doorway leading from the sherry room.

Three expert witnesses testified. One, testifying for the appellants, expressed the opinion that the first thing that must have occurred was an explosion in tank 49 when a spark came in contact with the right combination of alcoholic vapor and air, that this explosion forced flames out of the manhole causing a second explosion in the sherry room, that no fire preceded these explosions, and giving his reasons at length. Two other experts, testifying for the respondent, expressed the opinion that no explosion occurred within tank 49; that a fire existed there; that burning gas given off by the lees at that temperature came out through the manhole, igniting similar gas which was in the sherry room; that this burned until such a time as the burning gas reached the point or place where the mixture of gas and air existed in the right combination to cause an explosion, which then occurred; and that there was a pre-existing fire which burned for an appreciable time and which itself caused the explosion which later occurred, and giving at length their reasons for this opinion.

[4] The appellants argue, in effect, that the testimony of their expert was more worthy of belief than that given by the other experts. Relying upon the testimony of their expert witness they argue that alcohol vapor is an explosive gas; that tank 49 contained this vapor in its highest explosive form; that "the *explosion* of alcohol vapor is merely *combustion* or the propagation of a flame through the mixture"; and that the first thing that occurred in tank 49, when a spark appeared, must have been an explosion. While in a technical sense an explosion may be merely a form of combustion, to the ordinary man an explosion means something different from a mere burning. This expert had no knowledge as to the exact conditions prevailing in tank 49, and his opinions were necessarily based on various assumptions. Giving his opinion the weight to which it was entitled as evidence, the fact remains that there was other evidence, both expert and direct, which conflicted therewith.

While there was no conflict in the testimony of what may be called the eyewitnesses, the appellants point to portions thereof other than those we have referred to, which are relied upon as modifying their testimony and justifying inferences favorable to the appellants. For example, while Miller testified that approximately a minute and a half or two minutes elapsed from the time he first saw the flame in the tank 49 until he reached a point of safety he later stated that he could not be sure of the time and that the elapsed time might have been closer to ten or fifteen seconds. Again, although Miller testified that immediately after he saw the fire he was not thrown against anything by an explosion he was asked on cross examination whether, having felt "a pretty heavy burn about that time", it was not possible that feeling the burn might have taken his mind off any blow there might have been back of the flame and, in reply, he said: "I really don't know." At best, the matters relied upon by the appellants amount to nothing more than conflicts in the evidence.

[5, 6] The question whether an ordinary fire, as that term is generally understood, here existed or whether a preliminary explosion occurred in tank 49, which in turn resulted in a greater explosion in the room itself, was one of fact. Tank 49 was left intact and a considerable interval elapsed before any explosion was heard and before any of the usual results of an explosion were observed. Notwithstanding the attack made upon its credibility the court was justified in believing the testimony of the two experts who testified for the respondent. The attacks

upon the testimony of what may be called the eyewitnesses go to the weight thereof and their evidence was in itself sufficient to justify the inference or finding that a fire preceded any explosion and burned for a considerable time before an explosion occurred. Conceding that there was evidence which would have supported a contrary conclusion there was, in our opinion, substantial evidence upon the point here presented which would have supported a judgment in favor of the respondent. It follows that the granting of a new trial was within the sound discretion of the court and that its action may not be here disturbed.

The order appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

WEST KEY NUMBER SYSTEM

31 Cal.App.2d 443

KELLY v. STATE PERSONNEL BOARD OF CALIFORNIA et al.

Civ. 6021.

District Court of Appeal, Third District, California.

March 13, 1939.

1. Officers 🔑69

Where investigator in the California highway patrol was blanketed in by civil service constitutional amendment subject to eight months probationary period, it was not necessary to give any reason in notice of dismissal. St.1913, p. 1041, § 9; Const. art. 24, § 1 et seq.

2. Time 🔑11

Where investigator in the California highway patrol was blanketed in by civil service constitutional amendment effective on December 20, 1934, subject to eight months probationary period, such period did not expire until midnight on August 19, 1935. Const. art. 24, § 1 et seq.

3. Officers 🔑72(1)

Where investigator in the California highway patrol was blanketed in by civil service constitutional amendment subject to eight months probationary period, the reasons for dismissal of investigator within probationary period must be filed with personnel board before the probationary period has expired. St.1913, p. 1041, § 9; Const. art. 24, § 1 et seq.

4. Statutes 🔑190

In the construction of a statute, the first step is to apply the rules of grammar to determine whether an ambiguity exists, and, if no such fault or uncertainty is found and there is no inconsistency in the statute, the courts are not called upon to construe the meaning of the statute, since the legislative intent is made clear by the language used.

5. Statutes 🔑196

The "last antecedent rule" is a grammatical rule to the effect that relative and qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding, but such rule is applicable only where there exists uncertainties and ambiguities in the statute.

[Ed. Note.—For other definitions of "Last Antecedent," see Words & Phrases.]

6. Statutes 🔑196

The rule of last antecedent is invoked in those ambiguous sentences where a series of noun or noun phrases are followed by a relative phrase, the noun equivalent to the relative phrase being the last noun or noun phrase in the series, but such rule can have no application to an adverbial phrase modifying a verb.

7. Officers 🔑61
Statutes 🔑190, 196, 218

Civil Service Act providing that, unless employee shall have been dismissed within probationary period by the appointing power for reasons stated in writing and filed with the commission, his appointment shall become permanent, is grammatically correct, free from any ambiguity or uncertainty, and is not open to judicial construction, nor to the rule of last antecedent, nor the doctrine of contemporaneous construction. St.1913, p. 1041, § 9.

8. Officers 🔑72(1)

Under Civil Service Act requiring filing of reasons within probationary period for dismissal of employee, "unsatisfactory service" cannot be a reason for unsatisfactory conduct or capacity. St.1913, p. 1041, § 9.

9. Officers ⚷72(1)

In proceeding by investigator in the California highway patrol for reinstatement where bad faith or fraud was not attempted, court was not concerned with the motive for dismissal. St.1913, p. 1041, § 9.

10. Officers ⚷76

Where investigator in the California highway patrol was wrongfully dismissed and thereafter brought action for reinstatement, fact that investigator subsequently was appointed a deputy sheriff of Sacramento county did not preclude reinstatement, but amount earned as deputy sheriff should be deducted from accrued salary as investigator. St.1913, p. 1041, § 9; Pol.Code, § 360c.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Petition by Frank Kelly against the State Personnel Board of the State of California and others for a peremptory writ of mandate to compel respondents to recognize petitioner as the holder of the position of investigator in the California Highway Patrol, and to permit him to perform the duties of such investigator. From a judgment refusing to issue the writ, petitioner appeals.

Judgment reversed and peremptory writ of mandate directed to issue as prayed for.

Gerald M. Desmond and Stanley W. Reckers, both of Sacramento, for appellant.

Anthony J. Kennedy and Albert E. Sheets, both of Sacramento, amici curiæ.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondents.

Mr. Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment refusing to issue a peremptory writ of mandate whereby it sought to compel the respondents to recognize petitioner as the holder of the position of investigator in the California Highway Patrol, and to permit him to perform the duties as such investigator.

[1] On December 20, 1934, when the civil service constitutional amendment (art. 24) became effective petitioner was "blanketed in" subject to the eight months probationary period required by the Personnel Board. On August 19, 1935, petitioner was served with notice from the chief of the department advising him that his services as a member of the highway patrol were terminated. No reason was given for the dismissal in this notice, but under the rule enunciated in Neuwald v. Brock et al., Cal.Sup., 86 P.2d 1047, it was not necessary to give any reason to an employee in the notice of dismissal.

[2] There is a conflict in the evidence as to whether this notice of dismissal to the employee was served upon him during or after business hours of August 19th. Some witnesses testified the notice was delivered shortly before 4 o'clock of the afternoon of that day, and other witnesses fixed the time as after 4 o'clock. We need not, however, consider that point here as the trial court found that the notice was served before 4 o'clock and also held, with which holding we are in accord, that the probationary period did not expire until midnight on August 19th, and a notice served prior to that time is within the statutory period. "The fractions of the days are no more taken into consideration than are the fractions of the seconds. The consequence is that every day, and every part of that day, is, by this rule, one day before every part of the succeeding day." Cosgriff v. Board of Election Com'rs et al., 151 Cal. 407, 91 P. 98, 99.

[3] The real question here for determination is whether that portion of section 9 of the Civil Service Act, St.1913, p. 1041, which reads, "Unless such appointee shall have been dismissed within such probationary period by the appointing power, for reasons stated in writing and filed with the commission, his appointment shall become permanent * * *," requires that reasons for such dismissal be filed with the commission prior to the expiration of the probationary period.

The answer is not altogether free from doubt but a careful analysis of the construction of the language from section 9 seems to indicate that the reason for the dismissal must be so filed with the Personnel Board before the probationary period has expired.

[4] The first step in the solution of the question is to apply the rules of grammar to determine if any ambiguity exists. If no such fault or uncertainty is found and there is no inconsistency in the law, that the courts are not called upon to construe the meaning of the act, for the legislative intent is made clear by the lan-

guage used. As said in Frinier v. Kubach Co., 177 Cal. 722, 171 P. 952, 954: "Where the intent is given expression in plain and unambiguous language, the courts cannot add to or subtract from the act unless forced to do so in order to obviate impractical or absurd results." And, to the same effect, the court, in People v. Stanley, 193 Cal. 428, 225 P. 1, 2, used these words: "To ascertain the intent of the Legislature in enacting [a statute], recourse must first be had to the language of the statute itself, and * * * if the words of the enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning."

A grammatical analysis of this sentence reveals a main clause "his appointment shall become permanent". The noun of this sentence is "appointment", the predicate "shall become", together with the predicate adjective "permanent". To this main clause is joined by the conjunction "unless", a subordinate clause "unless such appointee shall have been dismissed", which is limited or modified by the balance of the sentence. The verb or verb phrase of the subordinate clause is "shall have been dismissed", which is the future perfect tense of "dismiss". The future perfect tense represents an action that will be completed, or a condition that will have to come at some future time, or a future date when conditions are completed.

Webster defines the future perfect as "designating or pertaining to the tense of a verb denoting a future act or event as past in relation to a given future time". Curme on Syntax, page 371, discussing this tense, says: "This form represents that an action or state will be completed at or before a certain time, yet future." The "certain time, yet future" in the instant case is when all the conditions required are fulfilled.

The prepositional adverbial phrases "within the probationary period", "by the appointing power", "for reasons stated in writing and filed with the Commission", each modify the verb "shall have been dismissed". These adverbial phrases are coordinates of the same rank expressing conditions of time, agency, and manner, giving effect to the future perfect verb which they modify. Their order of arrangement can make no difference in the meaning of the sentence, as each is attached to the verb as a condition to its becoming effective, and can only become effective, when all of the conditions are fulfilled.

The meaning of the preposition "for" in the clause "for reasons stated in writing * * *" indicates the cause, motive or occasion of the act, and is used in the sense of "because of", "on account of" or "in consequence of"; this clause then states the method, procedure or manner in which a dismissal is made. It is the act required in order to have a dismissal.

The legislature in their right might have required the appointing power to indicate a dismissal by filing a notice of dismissal in the office of the secretary of state, or by requiring the appointing power to notify the state controller to execute no more warrants in favor of the employee, or by some other method by which the appointing power would be required to evidence their intention to terminate the employment. In this case the legislature has required such particular act,—that is the giving of reasons in writing and filed with the commission,—which is a condition precedent to a dismissal. This must be so in order that the future perfect verb "shall have been dismissed" may have its full meaning. Inasmuch as the legislature has prescribed this particular action to be performed within the probationary period by the appointing power no one is authorized to vary the prescribed method of dismissal. If, as here, therefore, no such written reasons were filed with the commission within the probationary period, it would seem that no dismissal had been effected.

[5] It is the contention of respondents in construing this particular provision of section 9 that the rule known as the last antecedent should be applied, a grammatical rule to the effect that relative and qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding. Such rule, however, is applicable only where there exists uncertainties and ambiguities in the statute. In Sutherland on Statutory Construction, second edition, page 812, this rule is discussed, the author there saying: "This principle is of no great force; it is only operative when there is nothing in the statute indicating that the relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and commonsense reading of the statute, may overturn it

and give it a more comprehensive application. (Citing cases.) Thus, as was said by the court in Great Western Railway Company v. Swindon (L.R. 9 App.Cas. at p. 808), referring to the phrase 'horses, oxen, pigs and sheep, from whatever country they come', the last clause would apply alike at all these animals and not alone to sheep. In furtherance of the intention it was held in that case that in the construction of the phrase 'messuages, lands, tenements and hereditaments of any tenure', the last and qualifying words, 'of any tenure', applied to all the preceding words and not merely to 'hereditaments'."

A further consideration of this rule is to be found in People v. Sassovich, 29 Cal. 480; American Trust Co. v. California-Western, etc., Co., Cal.App., 76 P.2d 201; Davis v. Hart, 123 Cal. 384, 55 P. 1060.

[6] It will be observed that the rule of last antecedent is invoked in those ambiguous sentences where a series of noun or noun phrases are followed by a relative phrase, the noun equivalent to the relative phrase being the last noun or noun phrase in the series, but such rule can have no application to an adverbial phrase modifying a verb. Such attempt would render the verbial phrase meaningless.

Respondents cite a number of cases, among others being: Allen v. Corbett, 25 Cal.App.2d 202, 77 P.2d 261; In re Carter, 141 Cal. 316, 74 P. 997; People ex rel. Walter v. Woods, 168 App.Div. 3, 153 N.Y.S. 872; Hall v. Board of State Harbor Commissioners, 21 Cal.App.2d 680, 70 P.2d 199; Lowy v. Reardon, 12 Cal.App.2d 748, 55 P.2d 1214; Kennedy v. State Personnel Board, 6 Cal.2d 340, 57 P.2d 486. These cases, when examined, reveal that they are either not applicable or do not involve the point here at issue.

[7] It would appear clearly that this particular sentence being grammatically correct, free from any ambiguity or uncertainty, is not open to judicial construction. Neither the rule of last antecedent nor the doctrine of contemporaneous construction are applicable. The statute has an obvious meaning, clear in construction, language and in law, that is that a written statement of reasons must be filed with the commission prior to the expiration of the probationary period, in order to effect the dismissal of a probationer.

[8] If it is material to this discussion, an examination of the report of separation filed with the State Personnel Board October 8, 1935, gives as for the reason of the separation, "dismissed—unsatisfactory service". No further reason was given therefor, although the instructions of the Personnel Board to the department contained the following: "Dismissed during probationary period for unsatisfactory conduct or capacity. Report must contain a statement of reasons for dismissal." It is obvious that "unsatisfactory service" cannot be a reason for unsatisfactory conduct or capacity.

Judge Glenn, in his opinion in commenting upon the marks given petitioner by the department, said: "During the trial it appeared from the remarks of the court that it was deemed unfair to give petitioner a questionable mark under the caption 'loyalty'. All his marks are either 'good' or 'fair' except under the heading of 'reliability' he was marked 'poor'. He is given a mark of 69. If we take the record of performance and average his marks as indicated thereon, giving him the minimum mark in each instance, and allow no credit for the trait for which he was marked 'poor' it will be found that his average is above 69. If under the heading of 'reliability' we give him a marking or grade of 69, and still give him but the minimum marks as indicated on the report, his average would be considerable above 69. In other words, the report itself would indicate that he was entitled to a better mark than the average of 69 * * *."

[9] We mention this as having some bearing as to why, perhaps, no reason for the dismissal was given in the separation report. We are not concerned with any motive there may have been for the dismissal, as no showing is attempted to even indicate bad faith or fraud. Kennedy v. State Personnel Board et al., 6 Cal.2d 340, 57 P.2d 486.

[10] It is also claimed that inasmuch as petitioner accepted an appointment as deputy sheriff of Sacramento county, after the receipt of the notice of dismissal he thereby lost his right to reinstatement. The notice of severance was served August 19, 1935. Within three months these proceedings for reinstatement were commenced. In March, 1936, petitioner was appointed a deputy sheriff.

In this we see no attempt to occupy two offices, nor an effort to serve two masters. Petitioner had demanded reinstatement, which had been refused. He and his family had to live. There is nothing to show but what petitioner was immediately ready for duty if recalled by the state. It would not be reasonable to permit the state to say petitioner was not in its employ and at the same time be heard to object to him seeking to maintain himself while the question was being tested. We do not believe, however, petitioner should be permitted to profit by such employment. If petitioner was an officer of the state a different rule might apply, but we believe he was an employee only as indicated by section 360c of the Political Code. This section states in effect, the Director of the Department of Motor Vehicles, the Chief, Assistant Chief and Deputy Chiefs of the California Highway Patrol, and the inspectors, captains, and traffic officers as therein provided shall constitute the California Highway Patrol and shall have the authority of peace officers with reference to the enforcement of the Vehicle Act or Vehicle Code as it is now called.

This disposes of the principal issues raised, and for the reasons herein given the judgment and order are reversed, and petitioner reinstated, with accrued salary, less such sums paid him as a deputy sheriff of Sacramento county. Let the peremptory writ of mandate issue, as prayed for, by the trial court. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

13 Cal.2d 199

In re JUNG.

S. F. 15835.

Supreme Court of California.

March 22, 1939.

Attorney and client 🔑53(2)

Evidence did not show that attorney, in application for admission to practice, willfully or knowingly concealed any material fact in the application, or made any false answer to questions therein, and hence a proceeding to revoke license of the attorney to practice, on the ground that the license was obtained through misrepresentation and false answers in the application, would be dismissed.

EDMONDS, J., and WASTE, C. J., dissenting.

In Bank.

Proceedings by the State Bar to revoke the license of Charles Joe Jung, a member of the State Bar.

Proceeding dismissed.

For prior opinion, see 80 P.2d 976.

Charles Joe Jung and I. M. Peckham, both of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

On this rehearing, we adopt the following statement of the facts from our former opinion:

"This proceeding was instituted by The State Bar to revoke the license of the respondent Charles Joe Jung to practice law in all the courts of this state on the ground that it was obtained through misrepresentation and concealment in that respondent made false answers to several material questions in his sworn application for admission to practice. Respondent was thereupon directed to show cause before this court why the order admitting him to practice law should not be revoked. Thereafter he demurred and answered and the matter was referred to a referee to receive evidence, make findings and file a report. Both sides have filed exceptions to the referee's findings and report and the matter now comes before us on the evidence adduced before the referee and the briefs of the parties.

It appears that in June, 1936, the respondent filed with the committee of bar examiners his sworn application in writing to take the examination for admission to the bar of this state. Subsequently, he passed the examination and, upon motion of the committee, was admitted to the practice of the law by this court on October 21, 1936. In its petition herein to revoke the order so admitting him to practice, The State Bar alleges that respondent by making false answers to certain questions in his sworn application for admission misrepresented certain matters and concealed certain facts material to a proper determination of his moral character.

"Specifically it is charged that in answering question 14 relative to his previous business or occupation, respondent said that he had been employed as an interpreter in the United State immigration service and then, as reason for the termination of the employment, stated '(4) (Non-civil service, Political Appointment) Position discontinued in March, 1933.' In question 16 respondent was asked: 'Have you ever been reprimanded, censured, or otherwise disciplined as an attorney or member of any profession or organization, or holder of any office, or have any charges ever been made or filed or proceedings instituted against you?' Respondent's answer thereto was 'No.' In reply to question 17 as to whether he had 'ever been charged with fraud, either formally or informally', respondent likewise answered 'No.'

"In effect, it is The State Bar's theory that respondent's answers to said three questions were false in that he deliberately withheld information relative to his dismissal 'with prejudice' by the immigration department following an investigation of a complaint received by that department having to do with asserted misconduct on his part as an interpreter. A reading of the transcript herein discloses that on November 28, 1932, the central immigration office in Washington requested the San Francisco office, where respondent was employed, to investigate a complaint from the Florida office apparently charging respondent with having taken money to effect the entry of an alien Chinese. Accordingly, an investigation was first made at Jacksonville, Florida, the source of the complaint and the location of the informer. When that investigation was completed to the satisfaction of the officer in charge, respondent was directed by said officer to report at the Angel Island station. The officer testified in this proceeding that he thereupon informed respondent that 'he was charged with certain derelictions and malfeasance in office', that respondent was given 'specifications of the elements of malfeasance with which he was charged'; that respondent was then sworn and under oath made a statement denying the charges against him, stating, in substance, that 'from what had transpired it was his understanding he was under charges by a certain individual for taking money in order to effect the admission of an alien Chinese. He disclaimed all knowledge concerning the matter; disclaimed all activities in connection therewith; referred to his previous record and asserted that the charges were not true, and said that from the evidence, so far as he knew, there was no cause why he should be discharged from his position. He stated that the statements which he had made were all under oath, and that he fully understood the position which existed at that time. This statement that Mr. Jung understood his answers were made under oath was in addition to his being sworn. He was sworn before the statement was commenced. That was the material part of his comment.'

"The record also discloses that less than three months after the commencement of this investigation, respondent was informed by letter from the local office and by a second letter from the department of labor in Washington of the termination of his employment, the latter letter stating that 'upon the recommendation of the Commissioner-General of Immigration, your services as Chinese interpreter * * * have been discontinued with prejudice. * * *'"

The referee found, with respect to the material issues herein, that petitioner made no false statements, but acted in good faith in the answer given to the question asked; that he did not know the exact meaning of the statement that his services had been discontinued "with prejudice", and was not expressly advised of the reason for the dismissal; that it was not clearly shown to what extent he knew of the nature or extent of the investigation; and that the testimony of the witnesses for The State Bar was "inconclusive and unsatisfactory". His explanation of his understanding of the dismissal, which the referee found acceptable, was that he was appointed to his position by a commissioner who was himself a political appointee, holding at the will of the appointing power; that the commissioner died in December, 1932, or January, 1933, and he assumed that his dismissal followed naturally upon the termination of the political appointment of his superior.

The conclusion of the referee, that petitioner did not wilfully or knowingly conceal any material facts in his application or make any false answers to questions therein, appears to us to be a reasonable one in the light of all the evidence in the record.

It is therefore ordered that the proceeding against petitioner be dismissed.

EDMONDS, Justice (dissenting).

I dissent. In July, 1938, this court decided that the charges made by The State Bar against the respondent had been fully sustained and warrant a revocation of his license to practice law in this state. Thereafter a petition for rehearing was granted. Upon the same evidence which was before the court when the first decision was reached, a majority of the justices now determine that the conclusion of the referee is "a reasonable one".

I adhere to the views first expressed. In my judgment, the record clearly shows that while the respondent was in government service as an interpreter, a complaint was made against his conduct; that thereafter an investigation was made which included a statement taken from him concerning the pending charges, of which he was fully informed; and that thereafter he was dismissed from the service "with prejudice". It strains ordinary credulity to believe, as found by the referee, that the respondent, with sufficient legal education to pass the bar examination, did not know the meaning of the words "with prejudice" or understand that his dismissal, which followed the investigation of his official conduct by less than three months, had no connection with it.

The State Bar Act, Stats.1927, p. 38, as amended; Deering's Gen.Laws, 1937 ed., Act 591, prescribes as a qualification for admission to practice law, that a person must be "of good moral character". (Sec. 24.2.) The examiners, whose duty it is "to administer the requirements for admission to practice, and to certify to the Supreme Court for admission those applicants who fulfill the requirements" therefore (sec. 24), have a right to know the circumstances which necessarily influence a determination as to whether a person is of the character required by the statute. For the purpose of securing information, upon which to determine the eligibility of applicants, each is asked certain questions. One who under oath falsely answers such inquiries is not a person qualified by either the specific terms of the State Bar Act, supra, or the principles of common honesty to engage in the practice of law.

In my judgment, the only conclusion which can reasonably be drawn from the record before this court is that the respondent made false representations in connection with his application to take the examination for admission to the bar, and that in view of such conduct his license to practice law should be revoked.

I concur: WASTE, C. J.

13 Cal.2d 234

LOEWENBERG v. SCHNEIDER et al.

L. A. 16425.

Supreme Court of California.

March 24, 1939.

Appeal and error ⟹659(3)

The respondents' motion for diminution of record by adding certified copy of trial court's order striking bill of exceptions from record would be granted, and motion to strike bill of exceptions from record would be denied, where transcript of proceedings with respect to settlement of bill would show whether trial court exceeded its authority in making order and whether bill of exceptions should be stricken. Code Civ.Proc. § 953a.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Bertha Loewenberg against Edward J. Schneider and Ida M. Schneider. From the judgment, the plaintiff appeals. The defendants filed motions for diminution of record and to strike a purported bill of exceptions from the record.

Motion for diminution of record granted and motion to strike bill of exceptions denied.

Arthur C. Arnold, Elias Mansfield, Anthony C. Kolda, and Elon Gilbert Galusha, all of Los Angeles, for appellant.

Holbrook, Taylor, Tarr & Reed and Taylor, Kolliner, Bolton & Schwartz, all of Los Angeles, for respondents.

PER CURIAM.

The respondents have presented two motions: (1) A motion for diminution of record, and (2) a motion to strike a purported bill of exceptions from the record.

Plaintiff and appellant, desiring to perfect a record on appeal, notified the clerk of the Los Angeles superior court on July 15, 1937, to prepare a clerk's transcript under section 953a of the Code of Civil Procedure. That transcript was filed in this court on July 30, 1937. Meanwhile appellant had also initiated proceedings to obtain a bill of exceptions. A purported bill was settled on December 2, 1937, and was filed in this court on December 8th. It consists of six typewritten pages, and a clerk's certificate which recites that at the time the motion for settlement came on for hearing, appellant was represented by counsel, but respondents were not.

Respondents now move to strike this purported bill of exceptions from the record on the ground that the entire proceedings leading to its settlement were defective and void. They charge, among other things, that no proposed bill was filed, that they were not given due notice of the hearing of motion for order of settlement, that the purported bill does not set forth fairly or accurately the testimony adduced on the trial of the cause, and that they had no opportunity to file written, or any, objections to the purported bill as engrossed. They also move for diminution of the record on appeal herein by adding a certified copy of an order made by the trial court on February 14, 1938, granting a motion theretofore made by them to set aside the order settling the bill of exceptions, and striking the bill from the record, together with a transcript of the proceedings which resulted in the entry of the order.

Appellant opposes both motions, urging that the trial court was without authority to set aside the order of settlement and to strike the bill of exceptions from the record, and also that the certification of the bill cured all omissions in procedure.

No good reason appears why a transcript of all proceedings had in the court below with respect to settlement of the bill should not be brought up and made a part of the present record. This data will show whether or not the trial court exceeded its authority in making the alleged order, and it will also enable this court to determine whether the bill of exceptions should be stricken from the record.

The motion for diminution of record is granted. The motion to strike the bill of exceptions is denied, without prejudice.

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13 Cal.2d 223

PEOPLE v. SMITH.

Cr. 4197.

Supreme Court of California.

March 24, 1939.

1. **Homicide** 🔑253(1)

Evidence sustained conviction for murder in the first degree.

2. **Criminal law** 🔑406(5)

In prosecution for murder, evidence of conversation between defendant and a fellow convict at a time when defendant was serving sentence for another crime, wherein defendant stated there had been a witness to the murder whom he must get rid of and sought the aid of the fellow convict in so doing, was admissible as tending to prove defendant's guilt of the crime for which he was on trial.

3. **Criminal law** 🔑338(1), 380

In prosecution for murder, excluding evidence of facts concerning defendant's past history, wholly disconnected with the crime for which he was on trial, was not an abuse of discretion.

4. **Criminal law** 🔑338(1), 380

Where trial court in prosecution for murder allowed defendant to testify as to some facts concerning his past history, refusal to allow testimony as to some other such facts was not an abuse of discretion, notwithstanding certain casual remarks of trial court indicated that such evidence was improper.

5. **Criminal law** 🔑768(4)

An instruction that, in exercising discretion to determine whether to inflict penalty of death or of life imprisonment upon defendant found guilty of murder in the first degree, jury should bring in verdict calling for one or the other penalty depending on whether they did or did not find mitigating circumstances, is condemned as an interference by court with discretion which statute confers on jury alone. Pen.Code, § 190.

6. **Criminal law** 🔑1172(9)

Instruction that, in exercising discretion conferred by statute to determine whether to inflict penalty of death or of life imprisonment upon defendant found guilty of murder in the first degree, jury should bring in verdict calling for one or the other penalty depending upon whether they did or did not find mitigating circumstances, *held* not prejudicial in view of overwhelming evidence calling for verdict carrying death penalty. Pen.Code, § 190.

In bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

William G. Smith was convicted of murder in the first degree, and he appeals.

Affirmed.

Albert L. Wagner and Kenneth McGilvray, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

CURTIS, Justice.

The defendant was found guilty of murder in the first degree and sentenced to suffer the death penalty. From the judgment of conviction so rendered against him and from the order of court denying his motion for a new trial the defendant has appealed.

The evidence in the case is without conflict. On January 3, 1936, Mary Mendonca was residing with Mr. and Mrs. Frank Durkee in their home located in the city of Sacramento. On that evening Mr. and Mrs. Durkee left Mary Mendonca alone in their home, and between 6 and 7 o'clock on that evening Mary Mendonca heard a noise in one of the bedrooms which sounded as if a person was in said room. On hearing the noise she jumped up and ran next door to the home of Mr. and Mrs. Elmer Cox and told Mr. Cox that someone was prowling around the Durkee home. Mr. Cox got his pistol, and he and Mary Mendonca went back to the Durkee home. On entering the hall, Mary Mendonca switched on the electric light and saw the defendant standing in the doorway of one of the bedrooms. Mr. Cox told him to hold up his hands, and with that the defendant shot Mr. Cox and felled him to the floor. The defendant followed the first shot by three other shots, all of which took effect in Mr. Cox's body. Nothing was said by any of the three persons during the shooting except that Mr. Cox said to the defendant after the first shot not to shoot any more, but the defendant kept on shooting. As a result of these shots, Mr. Cox was taken to a hospital where he died four days later. The defendant escaped from the house through a window. He remained in Sacramento during that night, and the next morning read in the papers of the murder of Elmer Cox. He eventually made his way to Auburn in this state and from there to other parts of this state. During the month of June, 1936, he was received as a prisoner in the state prison at San Quentin. While there he disclosed to a fellow prisoner named Rowell the fact that he was wanted in Sacramento for shooting "some fellow by the name of Cox". This information was communicated by Rowell to the prison authorities, who in turn informed the police department at Sacramento of defendant's presence in San Quentin and of this incriminating admission. W. A. Thomas, a member of the police force of Sacramento, went to San Quentin, where he met the defendant in the presence of the captain of the guards at San Quentin, Ralph H. New. After some preliminary conversation between Mr. Thomas and the defendant in which Mr. Thomas told the defendant of the object of his visit and that the authorities at Sacramento believed they had a good case against him for the Cox murder, Mr. Thomas outlined the evidence which they had against defendant respecting the murder of Elmer Cox. After listening to these statements of Mr. Thomas, the defendant said, "Now you have got the right man." In further conversation with the defendant, Mr. Thomas asked him if he was willing to make a statement, to which defendant replied that he was willing to do so. A shorthand reporter was called in and defendant's statement was taken down in shorthand, and afterwards transcribed and submitted to the defendant, who signed it before those present. This statement was shown to have been voluntarily made without any promises of reward or of immunity and without any threats or compulsion and after he had been informed that it might be used against him in case he was tried for murder. In this statement the defendant admitted he was in the Durkee home at Sacramento on the evening of January 3, 1936, "just prowling around" when he heard someone in the hall; "There was a man standing with a gun. He made no effort to drop it and I was considerably excited. I shot before I realized what I was doing." He further stated that he shot four times. "The man he shot said, 'Don't shoot.' But I was under the impression that he was shooting at me because I thought I heard bullets whizzing over my right shoulder. I later discovered that what I had thought to be bullets were merely the cartridges ejected from my own gun." This statement was admitted in evidence at the defendant's trial without objection. The defendant also took the stand as a witness and told practically the same story as that contained in the written statement. He further stated at the trial that when Cox came into the Durkee home he was not alone, but said: "I don't know which person came in first, the maid or the man, but the first one that came in turned on the light." At the trial the prosecution called as witnesses, Mary Mendonca, Captain of the Guards Ralph H. New, W. A. Thomas of Sacramento police department and Youther Rowell, the fellow prisoner of the defendant to whom the defendant gave the information which led to the latter's arrest. The testimony of these witnesses substantiated the facts hereinbefore set forth.

[1] No contention is made that the evidence is not sufficient to support the verdict. In fact it would be futile to so contend in the face of the overwhelming evidence against the defendant. Not only did he make a full confession of the crime to the officers who confronted him while in San Quentin but this confession was reduced to writing and signed by him. It was admitted in evidence at the trial without any objection thereto by the defendant or any claim that it was not free and voluntary and binding upon him. In addi-

tion to this confession, the witness Mary Mendonca positively identified him as the person who shot and killed Elmer Cox in the Durkee home, and at the trial, the defendant took the stand as a witness, admitted the shooting of Cox, and his only explanation of his act was that he was frightened at the sudden appearance of Cox and Miss Mendonca. He further attempted to explain his reason for firing three shots after his first shot had felled Cox to the floor by the statement that he heard something whizzing over his right shoulder which he thought were bullets from Cox's gun, but later concluded that what he thought were bullets whizzing by him were cartridges from his own gun.

[2] Appellant contends, however, that the trial court committed prejudicial error in admitting evidence of another crime over his objections. This contention is based upon the evidence given by the prisoner Rowell, wherein the latter testified that the defendant stated to him that there was a girl in the hall, referring to the hall in the Durkee home, whom he almost ran into in getting out of the hall, and the defendant said, as testified by Rowell: "When you leave San Quentin I want you to do me a favor. I would like for you to get rid of this witness. * * * That witness is out there, and I have to get rid of her some way." The district attorney, in his opening statement to the jury referred to this conversation between the defendant and Rowell, and stated that this evidence would be produced for the jury's consideration as tending to prove defendant guilty of the crime for which he was then being tried. It is not clear just what "other crime" appellant contends that this evidence tended to prove, but assuming that it did tend to connect defendant with some other crime, it was clearly admissible as a declaration of the defendant tending to prove his guilt of the crime of which he was then on trial.

"The rule against the admission of evidence of other crimes does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which a defendant is being tried." 8 Cal.Jur., p. 60, sec. 168.

[3] At the trial the defendant in answer to questions propounded to him by his attorney testified to his age, his place of birth, the names of his parents, the occupation of his father, and various places at which he had resided during his lifetime. He was also asked further questions in regard to his past history, none of which bore even indirectly upon any circumstance or fact connected with the crime for which he was then being tried. Objections to such questions were sustained by the trial court and the defendant now contends that the court erred in sustaining such objections. This contention is without merit. It was within the discretion of the trial court to exclude evidence of certain facts connected with the defendant's past history, which were wholly disconnected with the crime for which he was on trial. 1 Wharton's Criminal Evidence, 11th ed., sec. 227, p. 272.

[4] Appellant admits that the rule is as stated above, but claims that the trial court refused to exercise its discretion but sustained objection to such questions on the ground that the answers were not proper evidence in the case. The record does not support this claim. It is based upon the casual statement of the trial court that the Supreme Court had held such evidence improper. The reporter's transcript shows that the trial court permitted the defendant to testify to much of his past life, but declined to permit him to testify as to other portions of his past. Notwithstanding the casual remarks of the trial judge that the Supreme Court had held such evidence improper, it appears from a reading of defendant's testimony that the trial court did exercise its discretion in the admission of evidence regarding his past by permitting him to testify as to certain events occurring in his past life and sustaining objections as to others.

[5] The court at the instance of the prosecution gave the following instruction: "You are instructed that section 190 of the Penal Code of the State of California, provides that a person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same. Therefore, if you do find the defendant guilty of murder in the first degree, you have the discretion to determine the nature of his or their punishment, *and if in your discretion or judgment find there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will, by your verdict, indicate the same but if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted*

you will simply find him guilty of murder in the first degree."

Appellant contends that the italicized portion of said instruction is erroneous and the giving thereof was highly prejudicial to the rights of the defendant. This instruction is substantially like an instruction considered in the case of People v. Bollinger, 196 Cal. 191, 237 P. 25, and found on page 205, 237 P. on page 31, of the opinion in that case. It was held in the Bollinger case that the giving of such instruction was not reversible error. At the same time this court in refusing to reverse that case by reason of said instruction expressed itself in the following pointed and emphatic language: "While we are satisfied that the giving of such instructions is opposed to the provisions of section 190 of the Penal Code, we are not prepared to depart from the decisions on this point. In other words, we consider as settled that the giving of such instructions is not error. We have, however, gone into the subject in the hope, if not the expectation, that the practice of giving such instructions may be abated, thus giving assurance that the penalty reflects the decision of the jury alone, and at the same time sparing this court the necessity of repeatedly passing on such assignments of error. And considering the numerous occasions this court has held that section 190 of the Penal Code confers on the jury alone the discretion of determining the punishment in cases of guilt of murder in the first degree, trial courts, especially where a human life is at stake, should not interfere with the discharge of that solemn duty by the jury."

[6] Just why this and similar warnings by this court have not been observed by prosecuting officers and trial courts, we are at a loss to understand. We are not prepared to say that cases, in which this instruction so frequently and vehemently condemned by this court may be given, may not arise, in which, due to the unusual nature of the evidence therein respecting the facts and circumstances in mitigation of the crime, the court will refuse to adhere to its past practice of sustaining death penalty judgments. But in the instant case, in view of the condition of the evidence which is so overwhelming against the defendant as to leave no doubt in our minds that the jury would have found the defendant guilty of murder in the first degree without recommendation, even if such instruction had not been given, we are of the opinion that the defendant suffered no prejudice by reason of the inclusion of this instruction in the trial court's charge to the jury.

The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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13 Cal.2d 191

ANDERSON-COTTONWOOD IRR. DIST. v. KLUKKERT et al.

Sac. 5231.

Supreme Court of California.

March 21, 1939.

1. Taxation 🔑213

The constitutional provision exempting from taxation property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, the state, or to any county, city, and county, or municipal corporation within the state, exempts state-owned property from taxation, whether it is held in a proprietary or a governmental capacity. Const. art. 13, § 1.

2. Taxation 🔑217

Land, which had been sold to irrigation district when irrigation district assessments become delinquent, could not, under Constitution, be included in general assessment of taxes for county governmental purposes, irrespective of whether district held land in proprietary or governmental capacity. Gen. Laws 1931, Act 3854, § 29; Const. art. 13, § 1.

3. Taxation 🔑217

Land, which had been sold to irrigation district when irrigation district assessments became delinquent, would be deemed to be held or used by the irrigation district for a public purpose, and not in a proprietary sense, so as to be exempt from taxation, even though Constitution should be deemed to exempt such property only when used for a public purpose. Gen.Laws 1931, Act 3854, § 29; Const. art. 13, § 1.

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In Bank.

Appeal from Superior Court, Shasta County; C. A. Paulsen, Judge.

Proceeding by the Anderson-Cottonwood Irrigation District against John Klukkert, as Assessor, and Thomas Thatcher, as Tax Collector, to prohibit the defendants from including in a general assessment of taxes for county governmental purposes lands on which irrigation district assessments had become delinquent, and which had been sold to the plaintiff. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed.

L. C. Smith, of Redding, for appellant.

Harry W. Horton, of El Centro, Hankins & Hankins, of San Francisco, C. F. Metteer, of Sacramento, Arvin B. Shaw, Jr., of Los Angeles, Thomas C. Boone, of Modesto, and A. L. Cowell, of Stockton, amici curiae for Irrigation Districts Association of California in support of appellant.

Glenn D. Newton, of Redding, for respondents.

HOUSER, Justice.

As is indicated by the title of the cause, the plaintiff herein is a corporation known as an irrigation district. In due course of the exercise of its powers and operations as such district, an assessment was levied by it upon the lands that were located within the boundaries of the district. The assessment not having been paid, by reason thereof and in accordance with the provisions of the enabling statute, the lands upon which the assessment had become delinquent were sold to the said district. Thereafter, while such lands were thus apparently owned by the plaintiff, the county assessor of the county in which the lands were situated threatened to include them in a general assessment of taxes for county governmental purposes. Thereupon, the plaintiff instituted a proceeding for the purpose of prohibiting such contemplated action on the part of the said county assessor, as well as the collection by the county tax collector of taxes thus proposed to be assessed. From a judgment that was rendered therein in favor of the defendants, the instant appeal has been presented to this court.

Basically, the merits of the cause are determinable from a consideration of the pertinent provisions that are contained within section 1 of article 13 of the Constitution of this state. Therein, it is provided that "* * * property *used* for free public libraries and free museums, growing crops, property *used* exclusively for public schools, and such *as may belong to* the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation, * * *." (Italics added.)

In itself, as far as it may relate to the question here presented, the language there employed would seem to require no construction by the courts, particularly the pertinent provision which relates to the exemption of property *"belonging to"* the state. However, it is urged by respondents that the specific property in question was "non-operative", that is, not in actual use for the purposes for which the irrigation district was organized—and, consequently, that it was not of the class of public property which is or was intended to be relieved from the burden of taxation.

Passing for the moment the question whether the lands here involved were "non-operative" within the meaning contended for by respondents, or whether they are or were used for governmental purposes—in which latter event respondents concede they could not lawfully be taxed—we deem it expedient to give some consideration to the argument advanced by respondents to the effect that, notwithstanding the plain language of the constitutional provision which exempts from taxation *any* property belonging to the state without limitation as to its "use", nevertheless such property was not intended to be exempted unless it was *in actual use* for a public purpose.

On several different occasions, the appellate courts of this state heretofore have ruled upon that question adversely to respondents' contentions.

In the comparatively early case of San Francisco v. McGovern, 28 Cal.App. 491, 152 P. 980, under the constitutional provision here involved, as it existed prior to 1914, at which time an amendment thereto was adopted, it was held that property acquired by the City and County of San Francisco for the purpose of constructing and maintaining a municipal waterworks for the benefit of the inhabitants of said city and county and to supply water, light and power to cities outside such municipality, was exempt from taxation under the provisions of article 13, section 1, California Constitution even though such acquired property was located outside the territorial limits of said city and county. In substance, an identical conclusion was reached by the Supreme Court of this state in the case of Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, wherein it was sought to tax lands of an irrigation district which lay outside the corporate boundaries of such district, and wherein the court ruled that all property held or apparently owned by an irrigation district, even though not actually in use by it, in reality "belonged to" the state and was exempt from taxation under the constitutional provision. Also in the case entitled State Land Settlement Bd. v. Henderson, 197 Cal. 470, 241 P. 560, 564, it was held that "all lands held by the state and open for settlement upon the terms prescribed by the state land settlement act [Stats.1917, p. 1566] are lands which *belong* to the state and are exempt from taxation" under the constitutional provision. (Italics added.)

It is to be noted that in each of those cases the fundamental basis for the decision that was made by the court was that, in effect, the property upon which the tax was sought to be levied was *owned by* the state or held by a subordinate agency thereof, and that, in accordance with the constitutional provision, such land was exempt from taxation. In principle, the cases of Webster v. Board of Regents, 163 Cal. 705, 126 P. 974, and San Pedro etc. R. R. Co. v. Los Angeles, 167 Cal. 425, 139 P. 1071, 52 L.R.A.,N.S., 991, are to the same effect.

Also, directly bearing on the question is a note found in 3 A.L.R. 1440, wherein it is said: "Property owned by the state or subordinate municipal bodies is expressly exempted from taxation by constitutional provision or statutory enactment in many jurisdictions, and in some of these jurisdictions it is held that, where the exemption is express and unqualified, no tax can be levied against it, regardless of the use to which it is put." (Citing cases from several jurisdictions, including California.) However, in a succeeding note that appears on page 1442 of the same volume it is also said that, "As a general rule, property held by a municipality in connection with property used for a public purpose, but in excess of the amount required for proper conduct of such purpose, and not actually so used, is not within tax exemption provisions exempting property *used for public purposes.*" (Citing cases.) (Italics added.) The distinction would thus appear to be that in the first list of authorities, the constitutional or other provision with reference to the exemption is general, whereas in the latter the exempted property must be *"used for public purposes"*.

Among the several authorities from other jurisdictions which have followed the rule heretofore adhered to in California that where tax exemption provisions are directed solely to the "ownership" of public property, the use to which such property is put becomes immaterial, are the following: Otter Tail Power Co. v. Degnan, 64 N.D. 413, 252 N.W. 619, 621; City of Harper v. Fink, 148 Kan. 278, 80 P.2d 1080; Board of Com'rs. v. City of Wellington, 66 Kan. 590, 72 P. 216, 60 L.R.A. 850; City of Omaha v. Douglas County, 96 Neb. 865, 148 N.W. 938; Stewart v. City and County of Denver, 70 Colo. 514, 202 P. 1085; City of Springville v. Johnson, 10 Utah, 351, 37 P. 577; State v. Mayes, 174 Okl. 286, 51 P. 2d 266, 268; Town of Weaverville v. Hobbs, 212 N.C. 684, 194 S.E. 860; and Grand River Drainage Dist. v. Reid, 341 Mo. 1246, 111 S.W.2d 151; see, also, Teaneck Tp. v. State Board of Tax Appeals, 110 N.J.L. 28, 164 A. 895, affirmed 111 N.J.L. 242, 168 A. 449.

In the case entitled State v. Mayes, 174 Okl. 286, 51 P.2d 266, 268, under the Oklahoma constitution it was held that lands or property acquired and owned by a city for water right purposes were not liable to taxation by a county or other taxing district, although such lands or property were situated without the limits of such city and in a county other than that in which the city was located, and notwithstanding the fact that the property was used in part for other purposes. In discussing the constitutional exemption, the court said:

"Section 6, art. 10, of the Constitution Okl.St.Ann. provides that 'all property of the United States, and of this State, and of counties and of municipalities of this state * * * shall be exempt from taxation.' To the same effect is subdivision 3 of section 12319, O.S.1931, 68 Okl.St. Ann. § 23, subd. 3. There is no mention of the use to which property of a municipality is put as a condition to its being nontaxable. The provisions of the Constitution and the statute are without condition or limitation. * * * It is the general rule that where the Constitution and laws of a state exempt from taxation all property of municipalities within the state, without reference to the use to which the property is put, it is exempt from all taxation regardless of the character of the use thereof. It is so held in Stewart, County Treas. v. City and County of Denver, 70 Colo. 514, 202 P. 1085; Omaha v. Douglas County, 96 Neb. 865, 148 N.W. 938; City of Colorado Springs v. Board of Com'rs, of Fremont County, 36 Colo. 231, 84 P. 1113; City of Springville v. Johnson, 10 Utah 351, 37 P. 577; City and County of San Francisco v. McGovern et al., 28 Cal. App. 491, 152 P. 980; Sumner County v. City of Wellington, 66 Kan. 590, 72 P. 216, 60 L.R.A. 850, 97 Am.St.Rep. 396."

[1, 2] In the light of the interpretation placed upon constitutional exemptions similar to the one here under consideration, by the several authorities hereinbefore cited, including the decisions of our own courts, it is manifest that the language of the exemption provision, being free from ambiguity, "has left no room for judicial construction."

In that regard, in the case entitled San Francisco v. McGovern, 28 Cal.App. 491, 152 P. 980, 984, in discussing the exemption provision here in question, the court said, "* * * ' "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature (or framers of a Constitution) should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." * * * Whenever a constitutional provision is plain and unambiguous, when no two meanings can be placed on the words employed, it is mandatory, and courts are bound to obey it. Such a mandate, whether wise or unwise, whether founded upon good reasons or not, is obligatory, and cannot be construed away by the history of the past, or by any mischief that it may be supposed it was intended to remedy.' See Cooley on Constitutional Limitations, pp. 89–91; Maxwell v. Dow, 176 U.S. 581, 602, 20 S.Ct. 448, 44 L.Ed. 597. We find ourselves unable to discover, from the language employed in the Constitution [art. 13, sec. 1], any reason for interpretation, or ground for entertaining doubt as to its meaning. The language employed in classifying the property declared to be exempt from taxation, it will be noted, limits the exemption as to property *used* for free public libraries and free museums and property *used* for public schools, but the language following is: 'And such (property) as may *belong* to the United States, this state, or to any county or municipal corporation within this state shall be exempt from taxation.' The condition here seems only to be that it (the property) shall 'belong' to the United States, etc. Its location or use is not made a condition of its exemption. The word 'belong' is applied alike and with the same force and meaning to the United States, this state and to counties and municipalities, and it seems to us was employed to denote an unqualified ownership of the property, not an ownership subject to the condition that it was to be used exclusively for governmental purposes. Certainly it was not intended to attach any such condition to property belonging to the United States or this state and how can we give it a different meaning as applied to counties and municipalities?"

And in the late case entitled Town of Weaverville v. Hobbs, 212 N.C. 684, 194 S.E. 860, 862, wherein it was held that real property which had been deeded to the state by a trustee's deed, for the use and benefit of the World War Veterans Loan Fund and which the state had rented to private persons and had applied the rentals to the fund, was exempt from ad valorem taxation by the town wherein the real property was located, the court said: "The Constitution of North Carolina contains this mandatory provision, article V, § 5: 'Property *belonging to* the State, * * * shall be exempt from taxation.' * * * The language of the constitutional provision is so clear and unambiguous that there is no room for judicial construction. The fact that social, economic, and political conditions in this state have undergone great changes since the adoption of our present Constitution, resulting in an enlargement of the functions of municipal corporations to meet the requirements of changed conditions, would not justify a construction of this provision which would in effect result in its amendment by the courts and not by the people." (Italics added.) To the same effect see, also, City of Springville v. Johnson, 10 Utah 351, 37 P. 577; City of Omaha v. Douglas County, 96 Neb. 865, 148 N.W. 938.

[3] Irrespective of that which hereinbefore has been stated with respect to the rule that under a constitutional provision exempting state-owned property from taxation it is immaterial whether the property is held in a proprietary or a governmental capacity, it does not appear that the lands here involved are nonoperative, within the meaning contended for by respondents. In the recent case entitled El Camino Irrigation District v. El Camino Land Corporation et al., Cal.Sup., 85 P.2d 123, this court held that an irrigation district was an agency of the state, whose functions were considered exclusively governmental; that it owns no lands in a proprietary sense, its property being owned by the state and held only for governmental purposes. The court pointed out that under section 29 of the Irrigation District Act, Deering's Gen.Laws 1931, Act 3854, p. 1948, 1970, it was provided that property acquired by the district should be held "in trust for", and was "dedicated and set apart to the uses and purposes" set forth in the act. See, also, Clough v. Compton-Delevan Irrigation District et al., Cal.Sup., 85 P.2d 126; Moody v. Provident Irrigation District, Cal.Sup., 85 P.2d 128. Also, in the recent case entitled Provident Land Corporation v. Zumwalt et al, Cal.Sup., 85 P.2d 116, where the economic history of irrigation districts in this state was reviewed at some length, it was held that lands acquired by the district under the provisions of the Irrigation District Act remain in trust, and that their proceeds, whether by sale or lease, were likewise subject to the trust.

Respondents have placed great reliance upon the case entitled La Mesa etc. Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143, in support of their contention that the property here involved was nonoperative and therefore taxable. In that case, for the reason that property so acquired by the district, being for resale, was not impressed with a public trust,—it was held that irrigation districts which acquired property by virtue of delinquent district assessments were not entitled to have canceled liens of county taxes and assessments existing against the property. In the light of the holding of this court in the recently decided cases, to which reference hereinbefore has been had, to-wit, El Camino Irrigation District v. El Camino Land Corporation et al., Cal.Sup., 85 P.2d 123; Clough v. Compton-Delevan Irrigation District et al., Cal.Sup., 85 P.2d 126; Moody v. Provident Irrigation District, Cal.Sup., 85 P.2d 128, and Provident Land Corporation v. Zumwalt et al., Cal.Sup., 85 P.2d 116, the decision that was rendered in the La Mesa case loses its importance as far as its applicability herein is concerned. Furthermore, in the La Mesa case, the court specifically left open the settlement of the question here presented, holding it unnecessary to reexamine the decisions in the cases entitled San Francisco v. McGovern, 28 Cal.App. 491, 152 P. 980; Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, or State Land Settlement Board v. Henderson, 197 Cal. 470, 241 P. 560, and therein declared that none of those cases dealt with the question there under consideration and further observed that [216 Cal. 730, 17 P.2d 147], "Whether *nonoperative property* or property held under a mere tax title and not devoted to the public use may be assessed *is not here involved.* * * * When a cause arises where such property of an irrigation district, or other agency, is assessed for general taxes, we can then, if required, treat that specific question." (Italics added.)

The fact that the property here involved has been judicially determined to be held or used by the irrigation district for a public purpose, and not in a proprietary sense, should not in any way be deemed to detract from the force of that which has been said hereinbefore with regard to the conclusion we have reached that, under the constitutional provision which makes ownership the sole test of exemption, the use to which the property is put would be immaterial.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; EDMONDS, J.; LANGDON, J.

13 Cal.2d 174

DOUGHERTY v. CALIFORNIA KETTLEMAN OIL ROYALTIES, Inc.

S. F. 16022.

Supreme Court of California.

March 21, 1939.

As Modified on Denial of Rehearing April 20, 1939.

1. Release ⚷29(1)

Release of one of two or more joint tortfeasors operates as release of all, since there can be but one compensation for the joint wrong.

2. Release ⚷28(1)

An action to recover oil royalties, allegedly held in trust by virtue of defendant's agreement that plaintiff should have royalties in consideration of services, sounded in contract rather than in tort, notwithstanding allegations showing defendant's fraud in concealing facts and transferring the trust property, and hence release of one defendant from liability under judgment for plaintiff did not release other defendants. Code Civ.Proc. § 675; Civ.Code, § 1543; § 2228 et seq.; § 2234.

3. Trusts ⚷189

A trustee's transfer of trust property to another without protection and in violation of beneficiary's rights is a fraud upon the beneficiary under statutes governing trusts. Civ.Code, § 2228 et seq.; § 2234.

4. Action ⚷28

One injured under circumstances where he may sue in either tort or contract may waive the tort and sue on the contract.

5. Action ⚷36

The mere fact that a pleading contains allegations of fraud does not convert a contract action into a tort action.

6. Release ⚷29(3)

In action to enforce trust in oil royalties allegedly transferred by trustee in violation of contract, wherein transferee was liable only for that part of the royalties which was transferred to it, there was no joint liability, and hence the rule that release of one joint tort-feasor releases all was inapplicable.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by F. C. Dougherty against the California Kettleman Oil Royalties, Incorporated and others, to recover oil royalties, wherein named defendant filed cross-complaint, plaintiff secured judgment, and, pending appeal therefrom, plaintiff settled dispute with another claimant of such royalties. From an order denying defendant's motion for an order directing clerk of court to enter satisfaction of the judgment, named defendant appeals.

Affirmed.

William M. Abbott, William M. Cannon, and Joseph F. Leonard, all of San Francisco, and Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

Sullivan, Roche & Johnson and Rogers & Clark, all of San Francisco, for respondent.

PER CURIAM.

California Kettleman Oil Royalties, Inc., appeals from an order of the superior court denying its motion for an order directing the clerk of the court to enter satisfaction of a certain final judgment secured by Dougherty against appellant. The motion to enter satisfaction was predicated upon the fact that after respondent Dougherty, in an action against appellant, had secured a judgment that he was the owner of certain oil royalties, and that appellant held them in trust for respondent, and while that judgment was on appeal, respondent entered into a written agreement settling his dispute with another claimant to a portion of the royalties—the administratrix of the estate of Washington H. Ochsner. It is appellant's position that Ochsner and its predecessor were joint tort feasors; that the agreement between respondent and the administratrix of Ochsner's estate constituted the compromise and settlement of a tort action with one joint tort feasor and a release from further liability of that tort feasor; that under elementary principles a release of one joint tort feasor releases all. Based on these premises it is urged that appellant has been released from all liability under the judgment. The incongruous nature of appellant's claim is disclosed by the fact that were appellant to prevail on this appeal it would result in appellant securing title to about 58 per cent of certain accrued and to be accrued oil royalties after it has been finally determined by this court that appellant has no lawful claim to any portion of these royalties, and that they are the property of respondent.

The facts giving rise to this controversy, including an analysis of the pleadings, have been fully set forth in the opinion of this court on the appeal from the judgment. Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155. So far as pertinent here the facts are as follows: In 1920 Dougherty and Ochsner entered into a written but unsigned contract whereby in return for certain valuable services to be rendered by Dougherty in securing for Ochsner a certain oil permit, Ochsner agreed that Dougherty should be entitled to 10 per cent of all oil or gas produced under the permit. Dougherty fully performed his part of the agreement, and as a result of his efforts Ochsner secured the permit. Ochsner, although frequently promising to do so, failed to sign the written agreement which admittedly embodied the full agreement between the parties. In 1923, Dougherty, after some negotiations, with Ochsner, voluntarily reduced his 10 per cent interest to 5 per cent. In August of the same year, Ochsner, who, under his agreement with Dougherty, had full control over the permit, assigned the permit to the Coast Land Company, reserving to himself an overriding royalty of 7½ per cent of all oil or gas produced from the so-called discovery area, referred to as the "A" royalties, and 2½ per cent from the balance of the area, referred to as the "B" royalties—a percentage mathematically less than the 5 per cent owned by Dougherty under his contract with Ochsner. Later on the same day, Ochsner assigned 6½ per cent of the "A" royalties and 2 per cent of the "B" royalties to Universal Oil Land Company, a corporation organized and owned by Ochsner and two of his friends. Several months later Ochsner assigned to the same company the 1 per cent of the "A" royalties and the ½ per cent of the "B" royalties still retained by him. The Coast Land Company assigned the permit to the General Petroleum Corporation, both it and its assignor being without knowledge of Dougherty's interest in the proceeds of the permit.

Upon discovering the true facts, Dougherty immediately notified all concerned of his claims, and commenced an action against Ochsner, Coast Land Company, General Petroleum Corporation, and the Universal Oil Land Company. The original complaint was predicated on the theory that as a result of a joint enterprise between Ochsner and Dougherty each owned one-half of the reserved royalties, a theory adopted by Dougherty's then counsel for the reason that he apparently felt that the unsigned written contract would be difficult to prove. After several amendments to the original complaint, and after all the defendants were fully informed that Dougherty's claim was predicated on the 10 per cent contract later reduced to 5 per cent, Ochsner died and the administratrix of his estate was substituted as a defendant. In 1928, pendente lite, Ochsner's two associates in Universal, organized appellant corporation—The California Kettleman Oil Royalties, Inc., and caused Universal to assign to it the 7½ per cent "A" royalties and the 2½ per cent "B" royalties. Ochsner's estate received some of the stock of this new corporation. Dougherty thereupon joined appellant as a party. Appellant cross-complained, seeking to quiet its title to the royalties. In his answer to this cross-complaint Dougherty clearly alleged the existence of his 5 per cent contract. Prior to trial, the action was dismissed as to all defendants except appellant. After a protracted trial judgment was entered in favor of Dougherty, the trial court holding that all royalties assigned to appellant were held in trust for respondent. On the appeal from that judgment, as already stated, the judgment was affirmed, the opinion being filed in May of 1937. Dougherty v. California Kettleman Oil Royalties, Inc., supra.

While the appeal was pending, the appellant, the administratrix of Ochsner's estate, and Universal, entered into a written agreement concerning the division of the royalties among themselves. From that agreement it appears that Ochsner's estate owned some of the stock of Universal, and that the corporation was desirous of securing that stock; that Universal and appellant had never claimed title to the 1 per cent of "A" royalties and ½ per cent of "B" royalties assigned to Universal by Ochsner, but had in fact executed an agreement declaring these were held in trust for Ochsner; that appellant had borrowed $800,000 from the General Petroleum Corporation and had assigned to that company as security by way of pledge the 6½ per cent of "A" royalties and 2 per cent of "B" royalties held by it; that a large sum of money had accrued on these royalties; that the three contracting parties were desirous of segregating their respective interests in these royalties. The agreement recognizes that of the original 7½ per cent-2½ per cent royalties, Ochsner's estate is the owner of 1 per cent of the "A" royalties and ½ per cent of the "B" royalties. In addition, in consideration of the estate transferring to Universal the stock owned by the estate in Universal, that company and appellant agreed to transfer to the estate 27 per cent plus of the total "A" royalties, and 25 per cent plus of the total "B" royalties, subject to a proportionate amount of the indebtedness owed to General Petroleum Corporation. Under this agreement, as among the three contracting parties, there was transferred to the Ochsner estate 40 per cent plus of the "A" royalties and 45 per cent of the "B" royalties, both accrued and to accrue. This is roughly 42 per cent of the total royalties. The Ochsner estate recognized that the balance of the royalties—roughly 58 per cent—as against the estate were the property of appellant. The agreement also recognized the existence of Dougherty's judgment then on appeal, and provided that in the event it finally should be determined that Dougherty owned any portion of these royalties, then each of the contracting parties should transfer and assign to Dougherty a proportion of the royalties, reserving to the administratrix the right to contest the application of that judgment to the portion of the royalties owned by her. This agreement was duly submitted by the administratrix of Ochsner's estate to the superior court sitting in probate and that court on September 2, 1936, made and entered its order authorizing and directing the administratrix to make, execute and perform the agreement.

It should be mentioned that the estate of Ochsner at all times claimed the 1 per cent royalty on the "A" area and the ½ per cent on the "B" area adversely to both appellant and respondent, and was contending that the judgment in the pending case, even if affirmed, would not be binding as to these royalties.

After the agreement above described had been entered into, and while the appeal was still pending, Dougherty and Ochsner's estate entered into a written agreement whereby they settled their dispute by agreeing to divide the total royalties claimed by the estate between themselves. This agreement is the contract upon which appellant herein relies as constituting the release of one joint tort feasor, which legally released it from any liability to respondent.

The agreement recites that the Ochsner estate claims an interest in the oil royalties payable from General Petroleum Corporation; that Dougherty claims a 5 per cent royalty interest in all oil or gas produced under the permit (which claim is larger than all royalties reserved by Ochsner); that as against appellant the superior court has decreed that Dougherty owns all of said royalties; that said judgment is pending on appeal; that the estate claims that the judgment in that action, if affirmed, would not affect the estate's claim to 1 per cent of the "A" royalties and ½ per cent of the "B" royalties; that the estate and Universal and Kettleman have settled their dispute by dividing the royalties; and then states that: "it is the desire of the parties hereto (the estate and Dougherty) to adjust their interests as between each other * * * so that each may hold and own separate and apart from any claim of the other a definite royalty interest in and to all oil or gas and other hydro-carbon substances produced from said lands or allocated thereto, and in and to all accumulated royalties and moneys, now in the possession of said General Petroleum Corporation of California."

Next follows the provisions for the division between these two parties of the royalties transferred to the estate under its agreement with Kettleman and Universal. The estate agreed to transfer to Dougherty 16 per cent plus of the "A" royalties and 18 per cent plus of the "B" royalties, leaving in the estate 24 per cent plus of the "A" royalties and 27 per cent plus of the "B" royalties. The contracting parties recognized and confirmed each other's ownership of the royalties as so divided, and each agreed to assume a proportion of the indebtedness due General Petroleum Corporation. It was expressly provided that the agreement should have no effect upon the then pending litigation between Dougherty and Kettleman. This agreement was also submitted to the superior court sitting in probate by the administratrix of Ochsner's estate, and that court made and entered its order authorizing and directing the administratrix to make, execute and perform the agreement.

A few days after the decision of this court on the appeal had become final, the appellant, on July 8, 1937, filed its motion under section 675 of the Code of Civil Procedure asking the trial court to make an order directing the clerk to enter satisfaction of the final judgment on the ground that the judgment had been satisfied in fact. Upon denial of the motion this appeal was taken.

On this appeal it is the theory of appellant that the action prosecuted to final judgment by Dougherty against appellant was upon a cause of action ex delicto; that Ochsner and Universal, appellant's assignor, were joint tort feasors; that when Dougherty settled with the Ochsner estate and released the estate from liability, he was releasing one of two joint tort feasors; that under the law of California the release of one of two or more joint tort feasors releases all, and that Dougherty is now estopped from claiming that the estate was not in fact at fault and not liable for the injury; that the legal effect of the agreement was to release appellant from the judgment.

[1] The rule that a release of one of two or more joint tort feasors operates as a release of all is well settled in this state. The rule and the reasoning upon which it is based have frequently been stated. Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 4 P. 1165; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704; Flynn v. Manson, 19 Cal.App. 400, 126 P. 181; Hawber v. Raley, 92 Cal.App. 701, 268 P. 943; Bee v. Cooper, 217 Cal. 96, 17 P.2d 740. These and other cases that could be cited, disclose that the theory behind the rule is that there can be but one compensation for the joint wrong; that each joint tort feasor is responsible for the whole damage, and that once the injured party is paid for the injury he has suffered by any one of the wrongdoers, his cause of action is satisfied and his right to proceed against the others is at an end; or, stated another way, if the payment is, in law, a satisfaction of the claim against one, it is a satisfaction of the entire claim and necessarily releases all. Several of the cited cases emphasize, and properly so, that the claim against joint tort feasors is unliquidated, and, therefore, the payment of any sum, however small, in consideration of a release of that claim, operates as full compensation for that wrong. Basically, the rule is intended to prevent double compensation for the injury.

These principles were clearly stated and properly applied by this court in Bee v. Cooper, supra,—a case strongly relied upon by appellant on the present appeal. In that case, seven former directors of a corporation and other participating parties were sued for their alleged fraudulent disposition of the assets of a corporation pursuant to an alleged fraudulent conspiracy. The complaint alleged the fraud in detail, and it was further alleged that as a result of such fraud each of the defendants secured a portion of the diverted assets. The plaintiffs were not seeking restitution of specifically described diverted assets, but were seeking damages for the fraud.

The complaint also alleged that after the commencement of the action five of the seven directors had returned the respective amounts each had received out of the fraudulent deal, and that, in return, plaintiffs had agreed to settle and dismiss the action as to them. On appeal this court held that all the original defendants were joint tort feasors; that the agreement to release five of the defendants constituted the release of all of the joint tort feasors; that the release of one or more releases all; that the basis of the rule is that a plaintiff can have but one compensation for the wrong suffered; that when a plaintiff releases one or more joint tort feasors he announces that he has received satisfaction for the injury complained of, and he cannot secure double payment for the single wrong. After pointing out that the joint tort feasor rule has no application to joint contract debtors (sec. 1543 of the Civ.Code) the court held that the particular action was not one in equity to recover corporate assets, but one predicated upon a charge ex delicto for damages for fraudulently conspiring to divert corporate assets.

[2] In our opinion, the rule and theory of Bee v. Cooper, supra, and the other cases cited by appellant, have no application to the facts of the instant case, for the reason that the allegations of the complaint, the theory of the parties on the trial and on appeal, and the rationale of the opinion of this court, clearly demonstrate that basically the action sounds in contract and not in tort. Dougherty was not seeking damages based upon the fraud of appellant, but was seeking to have it determined that the appellant held the title to the royalties in trust for him. That action was basically predicated upon respondent's written but unsigned contract with Ochsner. The contract was the sine qua non of the cause of action.

A reading of this court's opinion on the prior appeal conclusively demonstrates that the cause of action sounds in contract.

In that opinion, after discussing the findings and complaint, and after holding that the action was not one for the recovery of possession or quieting title to *real estate* within the meaning of article 6, section 5 of the state Constitution, and after holding that the action was page 80, 69 P.2d page 166, "an equitable action to enforce a trust", it is pointed out that the main question involved (which is discussed at length) was whether the written but unsigned contract was unenforceable because of the statute of frauds. It was held that the appellant, under the facts, was estopped to plead the statute of frauds, and that the contract was enforceable. One of the main arguments of appellant on that appeal was that even if the contract was enforceable against Ochsner, the covenant contained therein to pay Dougherty 5 per cent of the oil or gas produced under the permit was a mere personal covenant not binding on the assignees of Ochsner. It was held that this covenant, i. e., this contract, was enforceable in equity as against assignees with notice. The entire emphasis of the opinion is that the contract between Dougherty and Ochsner was enforceable as against appellant.

Again page 82, 69 P.2d page 167, the court points out that under the contract Ochsner had the legal right to deal with the permit, except that under the terms of that contract he was legally bound to reserve and protect the percentage he had already assigned to Dougherty; that when "Ochsner assigned the permit to the Coast Land Company reserving a percentage that is mathematically less than the percentage he had already assigned to Dougherty, the percentage reserved was the property of Dougherty". In other words, at that moment Ochsner became trustee of a trust—an express trust—predicated upon the terms of the contract. The transfer of the trust property to Universal and by it to appellant constituted clear breaches of the contractual duty owed Dougherty, and the assignees took subject to the terms of that contract.

[3-5] It is true that under the facts of the case Ochsner and appellant acted fraudulently in concealing the existence of the Coast Land Company deal from Dougherty, and in the manner in which they dealt with the royalties. These facts are alleged in the complaint and recounted in the opinion of this court as part of the facts of the case. The cause of action, however, was not predicated on that fraud. It would have existed whether or not such actual fraud was present. It is also true that under the pertinent provisions of the Civil Code (sec. 2228 et seq., see particularly sec. 2234) it is a fraud upon the beneficiary for a trustee to transfer trust property to another without protection and in violation of the beneficiary's rights. There can be no doubt that Dougherty could have sued Ochsner and appellant for damages for this and the other frauds, but the point is he did not, but elected to sue for the enforcement of his contract with Ochsner. It is elementary that a person injured under circumstances where he may sue in either tort or contract, may waive the tort and sue on the contract. Stanford Hotel v. Schwind Co., 180 Cal. 348, 181 P. 780; Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990. These same cases establish that the mere fact a pleading contains allegations of fraud does not convert a contract action into a tort action.

[6] There are other factors involved which conclusively demonstrate that the joint tortfeasor rule has no application to this case. Under the cause of action here pleaded, Ochsner, Universal and appellant were not each jointly liable for the entire claim of Dougherty. Appellant, as the sole defendant, was liable only for those royalties to which it had the legal title. If the true facts were, as contended by Ochsner's estate, that Ochsner had assigned but 6½ per cent of the "A" royalties and 2 per cent of the "B" royalties to appellant, and had reserved the balance of the royalties in himself, in the action against appellant, under the cause of action as pleaded, the court could only have decreed that appellant was trustee of the portion of the royalties assigned to it. There would have been no possibility of Dougherty recovering his full claim against appellant. Under the supposed state of facts, each defendant would be liable only for the portion of the royalties claimed by it. This obviously demonstrates that the action was not one for damages for fraud, but was predicated upon an express contract. All that respondent was seeking to recover from appellant were the royalties claimed by it. Under the form of action actually brought there was no possibility of double compensation to Dougherty. Respondent was merely seeking to establish his claim, based on contract, to specific property. In substance and effect it was an action to

quiet title to the royalties, the respondent using the mechanism of an action in equity to establish a trust as to specific property to accomplish that result.

Appellant concedes, as it must, that during the trial it strenuously urged that the action was one based on contract; that on the appeal, down to the denial of the petition for rehearing, it was urged by both parties that the action sounded in contract. It contends that it was not until the opinion was filed that it learned for the first time the action was in fact one in tort. But as already pointed out, the gravamen of the action was the breach of the contract between Ochsner and Dougherty, and that is what the opinion heretofore filed clearly and unequivocally holds.

Appellant advances many other ingenious and highly technical arguments in support of its contention that the cause of action sounds in tort. These need not be separately considered. They are all answered by the holding that the action sounds in contract.

The order appealed from is affirmed.

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13 Cal.2d 216

ENGELKING v. CARLSON et al.

S. F. 16099.

Supreme Court of California.

March 24, 1939.

1. Physicians and surgeons 🔑18(6)

In patient's malpractice action against surgeons to recover for "foot drop" caused by severance of nerve during operation, where expert testimony showed that in such type of operation, the nerve is severed in 5 to 9 per cent. of the cases even where proper skill is exercised, doctrine of res ipsa loquitur did not apply.

2. Physicians and surgeons 🔑14(4)

A physician is required only to have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care in applying such skill and learning in the treatment of patients.

3. Physicians and surgeons 🔑18(8)

Whether a physician has exercised the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality, in a particular case, can be established only by expert testimony.

4. Physicians and surgeons 🔑18(8)

Expert evidence whether a physician has exercised the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality is conclusive where the matter in issue is one within knowledge of experts only and not within common knowledge of laymen.

5. Physicians and surgeons 🔑18(6)

Negligence of a physician will not be presumed but must be affirmatively proved.

6. Physicians and surgeons 🔑18(8)

In absence of expert testimony to the contrary, a physician will be presumed to have exercised ordinary care required of him in treating his patient.

7. Physicians and surgeons 🔑18(9)

In patient's malpractice action against surgeons to recover for "foot drop" caused by severance of nerve during operation, where uncontradicted expert testimony showed that such nerve is severed in 5 to 9 per cent. of operations of the type which patient had undergone, evidence was insufficient to raise jury question as to surgeons' negligence.

SEAWELL, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Malpractice action by Charley H. Engelking against F. J. Carlson and another, surgeons. From adverse judgments, plaintiff appeals.

Affirmed.

Prior opinion, 80 P.2d 96.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Call & Stearns, of San Mateo, amici curiæ.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for respondents.

Hartley F. Peart, Howard Hassard, and Bronson, Bronson & McKinnon, all of San Francisco, amici curiæ.

EDMONDS, Justice.

Each of the defendants in this case is a duly licensed and practicing physician and surgeon who has been sued by the plaintiff for physical injuries alleged to have been sustained as the result of his negligence in the performance of an operation. At the conclusion of plaintiff's case a nonsuit was granted as to defendant Ream, and after hearing the evidence presented by the defendant Carlson, the trial judge directed a verdict in his favor. The appeal is from the judgments which followed the order and verdict.

Dr. Carlson, with the assistance of Dr. Ream, operated upon plaintiff for the purpose of correcting an instability of the left knee. The facts concerning this operation are not disputed. It appears that the operative work consisted of the repair of the exterior lateral and posterior crucial ligaments, which had been torn and ruptured as the result of a fall. The former of these structures runs alongside the knee where the femur comes in contact with the fibula; its function is to hold the knee steady and prevent lateral or sidewise movement. The other runs from the femur to the tibia, and prevents an excess of gliding in the knee. The operation involved the removal of the damaged portions of the ligaments, and the substitution therefor of new material obtained by cutting sections from the fascia lata and the biceps muscle of the left leg. It was performed while plaintiff was unconscious and relaxed under the influence of an anaesthetic.

After the operation plaintiff began to suffer from a "foot drop", that is, an inability to control the lifting and sidewise movement of the left foot, and also from a numbness in an extensive area of the lower left leg. Upon examination by another physician it was found that the external peroneal nerve in that leg was severed in the vicinity of the knee. This nerve runs down the side of the leg below the knee and affects the muscles which raise the foot. A severance of it, according to the medical testimony, will produce the difficulties experienced by plaintiff.

Dr. Carlson was the only physician called by the plaintiff who testified concerning what was done by him and Dr. Ream and the procedure ordinarily employed by surgeons performing an operation of the kind submitted to by the plaintiff. Admittedly, the peroneal nerve, the position of which does not vary normally, is in the operative field. Although this nerve can be isolated, said Dr. Carlson, it is not the practice to do so in operations of this kind. Accordingly, after he made the necessary incision and the cutting progressed through the skin, the fascia, and other structures down to the bone, the surrounding muscles and tissues were drawn aside and held back by blunt retractors, which were adjusted by him and maintained in position by Dr. Ream. Dr. Carlson handled all of the sharp instruments; Dr. Ream did nothing except to hold the retractors.

After the operation was completed a check was made to see whether the nerve was cut. This was done by looking at the tissues which had been dissected and all of them were identified. The nerve was not sutured, said Dr. Carlson, because, in his opinion, that was not required. Asked if "you can state positively that neither you nor Dr. Ream severed this nerve", Dr. Carlson replied that he could not say, although he did not do any cutting "in the neighborhood of it". "The severance of this nerve is a problem that is one of the difficulties of surgery." Although it does not ordinarily happen, he continued, it is something which may occur. "The nerve can be injured by pulling on a blunt instrument alone, and the problem as to whether or not that was true was our first problem after the operation."

Asked a hypothetical question concerning what method would ordinarily be employed "by a physician and surgeon possessing the reasonable degree of skill and knowledge possessed by others of his profession in good standing in the East Bay Area" to protect the peroneal nerve during such an operation, Dr. Carlson answered: "To retract it with its protective tissue." However, he said, in doing so it might be stretched with temporary loss of function. He also very frankly said that although the peroneal nerve is not difficult to locate and identify, a surgeon can miss it and thereby cause injury. Several instances where that had occurred were mentioned by him and his testimony in this regard was corroborated by two well-qualified surgeons who were called as witnesses in his behalf. One of them said that in average surgical practice the peroneal nerve is cut in five per cent of operations such as that undergone by the plaintiff; another stated that it is severed even by those using care and skill in over five per cent of the cases, some authorities claiming that the number runs to eight or nine per cent. Each of these witnesses declared that it is standard technique to leave the nerve covered in its own protective tissue rather than to expose it because exposure is more likely to cause injury; to retract the nerve with the tissues is the most conservative method.

The plaintiff contends that with this evidence before the jury the trial judge should not have granted a nonsuit or directed a verdict. He insists that the evidence offered by him together with the reasonable inferences legitimately deducible therefrom, would support a verdict in his favor upon the theory (1) that the condition of the left foot and leg subsequent to the operation was due to the severance of the peroneal nerve; (2) that this nerve became severed in the course of the operative work upon the ligaments; and (3) that such severance was the result of negligence in the performance of the surgical work.

The first of these propositions is supported by expert evidence introduced by the plaintiff, and is not controverted by the defendants. The second proposition also requires no consideration, because the defendants take the position that for the purpose of passing upon the particular rulings of the trial court under review, "the sufficiency of plaintiff's evidence upon this point and the reasonableness of his inference that the nerve became severed in the course of the operation, may be assumed". The third proposition states the principal controversial point. Conceding that the evidence stands undisputed, the plaintiff contends that it justifies an inference of negligence under the doctrine of res ipsa loquitur. He insists that he was unconscious; that the defendants had charge of the operation; that the result suffered by him does not ordinarily occur; and that in the absence of an explanation by the defendants justifying a verdict in their favor upon the ground that they were not negligent, they are liable to him in damages.

[1] If this were the rule, as a practical proposition, no surgeon could ever operate without being an insurer of a medically satisfactory result. The medical testimony in this case shows without any contradiction whatever that although the severance of the peroneal nerve is something which ordinarily does not occur in operations such as that performed by Dr. Carlson, yet even when the precautions prescribed by the approved technique are taken, there is a break of or injury to it in between five and nine per cent of the cases. There is nothing startling about such evidence and it affords no basis for the recovery of damages against a surgeon. Probably in every operation there is some hazard which the medical profession recognizes and guards against but which is not always overcome. To say that the doctrine of res ipsa loquitur allows the recovery of damages in every case where an injury does not ordinarily occur, would place a burden upon the medical profession which the law has not heretofore laid upon it. Moreover, such a rule is not justified by either reason or authority.

[2-6] The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Whether he has done so in a particular case is a question for experts and can be established only by their testimony. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Patterson v. Marcus, 203 Cal. 550, 265 P. 222. And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive. William Simpson C. Co. v. Ind. Acc. Com., 74 Cal.App. 239, 240 P. 58; Johnson v. Clarke, 98 Cal.App. 358, 276 P. 1052. Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698.

[7] It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. For example, it has been applied where a sponge was left in the body of the patient after closing an operative incision (Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740); where the patient was burned by the application of hot compresses or heating apparatus (Timbrell v. Suburban Hospital, 4 Cal.2d 68, 47 P.2d 737; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; McCullough v. Langer, 23 Cal.App.2d 510, 73 P.2d 649); where the patient was burned through the operation of an X-ray machine (Moore v. Steen, 102 Cal.App. 723, 283 P. 833; Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107); and where the patient sustained an infection through the use of an unsterilized hypodermic needle. Barham v. Widing, 210 Cal. 206, 291 P. 173. In each one of these situations the rule was applied because common knowledge and experience teaches that the result was one which would not have occurred if due care had been exercised. But the present case shows an entirely different situation. Here what was done lies outside the realm of the layman's experience. Medical evidence is required to show not only what occurred but how and why it occurred. That evidence establishes beyond question not only that the peroneal nerve may be injured even where due care is used but that this unfortunate result invariably occurs in a limited number of cases. The doctrine of res ipsa loquitur is, therefore, entirely inapplicable and no malpractice has been proved.

The judgments are, and each of them is, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; HOUSER, J.; SHENK, J.; LANGDON, J.

SEAWELL, Justice.

I dissent.

I am of the view that the decision rendered by the District Court of Appeal, First Appellate District, Division 2, Nourse, P. J., 80 P.2d 96, correctly states the law of the case and it cannot in principle be distinguished from Brown v. Shortlidge, 98 Cal.App. 352, 277 P. 134; Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Thomsen v. Burgeson, 26 Cal.App.2d 235, 79 P.2d 136, and Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740, and a number of the decisions of this court where the doctrine of res ipsa loquitur has been considered in its relation to kindred situations. The doctrine is not novel in its application to cases of this kind. It is applied in cases in which the person is charged with negligence by reason of his superior knowledge and exclusive control of the agency which caused the injury. All that the law requires, is that the defendant charged with negligence rebut the presumption of negligence by giving a reasonable explanation of the cause of injury. The application of the doctrine should not be arbitrarily limited to certain fields and extended to others when there is no good reason for making a distinction. It is difficult to understand why the cases cited herein can be regarded as stating the true principle if the doctrine, in the instant case, is sound.

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13 Cal.2d 158

LONG BEACH DRUG CO. v. UNITED DRUG CO.*

L. A. 16748.

Supreme Court of California.

March 20, 1939.

Rehearing Denied April 19, 1939.

1. Specific performance ⇨28(1)

A greater degree of certainty is required in terms of agreement which is to be specifically executed in equity than is necessary in contract which is basis of action at law for damages.

2. Injunction ⇨57

Specific performance ⇨25, 28(1)

A valid contract may be unenforceable either by direct decree of specific performance or indirectly by prohibitory injunction, by reason of its inherent nature or lack of necessary degree of definiteness.

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*Rehearing denied 89 P.2d 386.

3. Contracts 🔑10(2)

A contract by which retail drug company was appointed special selling agent for wholesale drug company contained implied covenant of wholesale company to sell and of retail company to buy and keep on sale a supply of wholesale company's products. Civ.Code, §§ 1655, 1656.

4. Principal and agent 🔑9

The procuring of advantageous retail outlet for sale of wholesale drug company's products and keeping off the open market during continuance of agreement wholesale company's stock owned by retail drug company was sufficient consideration for agency agreement by which retail company handled wholesale company's products.

5. Principal and agent 🔑9

An agency agreement for sale of drugs supported by sufficient consideration when made in 1909 was not rendered invalid by fact that agency later became so burdensome to one of the parties that it repented of its bargain and sought to repudiate agreement.

6. Contracts 🔑54(1)

The sufficiency of purported consideration for contract must be determined from facts of transaction as they existed when contract was made rather than by subsequent developments.

7. Contracts 🔑9(3)

Generally, contract is not fatally defective for failure to specify a time presently definite for its termination.

8. Contracts 🔑9(3)

An agency agreement between wholesale drug company and retail drug company providing that retail company's exclusive right to sell wholesale company's drugs should endure so long as retail company retained wholesale company's stock and upheld all of wholesale company's products to full list retail prices and confined sales of products to retail company's consumers was not invalid for uncertainty as to time of duration in view of practical construction by the parties that contract was valid. Civ.Code, §§ 1643, 3541.

9. Contracts 🔑170(1)

The construction placed on contract by parties thereto is persuasive, and practical construction made by them is cogent evidence of what they intended.

10. Injunction 🔑58

Under statutory law, equity will not interfere to prevent breach of negative covenant of contract also containing affirmative covenant which is of such nature that it cannot be specifically enforced by judicial decree. Civ.Code, § 3423, subd. 5; Code Civ.Proc. § 526, second subd. 5.

11. Specific performance 🔑75

Courts of equity will not decree specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will require protracted supervision and direction.

12. Injunction 🔑58

Where affirmative covenants of agency agreement by which retail drug company was to sell wholesale drug company's products were specifically unenforceable as requiring protracted supervision, retail company was not entitled to a prohibitory injunction to restrain wholesale company from breaching its negative covenant not to sell its products to other retail companies. Civ. Code, § 3423, subd. 5; Code Civ.Proc. § 526, second subd. 5.

13. Appeal and error 🔑478

Supersedeas proceeding to stay operation of prohibitory injunction pending appeal and motion to dismiss temporary stay issued on hearing of order to show cause would be dismissed where determination of appeal on merits rendered moot all questions presented by proceeding and motion.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by the Long Beach Drug Company, a California corporation, against the United Drug Company, a Delaware corporation, for an injunction enjoining the defendant from selling drug products to any dealer other than the plaintiff. From the decree, the defendant appeals.

Petition for supersedeas and motion to dismiss a temporary stay dismissed; judgment reversed.

Rehearing denied; CURTIS, HOUSER, and EDMONDS, JJ., dissenting.

Joseph Scott, and J. Howard Ziemann, both of Los Angeles, for appellant.

Earl E. Moss, of Los Angeles, and James E. Pawson, of Long Beach, for respondent.

SHENK, Justice.

The questions presented upon this appeal concern the validity and scope of a written agreement, and the right of plaintiff to permanently enjoin its violation by defendant, or to procure other relief. The word "defendant" is used to refer to both defendant United Drug Company, a Delaware corporation, and its predecessor, United Drug Company, a New Jersey corporation.

By the written agreement plaintiff was appointed the special and exclusive agent in Long Beach for the sale of defendant's Rexall remedies and other drug products. The contract was made on April 16, 1909, and was performed by the parties until the fall of 1936, when defendant gave notice that it would no longer be bound. In October, 1936, defendant started, without plaintiff's consent, to sell to other drug stores in Long Beach, and on May 10, 1937, it refused to make further sales to plaintiff. Plaintiff then brought this action and, upon trial of the cause, was awarded the relief for which it prayed, to-wit: a decree which (1) permanently enjoined defendant from directly or indirectly selling Rexall products to any dealer in Long Beach other than plaintiff and certain sub-agents; (2) ordered an accounting to ascertain all damage suffered by plaintiff from sales made in violation of the contract; and (3) ordered judgment for plaintiff for all sums found to be due it on the accounting, together with costs. Defendant appealed from this decree.

The written agreement is in words and figures as follows:

"Agreement made this 16th day of April in the year one thousand nine hundred and nine between the United Drug Company, a corporation organized under the laws of the State of New Jersey, and having its office and laboratory in the City of Boston and State of Massachusetts, party of the first part, and Long Beach Drug Co. of Long Beach, California party of the second part.

"Whereas, the party of the first part is in the business of making and selling the Rexall Remedies and other products.

"Whereas, the party of the second part has purchased from the party of the first part a portion of its Capital Stock, and desires to be appointed special selling agent of the party of the first part in the city of Long Beach.

"Now, therefore, this agreement witnesseth, that the parties hereto, in consideration of the sum of one dollar, by each to the other paid, the receipt whereof is hereby acknowledged, hereby agree as follows:

"First. The party of the first part hereby constitutes and appoints the party of the second part its special selling agent in above named place, and agrees not to sell its products to any other dealer in said place so long as the party of the second part shall perform the terms of this agreement.

"Second. The party of the first part hereby agrees that should the party of the second part become dissatisfied with the agency given him by this contract, or should the party of the second part feel that any misrepresentation has been made him by the party of the first part, or his representative, he can, by notifying the party of the first part, sell and the party of the first part hereby agrees to purchase, any capital stock of the United Drug Company that the party of the second part may hold, at its par value plus seven percent interest on the same since the date of issue, less any dividends that may have been applied, and the party of the first part furthermore agrees that in the event of the party of the second part notifying the party of the first part of his desire to sell his stock, the party of the first part will, in addition to buying his capital stock, take back any and all merchandise that the party of the second part may have on hand at the price such merchandise may have cost the party of the second part.

"Third. The party of the first part further agrees to keep a record of all advertising and other expenses directly charged to the territory of the party of the second part, and to credit said record with all purchases, said record to be open to inspection of the party of the second part.

"Fourth. The party of the second part agrees to uphold all of the products of the party of the first part to the full list retail prices set by the party of the first part, and further agrees never under any circumstances to sell or allow said products to be sold to the wholesale or retail dealers except at full retail price.

"Fifth. The party of the second part further agrees to confine the sale of the products of the party of the first part to his own retail store and to consumers only, and it is mutually understood and agreed that in the event of any violation of the terms of articles fourth and fifth of this agreement by the party of the second part or its servants or agents the party of the first part shall thereupon become entitled to and the party of the second part shall pay the sum of one hundred dollars as liquidated damages for each and every such violation.

"Sixth. In the event of the party of the second part owning the preferred stock in the United Drug Company, it is agreed by the party of the first part, if it is mutually agreeable, to waive the three years' redemption clause inserted in the preferred stock certificate, so long as the territory controlled by the party of the second part shall prove profitable to the party of the first part, and so long allow him to control said stock.

"Seventh. It is further agreed that the party of the second part will, in case he desires to sell the United Drug Company stock, first offer it to the executive committee of the party of the first part, giving ten days' notice.

"(Seal of Long
Beach Drug Co.)

"United Drug Company (Seal)

"Louis K. Liggett, General Manager

"Long Beach Drug Co. (Seal)

"All conditions that exist in connection with this agreement are above stated."

[1, 2] A primary question is that of the validity of this agreement. Is it void for uncertainty? If not, then is it capable of enforcement by a court of equity? "That a greater degree or amount of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages" has often been declared. Durst v. Jolly, 35 Cal.App. 184, 169 P. 449; Noble v. Reid-Avery Co., 89 Cal.App. 75, 79, 264 P. 341; Long v. Sacramento Valley, etc., Co., 127 Cal.App. 715, 723, 16 P.2d 337; Pascoe v. Morrison, 219 Cal. 54, 58, 25 P.2d 9; Janssen v. Davis, 219 Cal. 783, 787, 29 P.2d 196. The contract may be valid and yet because of its inherent nature or because it lacks the necessary degree of definiteness may be unenforceable either by a direct decree of specific performance, or indirectly by means of a prohibitory injunction.

[3-6] Testing first for validity, we find that the contract made by these parties was valid. By its terms plaintiff was appointed the special selling agent for defendant in Long Beach. Plaintiff expressly agreed to uphold all of defendant's products to the full list retail prices and to confine sales to its own retail store and to consumers only. Defendant agreed not to sell to any other dealer in the city so long as plaintiff should perform. Clearly implied in these express provisions was a covenant on the part of defendant to sell, and upon the part of plaintiff to purchase and keep on sale a supply of defendant's products sufficient to meet the demands of the retail trade for these particular remedies. Civ.Code, §§ 1655, 1656. At the time this agreement was made, plaintiff's drug store afforded a desirable outlet for defendant's products. Long Beach had a population of only about 18,000 inhabitants, and the store was well and centrally located. Furthermore, defendant was then endeavoring to effect a refinancing project, the success of which was vitally important to it, and to aid the plan plaintiff had purchased some $200 worth of defendant's corporate stock. To support the market for such stock it was essential that as little as possible be put up for public sale. Hence the provision of the agency agreement which required plaintiff, in event of dissatisfaction, to give defendant an opportunity to repurchase, and the covenant of defendant that in the event of such repurchase it would also take back at cost price any merchandise held by plaintiff. By the agreement as a whole defendant not only insured that so much of its stock as was held by plaintiff would be kept off the market during the life of the agency, but it also procured an advantageous outlet for the sale of its products in Long Beach. This was a good and sufficient consideration in the year 1909, and it is immaterial to the validity of the contract that by reason of the rapid growth of Long Beach and other factors, the agency later became so burdensome to defendant that it repented of its bargain and sought to repudiate it. The sufficiency of a purported consideration for a contract must be determined from the facts of the transaction as they existed when the contract was made rather than by subsequent developments. Parsons v. Cashman, 23 Cal.App. 298, 137 P. 1109, 1111; Johnson v. Studley, 80 Cal.App. 538, 560, 252

P. 638; Gosnell v. Lloyd, 215 Cal. 244, 10 P.2d 45; 6 Cal.Jur., sec. 116, p. 167.

[7, 8] It is the general rule that a contract is not fatally defective merely because it does not specify a time presently definite for its termination. 13 C.J., p. 271. While the agreement here does not state a definite term, it is not wholly silent with respect to its duration. It provides that the exclusive selling right of plaintiff is to endure so long as plaintiff "shall perform the terms of this agreement"; that is, so long as plaintiff shall, in addition to observing the covenant with respect to sale of stock, etc., "uphold all of the products" of defendant to the full list retail prices, confining the sale thereof to its "own retail store and to consumers only". Provisions such as this for the duration of an agreement are sufficiently certain and have frequently been declared valid. In Sutliff v. Seidenberg, 132 Cal. 63, 64 P. 131, 469, the agreement was to remain in force "as long as our goods find ready sale on this coast", and the court said it was not so vaguely expressed as to be wholly unascertainable. In Noble v. Reid-Avery Co., supra, plaintiff agreed to "handle the output" of defendant's "welding-rods", it being understood at the time of the first order that plaintiff "should have the exclusive right to sell the goods and represent [defendant] in that part of California known as Southern California, as long as they were able to give faithful service and a business management to the trade and produce the trade that was warranted in the territory allotted to them, and no longer". [89 Cal.App. 75, 264 P. 342.] Upholding the validity of the contract, the court said: "Such provisions for the duration of the contract are sufficiently certain and valid. As a general proposition the failure of an executory contract to state a time presently definite for its termination does not render it void for uncertainty." This holding was approved in Great Western D. Products v. J. A. Wathen D. Co., 10 Cal.2d 442, 74 P. 2d 745, 746, where there was an agreement "that as long as the plaintiff purchases and continues to purchase from the defendant all of its John A. Wathen Distillery Company warehouse receipts for whiskey that it may require and sells and exploits in California said warehouse receipts and refrains from selling and exploiting warehouse receipts from any other distillery, the defendant will not sell in California any of the said warehouse receipts (for resale to investors) to any other person except one in San Francisco". The court held that the failure to specifically limit the duration of the contract did not fatally affect it and did not give rise to a right to terminate it at will without a liability for damages. See, also, Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P. 329; Wittmann v. Whittingham, 85 Cal. App. 140, 259 P. 63; Ehrenworth v. Stuhmer & Co., 229 N.Y. 210, 128 N.E. 108.

[9] A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if this can be done without violating the intention of the parties. Civ.Code, § 1643. An interpretation which gives effect is preferred to one which makes void. Civ.Code, § 3541. Moreover, the construction placed upon the instrument by the parties themselves is persuasive; the law recognizes that the practical construction made by them is cogent evidence of what they intended. Tennant v. Wilde, 98 Cal.App. 437, cases cited pages 453, 454, 277 P. 137, page 143; Burns v. Peters, 5 Cal.2d 619, 623, 55 P.2d 1182; Retsloff v. Smith, 79 Cal.App. 443, 452, 249 P. 886; Moore v. Superior Court, 114 Cal.App. 333, 299 P. 760. The undisputed facts of the present case leave no doubt as to the manner in which the parties construed the contract. They performed under it for a period of twenty-seven years without complaint of its lack of definiteness or intimation that it was void for uncertainty. At all times plaintiff carried a stock of defendant's products and sold them at full list price in its retail store. Defendant, on its part, filled plaintiff's orders and expressed no dissatisfaction with the representation it was receiving. The corporate stock which plaintiff held was never offered for sale or sold by it. The existence of plaintiff's exclusive agency was recognized and on occasions definitely ratified. It was recognized in 1925 in connection with the establishment of a subagency in Orange Center, Long Beach. On December 29, 1930, defendant wrote plaintiff saying: "This letter is for the purpose of giving you written assurance that in permitting the United Drug Company to place certain Sub-Agencies within the city of Long Beach, this act does not in any way abrogate your present Rexall Franchise." In January, 1931, a subagency was granted to L. E.

Stucker. Appended to the subagency agreement was the following supplementary provision, executed by the subagent and also by both plaintiff and defendant: "This Sub-Agency Agreement with L. E. Stucker and the United Drug Company is given with the understanding, and can be terminated upon thirty days notice if at any time the Long Beach Drug Company, the authorized agent, feels the said Sub-agency is detrimental to its business." Later two other subagencies were created.

From the year 1909 until 1923, the record shows there was a substantial yearly increase in the sales by plaintiff of defendant's products, whereas from 1923 until defendant's repudiation of the contract in 1936 there was a gradual decline. As against $1,639 for the year 1909, the 1923 sales totaled $19,927.07. Sales for the year 1934 declined to the low mark of $2,829.44. Between 1910 and 1920, according to the official census, the population of Long Beach rose from 18,809 to 55,593. Outside communities were included within the city area, and by 1930 there was an estimated population of 142,032. This rapid growth of the city, combined with the declining sales by plaintiff after the year 1923, made the agency contract increasingly disadvantageous to defendant. When defendant later acquired or became affiliated with the Owl Drug Company, and desired to use the four Owl Drug stores in Long Beach as outlets for its products, it simply notified plaintiff that it would no longer recognize the 1909 agreement. Between October, 1936, and December, 1937, it sold $10,604.70 worth of its products to the four Owl stores. It continued to sell to them and to some of the other stores until the date of judgment herein.

This recital of undisputed facts shows that the construction of the agreement as lawful and operative accords with the recognition which was given to it by the parties themselves for some twenty-seven years. The further fact that during the latter portion of that period the obligation became burdensome to defendant does not alter the purport and effect of the writing. We hold that the contract is valid.

The next question is whether plaintiff is entitled, under this valid contract, to the equitable remedy of prohibitory injunction. Plaintiff, by its complaint herein, did not ask the court for a direct decree compelling defendant to specifically perform the contract, but sought such relief indirectly by means of the injunction, the assumption being that if defendant were permanently restrained from selling to other dealers in Long Beach, it would continue to sell to plaintiff rather than abandon so lucrative a territory.

[10] Defendant contends that the prohibitory injunction will not lie, citing section 3423, subdivision 5 of the Civil Code, and section 526, second subdivision 5, of the Code of Civil Procedure, both of which provide that "an injunction cannot be granted * * * to prevent the breach of a contract * * * the performance of which would not be specifically enforced". In Anderson v. Neal Institutes Co., 37 Cal.App. 174, 173 P. 779, 780, this provision was construed and the doctrine was declared that where a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced by a judicial decree. While this declaration is contrary to the rule of the Restatement (Restatement, Contracts, sec. 380, p. 704), it is, by reason of the express statutory provision, the settled law of this jurisdiction.

The facts of the Anderson case are similar to those of the case at bar. There by written contract the defendant Neal Institutes had granted to plaintiff for a term of ninety-nine years the exclusive right to advertise and use the Neal remedies and method of treatment in the northern half of this state, and to use the name "Neal" in connection with such institutes as might be established in that territory. Defendant had further agreed to supply to plaintiff such medicines and advertising literature as he might require. Plaintiff established a Neal institute in San Francisco and thereafter by extensive advertising and personal care built up a valuable Neal business and good will. After both parties had performed under the contract for several years, defendant established a rival Neal institute in the same city, and refused to furnish any of its remedies to plaintiff. Plaintiff sought relief by way of prohibitory injunction and an accounting. A general demurrer to the complaint was sustained without leave to amend on the ground that an injunction could not properly be granted. Affirming this ruling, the District Court of Appeal declared that as the contract contained affirmative and implied negative covenants, and as it was of such a nature that specific performance could not be decreed, an injunction to prevent its breach would not lie. Said the court: "Where, as here, a contract contains both affirmative and negative stipulations, the authorities are in irreconcilable conflict upon the question whether equity will interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature, that it cannot be specifically enforced by a judicial decree. 2 High on Injunctions, § 1164. * * * But in this state the question was put at rest at the time of the adoption of the Civil Code by the terms of subdivision 5 of section 3423 (since incorporated in the Code of Civil Procedure [section 526]). * * * Subdivision 5 of section 3423 is free from ambiguity or uncertainty. It clearly declares as the law in this state the rule laid down in one of two opposing lines of authority. If there could be a doubt as to the intention of the Legislature in this regard, it is removed by an examination of the notes to section 1912 of Field's Proposed Draft of the Civil Code of New York, which section was practically adopted in this state, and by an examination of the notes to subdivision 5, § 3423, of the Civil Code Annotated, 1874, where the following authorities, cited as the foundation of that provision, declare that the court will not interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree of specific performance. Newbery v. James, 2 Mer. 446 [35 Eng.Reprint, 1011]; Williams v. Williams, 3 Mer. 160 [36 Eng. Reprint, 62]; Hamblin v. Dinneford, 2 Edw.Ch.(N.Y.) 529; Sanquirico v. Benedetti, 1 Barb.(N.Y.) 315. References in the case of Peterson v. McDonald, 13 Cal. App. 644, 110 P. 465, and of Farnum v. Clarke, 148 Cal. [610], 615, 84 P. 166, tend to support the view here taken."

The above holding was approved in Poultry Producers v. Barlow, 189 Cal. 278, 208 P. 93, 95. That case concerned a contract whereby the defendant agreed to "sell and deliver" to plaintiff, and the latter agreed "to purchase and market" such of the eggs produced by defendant's poultry during the years 1917, 1918, and 1919, as he intended to sell or market in any event, and further plaintiff agreed "to use its best efforts to resell said eggs at the best prices obtainable under market conditions". In May, 1917, in violation of this contract defendant sold to others than plaintiff all of the eggs produced by his flocks. Plaintiff sued for damages for breach of contract by reason of the sale of eggs to other purchasers, for specific performance of the covenant to sell and deliver eggs to it during the unexpired term covered by the contract, and for an injunction restraining defendant from making sales of his product to other persons. This relief was granted by the trial court. On appeal the judgment for recovery of damages was affirmed, but a reversal was ordered as to injunction and specific performance. This court, after an exhaustive review of the subject, affirmed the doctrine of Anderson v. Neal Institutes Co., supra. See, also, O'Brien v. O'Brien, 197 Cal. 577, 588, 241 P. 861; Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal.App. 431, 297 P. 73; Engemoen v. Rea, 8 Cir., 26 F.2d 576.

Seeking to distinguish the present case and to avoid application of the doctrine, plaintiff asserts that the instrument here contains only negative covenants. We cannot so view it. Clearly the contract is not wholly negative in character. In addition to the negative covenant of defendant to refrain from selling to dealers other than plaintiff, there are express and implied material affirmative covenants, notably an implied affirmative covenant on the part of defendant to sell to plaintiff as its special agent, and on the part of plaintiff an implied affirmative covenant to purchase from defendant and have available for resale a sufficient supply of its drug products to meet the demands of the retail trade, with the express covenant to "uphold all of the products * * * to the full list retail prices" set by defendant.

[11] Unless these affirmative covenants are of such a nature that they could be specifically enforced by a judicial decree, the trial court erred in granting the prohibitory injunction. Code Civ.Proc. § 526, second subd. 5; Civ.Code, § 3423, subd. 5, and cases, supra. That specific enforcement would not be allowed has already been intimated in the foregoing discussion, and it becomes evident upon a consideration of the nature of the stipulations. It is, as stated in Poultry Producers v. Barlow, supra, 189 Cal. at page 289, 208 P. at page 97, "the cognate rule that courts of equity will not decree the specific per-

formance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction. Stanton v. Singleton, 126 Cal. [657] 665, 59 P. 146, 47 L.R.A. 334; Pacific, etc., Ry. Co. v. Campbell-Johnston, supra [153 Cal. 106, 94 P. 623]; Crane v. Roach, 29 Cal.App. [584] 587 [156 P. 375]; Anderson v. Neal Institutes Co., supra. 'Courts of equity,' says the court in Pacific, etc., Ry. Co. v. Campbell-Johnston, 153 Cal. [106] 117, 94 P. [623] 628, 'only decree specific performance where the subject-matter of the decree is capable of being embraced in one order and is immediately enforceable. It will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require constant personal supervision and the oversight of it by the court.'" See, also, Pacific Electric Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 P. 623; Sheehan v. Vedder, 108 Cal. App. 419, 292 P. 175; Moore v. Heron, 108 Cal.App. 705, 292 P. 136; Chandler v. Hollingsworth, 96 Cal.App. 472, 274 P. 581; Richfield Oil Co. v. Hercules Gasoline Co., supra; Engemoen v. Rea, supra; 23 Cal.Jur., p. 480, sec. 43; Restatement, Contracts, sec. 371, p. 675.

[12] So, in the present case, to undertake to compel defendant to sell to plaintiff, and plaintiff to purchase from defendant and to uphold all products to the full list retail price set by defendant, over an indefinite term, would impose upon the court a duty well nigh impossible of performance. For this reason, if no other, the court would be constrained to deny equitable relief and to leave the parties to assert their legal rights under the contract. Further grounds urged in support of the contention that the contract is not susceptible of specific performance, to-wit: that it is unfair and lacks sufficient certainty a definite term, adequate consideration, and mutuality of remedy need not be discussed. It is clear that the contract is specifically unenforceable, and that therefore plaintiff is not entitled to a prohibitory injunction.

[13] This disposes of all points to be determined by the appeal on the merits. There are also under submission two proceedings, one a petition for supersedeas to stay operation of the prohibitory injunction pending the appeal, the other a motion to dismiss the temporary stay issued upon the hearing of the order to show cause. The determination of the appeal on the merits renders moot all questions presented in these proceedings.

The two proceedings must therefore be, and they are hereby, dismissed. The decree of the trial court is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.; HOUSER, J.

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13 Cal.2d 185

BERRY v. MAYWOOD MUT. WATER CO. NUMBER ONE.

L. A. 16924.

Supreme Court of California.

March 21, 1939.

Rehearing Denied April 20, 1939.

1. Appeal and error 🔑1099(7)

A decision on appeal that evidence will support a judgment for a party becomes the "law of the case" and is binding when the action comes before an appellate court on a second appeal on the same evidence.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Attorney and client 🔑166(3)

In attorney's action against a corporation for legal services, evidence sustained finding that attorney was originally employed to render all services under monthly retainer, including court work, and that attorney was entitled to no further compensation than had already been paid.

3. Appeal and error 🔑1170(7)

In attorney's action against corporation, tried by the court, to recover for legal services, where attorney testified that none of the items sued on had been paid, permitting corporation on cross-examination of attorney to question attorney as to receipt of money from corporation and to introduce receipts signed by attorney acknowledging receipt from corporation of various sums as attorney's fees, and checks of corporation payable to attorney, was not reversible error on ground that such evidence should have been introduced in corporation's case in chief. Code Civ.Proc. § 475; Const. art. 6, § 4½.

4. Corporations ⚿425(5), 426(9)

When a corporation, with knowledge of a contract, accepts performance and makes payments on account thereof, there is a ratification of the contract or an estoppel to deny its validity.

5. Corporations ⚿383

An attorney who sought to recover from corporation for legal services could not object that oral contracts under which corporation claimed he had been employed were not authorized by resolution of board of directors, where attorney who was corporation's legal adviser had not informed board that corporation should act by resolution.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Victor A. Berry against the Maywood Mutual Water Company Number One to recover for alleged legal services rendered by plaintiff to defendant. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 81 P.2d 472.

Victor A. Berry, of Culver City, and Earl Blodgett, of Los Angeles, for appellant.

H. W. Shaw, of Los Angeles, and Pearson C. Schaefer, of Glendale, for respondent.

SEAWELL, Justice.

Plaintiff sued to recover $2,150, alleged to be the reasonable value of legal services performed for defendant Maywood Mutual Water Company Number One, a corporation. The trial court found that plaintiff had rendered services for defendant under oral contracts by which he was to be paid a monthly retainer fee of $50, and, after September 12, 1934, an additional fee of $50 for each day spent in court, and that all sums due plaintiff had been paid. The plaintiff admits receipt of payments totaling $1,875, but contends that they did not cover the services which are the subject of the present action.

Judgment for plaintiff entered upon a jury verdict in the first trial of this action was reversed for error in an instruction. Berry v. Maywood Mutual Water Company, 11 Cal.App.2d 479, 53 P.2d 1032. The Appellate Court there said: "The evidence was conflicting, that of defendant being ample to support a verdict in its favor if such had been returned."

[1, 2] Upon the present appeal the plaintiff attacks the sufficiency of the evidence. He does not contend, however, that it differs from that introduced on the first trial. A decision on appeal that the evidence will support a judgment for a party becomes the law of the case, and is binding when the action comes before an appellate court on a second appeal on the same evidence. Raymond v. Glover, 144 Cal. 548, 78 P. 3; In re Baird's Estate, 193 Cal. 225, 233–239, 223 P. 974; McCormick v. Great Western Power Co., 134 Cal.App. 705, 26 P.2d 322; 2 Cal.Jur. 968. Furthermore, independent of the doctrine of law of the case, the evidence sustains the judgment for defendant.

Plaintiff was consulted by Mr. Goodway, president of the defendant water company, in April, 1933. Mr. Goodway and his fellow members of the board of directors, elected in April, 1933, were involved in a controversy with the former directors, who claimed to constitute the lawful board. In the present action plaintiff seeks to recover the sum of $2,100 for his services in five proceedings involving the right of the Goodway board to act as directors and to possession of the corporate property. Two of said actions established the authority of the Goodway board and its right to control the corporate property. For services in each of said two actions, plaintiff herein sues for $500. Another of the five proceedings was an application for a writ of prohibition made to the District Court of Appeal by the former directors and unsuccessfully resisted by plaintiff herein on behalf of the Goodway board. Somo v. Superior Court, 135 Cal.App. 584, 27 P.2d 790. For services in this proceeding also plaintiff herein sues for $500.

The remaining two of the five proceedings involved collections of water bills made by the former directors after the Goodway board claimed their authority had ceased. One of said cases had not been brought to trial when plaintiff ceased to be attorney for the company, while the other had been lost in the justice's court, and was awaiting trial on appeal to the superior court. Plaintiff claims to have done work in the former of these two cases of the reasonable value of $500, and in the latter, subsequent to the judgment of the justice's court, of the value of $100. An item of $50 for services for the month of May, 1935, brings the total sued for to $2150.

Goodway's testimony as to what took place when he consulted plaintiff in April, 1933, as embodied in the bill of exceptions, is as follows:

"He [plaintiff] said he could not tell how much litigation we might have and it would be hard to decide upon the pay; that he would do our work on a monthly basis as he was working for the City of Bell.

"I told him that would be all right, provided he did not want too big a salary, too big a monthly pay. He asked me how $50 a month would be. I told him as far as I was personally concerned, I thought it would be all right; that I would take the matter up with the balance of the board of directors and let him know the following day, which I did."

On September 12, 1934, plaintiff attended a meeting of the board of directors of defendant company. As counsel for the company he had received a check in the sum of $3,200 in payment of a judgment in its favor against a bank. According to testimony offered on behalf of defendant, Berry, the plaintiff herein, stated that he felt he was entitled to an additional fee of $200 for recovery of so large a judgment; that the contract for payment of the $50 retainer fee, made the preceding year, should not continue as the measure of his compensation.

The directors, after discussion, agreed to payment of the $200, but insisted that a definite arrangement be made as to future compensation for court appearances. The sum of $50 for each day's appearance in court was agreed upon with plaintiff as the amount he should receive in addition to the monthly retainer, according to testimony for defendant. The minutes of the meeting contain the following recital: "Mr. Berry proposed to handle cases still pending for $50 per day while same were on trial in court, and which after considerable discussion was finally agreed to by the board without a vote." The evidence shows payments of $50 thereafter made to plaintiff for court appearances.

On May 9, 1935, the secretary of defendant water company wrote plaintiff as follows: "The board of directors, at their meeting on the 8th inst. passed a resolution to discontinue your employment on a monthly salary basis, but to continue your employment in the cases now on file, to wit, the Gale case, the Strauss case, and the case against the old board, on a fifty ($50) per day basis for time in Court when the cases are tried and instructed me to notify you of their decision."

Plaintiff replied on the following day: "* * * I repudiate your resolution 100 per cent. In plain English I won't work on any such terms. You must remember that there are two parties to every contract of employment, the employer and the employee, and both must agree to the terms. You must also remember that a salary cannot be altered in the middle of the month."

Thereafter plaintiff did no work for defendant. In the trial herein he denied that he was originally employed under an agreement for a monthly fee of $50, to include litigation. He testified that Goodway on employing him said that if the company ever had any money it would pay him a good fee. He further testified that the arrangement for a monthly retainer fee was not made until February, 1934, which was after the major part of the services for which plaintiff herein sues had been performed, and that said fee was only "to cover advice and drawing small papers" and "it did not include any appearance in court." He denied that a further contract was made on September 12, 1934. He testified that payments totaling $475 made to him before February 1, 1934, were applied by him on his fee for resisting an injunction suit brought against the Goodway board by the former board in April, 1933, and that payments in the sum of $1,400 made after February 1, 1934, were applied either on the monthly retainer or on his fee for other suits for which he does not seek recovery herein.

Defendant introduced in evidence receipts and checks for payments to plaintiff. The receipts, which evidence payments made from the commencement of plaintiff's employment on April 12, 1933, to January 3, 1934, read "to apply on attorney fees." The sum of $475 paid during this period, in payments of either $50 or $25, exceeds by $50 what became due to plaintiff under the agreement for a monthly retainer of $50.

Between January 3, 1934, and September 12, 1934, on which date defendant claims it was for the first time agreed that plaintiff should receive additional compensation for court appearances, the checks show, in addition to the regular monthly payments of $50, three separate payments of $50, which plaintiff testified were for court appearances. Plaintiff received in all $1,875 for his services for approximately two years.

Plaintiff contends that these extra payments prior to September 12, 1934, demonstrate conclusively that plaintiff was at no time employed under a contract to render all services, including litigation, for a monthly retainer. Goodway testified that the corporation did not knowingly make any extra payments for court appearances prior to the payment of $200 on September 12, 1934; that it was possible that plaintiff overdrew his account; that one of the checks which constituted an extra payment was made to plaintiff because he said "he had another one coming to him" and "insisted on having it."

The record indicates that defendant company, a mutual water company, composed of landowners to whose land the water was appurtenant, was run in an informal fashion, without strict attention to business detail and record keeping. In the circumstances the fact that payments exceed somewhat the amount due under the retainer contract of $50 a month does not conclusively negative the existence of such a contract.

Plaintiff does not claim that he sent defendant company a bill for the account here sued for, or orally asked for payment, until after termination of his employment in May, 1935. The major part of the services for which he sued herein were performed in 1933. The trial court resolved the conflict in the evidence in favor of defendant company. It cannot be said that the judgment for said company is, as a matter of law, without support in the evidence.

[3] Error of the court, if any, in permitting the defendant to introduce in evidence the above-mentioned checks and receipts during the cross-examination of plaintiff, rather than requiring defendant to postpone introduction of said material until it put on its defense, did not affect the substantial rights of plaintiff in this action, tried by the court, and is too inconsequential to justify a reversal in the light of section 4½, article 6, Constitution, and section 475, Code of Civil Procedure.

Certain of the findings are inartificially drawn. But when read in the light of the record they are not in conflict with other clear findings which support the judgment.

[4, 5] Plaintiff also objects that the oral contracts under which the court found he had been employed were not authorized by resolution of the board of directors. It is well settled, however, that when the corporation with knowledge of the contract accepts performance and makes payments on account thereof, there is a ratification of the contract, or an estoppel to deny its validity. Tierney & Lawford, Inc. v. Wilshire Cafe, Inc., 209 Cal. 605, 289 P. 621; Brown v. Crown Gold Milling Co., 150 Cal. 376, 386, 89 P. 86; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 P. 817; Pacific Bank v. Stone, 121 Cal. 202, 53 P. 634; 6a Cal.Jur. pp. 1181–1189. Plaintiff, the legal adviser of the corporation, did not inform the board that the corporation should act by resolution.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; HOUSER, J.; LANGDON, J.

13 Cal.2d 203

PEOPLE v. D'ANGELO.

Cr. 4207.

Supreme Court of California.

March 24, 1939.
Rehearing Denied April 20, 1939.

1. Witnesses ⚷277(4)

In prosecution of husband for murder of wife, question to husband whether he had not had his wife arrested before her death in an attempt to have her put in an insane asylum was proper cross-examination, where on direct examination he had testified extensively regarding the relations theretofore existing between them.

2. Criminal law ⚷1166½(12)

In murder prosecution of husband who allegedly decapitated his wife with a meat cleaver, trial judge's statement in jury's presence that, if decapitation occurred in course of attempt to commit crime of mayhem, husband was guilty of murder in the first degree, was not prejudicial error, where statement was made in response to argument by husband's counsel, and trial judge thereafter ordered that his remarks be expunged from the record and instructed jury to disregard them. Pen.Code, § 189.

3. Criminal law 🔑1170½(6)

In murder prosecution, wherein defense of not guilty by reason of insanity had been interposed, error, if any, in permitting deputy district attorney on cross-examination of alienist who had previously testified that defendant was sane at time of alleged murder, to inquire whether, in alienist's opinion, defendant was shamming insanity at the trial, was cured, where question was withdrawn and jury was fully instructed to disregard the question.

4. Constitutional law 🔑257
Criminal law 🔑300

The statutes relating to the right afforded a defendant in a criminal action to enter not only a plea of "not guilty," but also a plea of "not guilty by reason of insanity," were not unconstitutional on ground that they denied due process to a defendant who was accorded every benefit that was legally possessed by him prior to the enactment of the statutes except the right to introduce evidence directly on the insanity issue. Pen. Code, §§ 1016, 1020, 1026, 1026a, 1027.

5. Criminal law 🔑965

Where one accused of murder did not introduce evidence of his mental condition on his first trial had on his plea of "not guilty," he could not on a subsequent trial question the validity of statutes providing for separate trials as to the plea of "not guilty" and the plea of "not guilty by reason of insanity." Pen.Code, §§ 1016, 1020, 1026, 1026a, 1027.

6. Criminal law 🔑945(1)

Trial court did not commit prejudicial error in refusing to grant a new trial to one convicted of murder, on ground of newly discovered evidence relating to his sanity, where it was extremely improbable that jury's verdict would have been different had that evidence been placed before them.

In Bank.

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Pasquale D'Angelo was convicted of murder in the first degree, and he appeals. Affirmed.

Carl H. Allen and J. Bruce Fratis, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Harmon D. Skillin, Asst. Dist. Atty., both of San Francisco, for the People.

PER CURIAM.

The evidence is undisputed in effect that on June 14, 1938, defendant killed his wife by decapitating her with a meat cleaver. From a judgment of conviction of the commission by him of the crime of murder in the first degree, which carried with it the imposition of the death sentence, defendant has appealed to this court. Defendant has also appealed from the order by which his motion for a new trial was denied.

On the trial of the action, defendant presented two defenses (1) that he was "not guilty"; and (2) that he was "not guilty by reason of insanity".

[1] On the appeal from the judgment, the point is urged that, on cross-examination of defendant as a witness in his own behalf, prejudicial error was committed by the trial court in that the deputy district attorney in charge of the prosecution was permitted to ask defendant whether, on an occasion which preceded the killing of his wife, he had not had his wife arrested and taken to a detention hospital, and "tried to have her put in the insane asylum". In view of the fact that on his direct examination, defendant had testified extensively regarding the relations that theretofore had existed between him and his wife, the questions to which attention has been directed were proper cross-examination. People v. Gallagher, 100 Cal. 466, 473, 35 P. 80; People v. Buckley, 143 Cal. 375, 386, 77 P. 169; People v. Rozelle, 78 Cal. 84, 20 P. 36; People v. Maughs, 8 Cal.App. 107, 117, 96 P. 407; People v. Turco, 29 Cal.App. 608, 156 P. 1001.

[2] The next asserted error of which appellant complains is to the effect that his defense was prejudicially affected by the fact that, in the presence of the jury, the trial judge made the statement that if the decapitation of the wife of defendant occurred in the course of an attempt

that was made by him to commit the crime of mayhem, as a matter of law the result of the incident would be that defendant had committed the crime of murder in the first degree. From a reading of the transcript of the reporter's stenographic notes made with relation to the aforementioned statement, it is obvious that it was made inadvertently, but nevertheless in response to argument that immediately theretofore had been presented by counsel for defendant. Following a more specific explanation of the position which was assumed by counsel for defendant with respect to the point then under discussion, which explanation included the statement that section 189, Penal Code "refers to where a particular crime is attempted to have been committed, and a killing is committed in the attempted perpetration of another crime entirely", the judge said: "* * * —that was my understanding upon the conclusion of your argument, that the defendant did not intend to commit a homicide; that he might have intended to commit something else"; and "I do not follow the argument. So as to clear the record, let all the remarks by the Court be expunged from the record. The jury is instructed to disregard them. We are discussing merely possibilities and questions of law that have no relation to any facts in the case, based upon, perhaps, a misconstruction of the position of counsel for the defense." In such circumstances, it is clear that the jury could not have been prejudicially influenced by the remarks to which appellant has objected.

[3] The third specification of error made by appellant relates to asserted misconduct on the part of the deputy district attorney in that in his cross-examination of one of the alienists who testified as a witness in the action, he asked the question whether, in his opinion, "the defendant, at the present time is shamming or faking the condition which he apparently visualizes or shows himself to the ladies and gentlemen of the jury".

It appears that theretofore the alienist had expressed his opinion that defendant was sane at the time when the alleged murder was committed; also that, notwithstanding the apparently abnormal actions of defendant or his incoherent language in the courtroom, after the assertedly objectionable question had been asked, the opinion of the alienist was then the same as it was at the time when he expressed his original opinion. It is clear enough that eccentric action or speech on the part of defendant might have afforded some indication of his mental status; but it also is obvious that such deportment was not conclusive of the ultimate fact regarding his sanity. Such action or speech may have constituted but a deception or pretense on the part of defendant. In substance, the alienist already had given it as his opinion that at all times defendant was sane; which answer, as far as the abnormal conduct of defendant was concerned, very aptly implied that defendant was "shamming or faking". And if the alienist was qualified to express an inclusive opinion with reference to the sanity of defendant, this court can perceive no good reason why the same alienist was not also possessed of the legal capacity to express an opinion concerning any act or conduct of defendant that might constitute an element in the ultimate conclusion regarding his sanity. If that position is tenable, it should follow that the point presented by appellant cannot be sustained. But even though it should be considered as worthy of serious consideration, the fact that, following discussion of the point by respective counsel, the question was withdrawn, and that thereupon the jury was fully and carefully instructed by the trial judge to disregard the fact that the question had been asked and that argument had ensued regarding its pertinency and competency—effectively cured any possible ill effect that, in the absence of such course, might have resulted.

[4] On the asserted ground of their unconstitutionality, appellant attacks the entire group of sections 1016, 1020, 1026, 1026a and 1027 of the Penal Code, which relate to the right afforded a defendant in a criminal action to enter not only a plea of "not guilty", but also a plea of "not guilty by reason of insanity". Those provisions, or some of them, also purport to establish certain presumptions of fact and to adopt specified procedure with relation to such pleas. However, in connection with such contention, appellant makes the statement that he "fully realizes that the constitutionality of the dual trial has been considered in the following cases", citing People v. Troche, 206 Cal. 35, 273 P. 767; People v. Leong Fook, 206 Cal. 64, 273 P. 779; People v. Dias, 210 Cal.

495, 292 P. 459, and People v. LaCrosse, 5 Cal.App.2d 696, 43 P.2d 596. To that list, the following cases might well be added, to-wit: People v. Perry, 195 Cal. 623, 234 P. 890; People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117; People v. Coen, 205 Cal. 596, 271 P. 1074; People v. Sloper, 198 Cal. 238, 244 P. 362, and People v. Davis, 94 Cal.App. 192, 270 P. 715.

In connection with the point thus presented, appellant particularly contends that even if, in accordance with the well-established law in this state, it be constitutional to require a separate trial as to each of the pleas of "not guilty" and "not guilty by reason of insanity",—nevertheless, the combined effect of the statutory provisions in substance that on the trial of the issue of "not guilty", the sanity of the defendant at the time when the offense was alleged to have been committed shall be conclusively presumed, and the judicial construction of those statutes that because of such conclusiveness on a trial of that issue no evidence may be introduced to the contrary of such presumption, deprives the defendant of his constitutional rights in that he is not afforded "due process".

Were the "bald" question thus presented new in the jurisprudence of this state, it might present a basis for legal discussion herein. But considering the fact that each of the particular phases of the point to which attention has been directed by appellant heretofore has received consideration by this court and a conclusion reached with reference thereto that such contention is untenable,—unless this court should now be prepared to recede from a position which for several years last past it has insistently maintained,—it necessarily follows that appellant's suggestion in that regard must be rejected.

[5] Technically, perhaps, but nevertheless in accord with well-settled rules of procedure, another reason exists which may form a basis for a ruling contrary to appellant's contention. It not only appears as an indisputable fact, but also from statements contained in the brief of appellant that on his first trial (had upon the plea of "not guilty") he *"did not introduce evidence of his mental condition.* * * * Under the present interpretation of the conclusive presumption contained in section 1026 of the Penal Code, *this evidence is not admissible and was not offered in the trial on the 'not guilty' plea."* (Emphasis added.) Manifestly, in such circumstances, defendant is in no position to question the constitutionality of the statute. Notwithstanding that situation, it may be noted that on the trial had on the issue of "not guilty" the stringency of the rule to which attention has been directed was somewhat relaxed.

At the outset of the direct examination of defendant, the trial judge said: "I mean the relations between the defendant and the deceased are certainly material to the extent that they may aid the jury in determining what the *punishment* shall be. * * * And I am explaining the ruling, so that the position of the Court will be made manifest; and that is, at least for the purpose of placing before the jury the environment in which the parties lived, *their relations one to the other, the state of feeling between them* and *whatever may have contributed to that,* are circumstances that in my opinion are proper to go before the jury to enable them *to assess the punishment.* * * * the testimony is admissible upon the theory that I have suggested, namely, that the jury must have before it the circumstances surrounding the parties to enable the jury to determine what the *punishment* shall be." (Emphasis added.) Thereupon, the defendant proceeded to and did testify to many facts and circumstances concerning the relationship which had existed between him and his wife. Among other things, he testified that the trouble between them had continued since 1935, when on an occasion of some argument his wife had spat in his face and threatened to kill him. On being questioned as to whether his wife had ever struck him, defendant indicated that she had done so on each of several different occasions,—once having thrown a plate which injured his hand and which necessitated the taking of three stitches thereon; that she had hit him on the head with an iron bar; that she had thrown plates and knives at him, which broke the windows and doors of a store owned and operated by defendant; and that on one occasion she had come to the store and then and there threatened to kill him with an ice pick which she had concealed up her sleeve. He further testified that on the morning of the day the crime was committed, he left his place of business and went to the store (then being operated by her) with no intention of killing his wife, but merely to "scare" her; that he accused her of having been intimate with another man, whom he stated that he had observed leaving the house at 1 o'clock on the morning of the day when the killing occurred; that she did not deny the accusation, but defiantly declared that she would do as she pleased in that respect, as marital relations between them were ended; that she called him opprobrious names and vehemently asserted that he was "through", and spat at him again. She further stated: "I will send two persons to kill you;" also that she would get rid of him, either by sending him to the prison at San Quentin or to an undertaking parlor. At this juncture, defendant declared a "screen" came before his eyes; that he was very violent when he thought of the way he had been treated,—but that he would not have killed her if she had not called him names and spat in his face.

On cross-examination, defendant also testified further in detail regarding the killing of his wife. On being questioned in regard to the cleaver which he had carried with him to "scare" his wife, defendant testified that (induced by statements of his wife that she wanted to get rid of him) he had urged her to take the cleaver, but that she did not do so; that she was calling him vile names and spitting at him; that he was "blind" and did not know what he was doing; that thereafter on leaving the scene of the crime he became aware of the blood present on his hands and clothing, but did not know where it came from, and did not remember striking his wife, nor anything of what had happened. Upon his leaving the store, after the crime had been committed, defendant was questioned as to his reason for crossing the street, instead of proceeding down the street on the side thereof on which the store was located and on which side of the street he had gone to the store (in which latter event he would have encountered a neighbor who was watering her lawn); and he testified that he did not know what direction he took, that he was "not in his right mind" and was not conscious of what he was doing.

In addition thereto, at a time when testimony was offered through another witness regarding an altercation that had occurred between defendant and his wife two years before the homicide was committed, in response to objection made thereto by the deputy district attorney, in part the trial judge said: "* * * And if the killing is as it has been indicated to be, that would not give excuse for the homicide, as far as it goes now. If you are offering this testimony for the purpose of excusing the homicide—if there is anything that happened, that counsel in good faith tells me, that anything happened in his conversation in 1935 between the defendant and the witness and the attorney that will excuse this homicide, and justify it, why, you can offer it subject to a motion to strike out. * * * I will allow that [referring to the statement that the wife had threatened the life of defendant] *for the purpose of mitigation* and it hasn't to do with the degree. It may come in for what it is worth; *but certainly it is admissible for the purpose of mitigation.*" (Emphasis added.) In respect to such prior threat or threats, the witness testified that on the occasion of the proposed signing of an agreement between the defendant and his wife (and in the presence of witnesses), she had refused to sign the said agreement and asserted that everything belonged to her and that she would like to see Pasquale D'Angelo "out like a dog"; that in the argument that thereupon ensued the wife of defendant opened the drawer of a table beside which she was standing and pulled therefrom a large kitchen knife; that in that connection the witness had asked her what she was going to do, whereupon she was induced by the witness to drop the knife back into the case; that during such action on her part, defendant had stood, talking, "but he never made any bad move". With respect to that incident, the trial judge said: "I say it is properly coming in for the purpose *of showing mitigating circumstances.* Yes [referring to date, 1935]. In other words, this is the starting point; and, as I understand it, there had been feeling between the two parties, and doubtless other testimony will come in more near in point of time; and its remoteness has to do with the weight. *Its weight will be for the jury.* It has to do in my judgment not for the purpose of fixing degree, but *for the purpose of establishing mitigation.*" (Emphasis added.)

Further testimony which was given by a lawyer, who formerly had represented defendant in a divorce action, disclosed facts regarding the conduct of, and statements that were made by, defendant early in the morning of the day when the crime was committed. He testified that defendant had berated and upbraided him for the reason that the attorney had failed to bring the divorce case to trial; that then defendant had "started to grit his teeth" and jerked open a cash register to show him some figures therein—following which he loudly declared that he was being impoverished by the actions of his attorneys, and applied epithets to the witness, who at that point made his retreat from the place.

A third witness testified regarding a quarrel which had occurred between defendant and his wife about three years before she was killed. In part the witness stated that as he joined defendant and his wife on that occasion, the argument which then was in progress between them became more heated; that defendant's wife "made a move" toward the defendant; that as she did so he put out his hands to defend himself and she fell down; and that as she got up "there was a sort of an object that she had wrapped up in a newspaper, and when it fell, it fell with a sort of a thud"; but that when the object fell, the younger daughter (who was present) picked up this object right away and put it under her arm.

It thus indisputably appears that defendant was permitted to and did introduce evidence outside the immediate "circumstances connected with the offense" (People v. Troche, 206 Cal. 35, 47, 273 P. 767, 772, and authorities there cited), all of which was expressly admitted "for the purpose of showing mitigation", and which also, in some respects, might have tended to establish the fact either that the killing constituted a murder in the second degree, or even that the crime of manslaughter was committed. And in that connection, the jury was not only instructed as to the law with respect both to first and second degree murder, but also was told that, on the evidence adduced, it might find defendant guilty of the latter offense; furthermore, that in the event it should determine that defendant was guilty of first degree murder, the jury had the right to fix the penalty therefor at life imprisonment. Appellant does not contend that he was entitled to have the jury instructed with regard to the crime of manslaughter. From a complete reading of the testimony that was given by defendant, in which he detailed not only facts which related to his marital affairs which immediately preceded the killing, but also to those which later existed at or about the time when the homicide occurred, it is obvious that, although not so intended by either court or counsel, the issue of the sanity of defendant was indirectly injected into the trial had on the plea of "not guilty";—that is to say, that the apparently eccentric conduct of defendant, both preceding and at the time of the commission of the offense, could not have failed to suggest to the minds of the individual jurors some question with reference to the sanity of defendent. Since on the trial on the issue of "not guilty" defendant was not precluded from showing "mitigating circumstances"—but was given every opportunity to establish either that the offense was that of second degree murder, in that it was not committed wilfully, deliberately and premeditatedly (or possibly that the act constituted a voluntary manslaughter)—under the provisions of the several statutes to which attention has been directed, and particularly in consideration of the judicial interpretation or construction which has been given to such statutes, it results that with respect to the conduct of the trial court no error was committed by it with reference to the procedure of which appellant complains. In other words, with the exception of the right to introduce evidence which might relate directly to the insanity issue on the trial of the plea of "not guilty", every right of defendant was secured to his benefit that was legally possessed by him prior to the enactment of the several statutes which relate to the question of whether at the time when the offense was committed, defendant was legally sane; and as to that issue, since, by judicial interpretation, as attested either singly or by a combination of some or all of the several authorities in this state to which attention hereinbefore has been directed, the manner in or by which the entire trial was conducted was procedural only, and did not deprive defendant of any of his just rights in the premises, it follows that none of his several contentions respecting a denial of "due process" may be sustained.

Finally, appellant presents the point that prejudicial error was committed by the trial court in that it denied defendant's motion for a new trial.

It appears that, in part, the motion for a new trial was based upon the asserted fact that since the trial had been concluded defendant had discovered new evidence that was material to his defense and which evidence, by the exercise of ordinary diligence, could not have been, nor was theretofore discovered by defendant. The materiality of such "new" evidence is said to relate principally to the issue of the sanity of defendant, and was addressed to evidence that was given on the trial by one of the alienist witnesses to the effect that if, preceding the killing of his wife, defendant had been afflicted by delusions respecting his wife's former conduct and actions with respect to defendant,—then, in the opinion of said alienist, defendant was insane. One of the assumed delusions of defendant which was contained in a hypothetical question which was propounded to the alienist was: "* * * that the man [defendant] believed that he called the police on several occasions for protection from his wife, which belief was contrary to the fact; * * *" On the hearing of the motion for a new trial, the substance of the material part of one of the affidavits that was presented to the trial court was that, shortly before the homicide occurred, defendant told one of the affiants that he was in fear of his life and was afraid that a person by the name of Don Hunt would kill him or at least do him great bodily harm; that he employed the affiant to act as a bodyguard for him on five occasions during the month of May, 1938; and that, in compensation therefor, defendant paid to affiant the sum of $54, during the period May 15 to 19, 1938. The other affidavit contained the assertedly material statements that, in defendant's beer tavern, on or about May 15 (1938), a man by the name of Don or Dave went into the beer tavern and started a quarrel with defendant; that the said person went back of the bar and struck defendant, knocked him to the floor and then continued to strike and to choke him as he was prostrate; and affiant stated that thereupon it was necessary for him to strike the said person on the head with a stool in order to prevent him from doing serious bodily harm to defendant; that a day or two later affiant told Rosa D'Angelo (wife of defendant), in the presence of her daughter Viola, what had occurred on the occasion just described, and the daughter stated to affiant in the presence of her mother that affiant should not have interfered; and the daughter asked affiant why he had not allowed the person to kill defendant; that at said time and place said Rosa D'Angelo acquiesced in the statement made by her daughter; also, that on or about the 28th day of May, 1938, a man by the name of Harry Marshall came into the beer tavern operated by defendant and started an argument with the latter, and in the course of the argument Marshall threw at least a dozen eggs, one at a time, at defendant and also at the back bar and bottles of liquor thereon.

[6] Considering the contents of such affidavits, together with the fact that on each of several occasions the wife of defendant had threatened him with personal violence, either by herself or through others, and actually had physically assaulted him, it becomes clear that defendant was justified in having at least a suspicion that his wife was the instigator of each of the unprovoked assaults to which reference was made in the two affidavits; and that if, on the insanity trial of defendant, evidence of the said assumed facts had been placed before the jury, it is extremely improbable that the verdict would have been different from that which the jury returned on said issue. At any rate, in the exercise of its sound discretion in the matter, the order that was made by the trial court, by which the motion for a new trial was denied, did not amount to prejudicial error.

No other points are suggested by appellant as affording impelling reasons for a reversal of the judgment or the order by which a new trial was denied.

Defendant had a fair trial. It is ordered that the judgment and the order be and they are affirmed.

In re NAEGELY'S ESTATE.

KOS et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 11976.

District Court of Appeal, Second District, Division 1, California.
March 14, 1939.

Rehearing Denied April 4, 1939.

Hearing Denied by Supreme Court May 13, 1939.

1. Statutes 🔑170

When a statute is repealed without a saving clause and as part of the same act law is simultaneously re-enacted in substantially the same form and substance, all rights and liabilities which had accured under the former act will be enforced.

2. Mortgages 🔑330

Where statute imposing certain requirements whenever money judgment is sought for balance due after sale of security under power of sale in trust deed was enacted with provision that it should remain in force until September 1, 1936, re-enactment of statute in 1935 in identical terms but without time limitation did not constitute a repeal of original statute so as to affect rights of holder and maker of note and trust deed executed while original statute was in force. Civ.Code, § 2924½, as added by St.1933, p. 1674, § 8; St.1935, p. 1807, § 9.

3. Executors and administrators 🔑236

The allowance of claim in probate is not equivalent to an ordinary judgment, and it possesses the character of a judgment only in a qualified sense, becoming absolute when the court orders the executor or administrator to pay it, but until such time it is simply an acknowledged debt of the estate.

4. Executors and administrators 🔑133

Where holder of note and trust deed executed by deceased sought to obtain deficiency from estate after exercise of power of sale in trust deed, executor as well as legatees had right to assert claim that estate was discharged from further liability on ground that holder of trust deed after exercising power of sale did not institute action to determine deficiency pursuant to statute and that, therefore, obligation of maker was discharged. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4.

5. Executors and administrators 🔑507(1)

Where executor filed his account and petition for distribution alleging that all debts of estate had been paid and holder of note executed by deceased interposed written objections claiming unpaid balance on note and issue was joined, court was authorized to determine such issues upon agreed facts presented by the parties.

6. Executors and administrators 🔑264(2)

Where holder of trust deed following exercise of power of sale did not institute proceeding for determining deficiency pursuant to statute but filed claim against deceased maker's estate which was allowed and approved, creditor was not entitled to payment of difference between the amount obtained on the sale and the full amount of the approved claim out of the assets of the estate the same as any other unsecured creditor. Code Civ.Proc. § 580a, as added by St. 1933, p. 1672, § 4.

7. Executors and administrators 🔑431(3)

Rule that an action cannot be brought against an estate except upon a disallowed claim has no application to secured claims.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceeding in the matter of the estate of Charlotte M. Naegely, deceased, wherein Nicholas Kos, executor of the estate of Charlotte M. Naegely, deceased, filed his first and final account and petition for distribution, opposed by the Bank of America National Trust & Savings Association. From the decree, the executor and Margaret Katherine Heneghan and others, legatees, appeal.

Reversed and remanded, with directions.

Frank Rouse and Julius V. Patrosso. both of Los Angeles, for appellant Nicholas Kos, executor of last will and testament of Charlotte M. Naegely, deceased.

Paul R. Cote, of Los Angeles, for appellants Margaret Katherine Heneghan, James F. Heneghan, John F. Banks, Mary Edwina Banks and Henry Edmund Naegely, Jr., legatees.

Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by the executor and certain legatees of the estate of the abovenamed decedent from the decree settling the first and final account of the executor and directing the payment of a claim of the respondent, Bank of America National Trust and Savings Association.

Prior to her death, on January 24, 1935, decedent executed to respondent bank a promissory note in the principal sum of $11,689.65, executing concurrently therewith and as security therefor a trust deed. The note remaining unpaid at the date of her death, respondent bank, within the time allowed by law, duly filed its creditor's claim with the executor, and such claim was in due course allowed and approved by the executor and the probate court. No payments having been made upon the note, and the same being in default, respondent bank on February 19, 1936, caused to be recorded in the office of the county recorder a notice of breach and election to sell the property described in the trust deed securing the note, as required by and in conformity with the provisions of section 2924 of the Civil Code. Thereafter, on June 16, 1936, the trustee named in the trust deed sold the real property therein described to the respondent bank for the total sum of $9,500, and after applying the proceeds of said sale to the payment of interest, advances, costs of sale and trustee's fees, there remained an unpaid balance of $3,637.35. Subsequent to such sale, however, respondent did not seek nor secure a judgment determining the amount of any deficiency.

Thereafter the executor filed his first and final account and petition for distribution, wherein it was alleged, among other things, that all claims presented and allowed against the estate had been fully paid, and prayed for an order directing that the balance remaining in his hands after the payment of costs of administration be distributed to the appellant legatees herein. To this account respondent bank filed written objections based upon the claim that there remained due upon the promissory note the hereinbefore mentioned deficiency of $3,637.35, and prayed that the petition for distribution be denied and that the executor be directed to pay such balance to the respondent bank.

With the issues thus joined, the matter was heard by the court, at which proceeding the foregoing facts were stipulated. Thereupon the court found as true the facts above recited, but made no finding that respondent bank had complied with the provisions of section 580a of the Code of Civil Procedure, or that respondent had obtained a judgment determining the deficiency, if any, due upon the note. Thereafter the probate court signed and filed its decree settling the account, decreeing that the estate was insolvent, and the cash on hand in the possession of the executor insufficient to pay respondent's claim directing the executor to sell, in the manner provided by law, the personal property specifically bequeathed by the will, and that the executor pay to respondent bank the sum of $3,637.35.

[1, 2] Appellants first contend that in the absence of evidence or finding that following the exercise of the power of sale contained in the trust deed securing the promissory note in question, respondent instituted an action to determine the deficiency, if any, resulting therefrom and obtained a judgment for such deficiency, the obligation of the deceased maker and her estate upon the note was discharged by the sale, and that the trial court erred in directing the payment of any amount thereon to the respondent. Section 580a of the Code of Civil Procedure, as enacted in 1933, St.1933, p. 1672, § 4, and in effect at the time of the execution by decedent of the note here in question, imposes certain requirements whenever a money judgment is sought for the balance due upon an obligation after the sale of the security under a power of sale contained in a deed of trust or mortgage. This provision, as originally enacted in 1933, provided that it should remain in force until September 1, 1936, Civ.Code § 2924½, as added by St.1933, p. 1674, § 8, but in 1935, St.1935, p. 1805, the legislature reenacted the section in identical terms, except that the reenactment provided that the terms thereof were to remain in force without any time limitation thereon. St.1935, p. 1807, § 9. That such a reenactment did not constitute a repeal of the section as of the date of such reenactment is firmly established by our law. When a statute is repealed without a saving clause, and as a part of the same act the law is simultaneously reenacted in substantially the same form and substance, all rights and liabilities which had accrued under the former act will be preserved and enforced. 25 R.C.L., p. 934, sec. 186; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 237, 295 P. 1, 75 A.L.R. 439. In Ruling Case Law above cited, it is said: "Where a statute is repealed and all, or some, of its provisions are at the same time re-

enacted, the reenactment neutralizes the repeal, and the provisions of the repealed act which are thus reenacted continue in force without interruption, so that all rights and liabilities that have accrued thereunder are preserved and may be enforced." See, also, People v. Drake, 162 Cal. 248, 249, 121 P. 1006; Chambers v. Davis, 131 Cal.App. 500, 506, 22 P.2d 27; San Joaquin Irr. Co. v. Stevinson, 164 Cal. 221, 234, 128 P. 924. Therefore section 580a of the Code of Civil Procedure, being in force on January 24, 1935, when the note was executed, continued in effect and determined the rights and liabilities of both the maker and holder thereof up to and following the date of the foreclosure sale under the trust deed on June 19, 1936.

[3, 4] It is the contention of respondent bank that neither section 580a of the Code of Civil Procedure nor section 2924½ of the Civil Code have any application to the facts of this case, for the reason, as asserted by respondent, that "we are not here concerned with a judgment for a deficiency". Respondent's position is that section 580a does not become applicable unless and until an action is instituted after sale under a deed of trust to recover a deficiency. In other words, respondent insists that having filed its claim in the estate proceeding, and the same having been allowed and approved, when the sale of the security did not produce sufficient to pay the approved claim, the claimant was entitled to have the balance of such approved claim paid by the estate; that the proceeds from the sale of the security amounted merely to a payment on account. This claim is based on the contention that when a claim in probate has received approval and allowance it has the same effect as a judgment and must be satisfied in full from the assets of the estate. It is, however, well settled that the allowance of a claim is not equivalent to an ordinary judgment; that it possesses the character of a judgment only in a qualified sense, becoming absolute only when the court orders the executor or administrator to pay it. Up to that time it is simply an acknowledged debt of the estate. Estate of Bell, 168 Cal. 253, 141 P. 1179. In the instant case, however, the executor and legatees do not deny the validity of the claim as originally filed and approved, but are contending that the debt in question has been paid and satisfied in full by reason of the foreclosure of the security under circumstances which bring the situation within the purview of section 580a of the Code of Civil Procedure, and which foreclosure, by reason of the provisions of such section, operates to discharge the debtor from further liability. This claim the executor, as well as the legatees, had a right to assert. Wise v. Williams, 88 Cal. 30, 25 P. 1064.

[5] That by the filing of the final account and petition for distribution and respondent creditor's objections thereto, the issues were legally framed, cannot be disputed. No other pleadings were necessary. The only provision for filing any pleading in a proceeding for the settlement of an account is that which authorizes "written exceptions to the account". When the executor filed his account and petition for distribution, alleging therein that all debts of the estate had been paid, and respondent bank interposed written objections thereto on the ground that its was an unpaid claim, issue was joined, and the court was authorized to determine such issues upon the agreed stipulation of facts presented thereunder.

[6, 7] Respondent's claim that a creditor, having filed a claim which was allowed and approved, and thereafter having foreclosed the security, is entitled to payment of the difference between the amount obtained on the sale and the full amount of the approved claim out of the assets of the estate the same as any other unsecured creditor, cannot be upheld. Conceding the existence of this right, generally speaking, nevertheless, in the case before us such right is now subject to the provisions of section 580a of the Code of Civil Procedure and dependent upon a compliance therewith. This is equally true of the rights of the holder of an obligation secured by a deed of trust against the estate of a deceased maker as it is of the rights of the holder of such an obligation against a living maker thereof. Respondent was not precluded from instituting an appropriate proceeding under section 580a by the fact that its claim had been approved and that an action cannot be brought against an estate except upon a disallowed claim. This rule has no application to secured claims. 11B Cal.Jur. 433, sec. 998, and authorities therein collected. Respondent having failed to commence an action to secure a judgment pursuant to the terms of section 580a of the Code of Civil Procedure, it was not entitled to payment of any sum in

addition to that obtained by it upon foreclosure of the security.

The conclusion just stated renders it unnecessary for us to determine the applicability of section 2924½ of the Civil Code to the facts of the case at bar, nor do other points raised require our consideration.

The decree appealed from is reversed and the cause remanded with directions to the court below to enter a decree settling the executor's final account and ordering distribution in accordance with the prayer of the petition therefor.

We concur: YORK, P. J.; DORAN, J.

31 Cal.App.2d 648

In re REY'S ESTATE.

REY v. REY et al.

Civ. 10990.

District Court of Appeal, First District,
Division 1, California.

March 22, 1939.

Hearing Denied by Supreme Court
May 19, 1939.

1. Wills 🔑685

A testamentary trust directing payment of income from stock to sons for 10 years at which time stock should be equally divided between them, subject to limitation that sons retain control of corporation, did not require that stock be distributed jointly or that sons be directed to vote the stock jointly after distribution, but placed limitation merely on the trustees for the 10-year period of the trust.

2. Trusts 🔑327

Statute authorizing a beneficiary or party interested in a trust to apply to the court for citation directed to the trustee to show cause why trustee should not file an account does not authorize personal judgment against the trustee. Probate Code, § 1121.

3. Trusts 🔑298

Statute providing an appropriate proceeding by trustee to determine to whom property shall pass, and statute authorizing beneficiary or party interested in trust to apply to court for citation directed to trustee to show cause why trustee should not file account, confer jurisdiction on probate court after distribution of estate when trust survives distribution. Probate Code, §§ 1120, 1121.

4. Trusts 🔑298

A court in granting or denying an application by a beneficiary for an accounting of a testamentary trust is engaged in exercise of its special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction. Probate Code, § 1121.

5. Trusts 🔑291

The purpose of statute authorizing a beneficiary or party interested in a trust to apply to the court for citation directed to trustee to show cause why trustee should not file an account is to provide means for determining disputes between beneficiaries and trustees. Probate Code, § 1121.

6. Trusts 🔑298

The questions raised by application for accounting by trustee of testamentary trust wherein it was alleged that son of testator had converted stocks and bonds constituting corpus to his own use and that they were never inventoried or administered in the probate proceeding or placed in trust should have been addressed to the general law and equity department of jurisprudence wherein personal judgment could be rendered and did not call for action by court exercising its probate jurisdiction, so that court did not improperly dismiss application on preliminary motion. Probate Code, §§ 1120, 1121.

7. Courts 🔑198

The superior court exercises its probate jurisdiction separate and distinct from its equity authority.

8. Trusts 🔑298

The superior court in exercise of probate jurisdiction has power to control trustees in management of testamentary trust estates, but, when the trust does not exist, statutory proceedings for determining to whom property shall pass and for requiring trustee to account do not authorize exercise of general equity jurisdiction in face of an objection presented prior to hearing on merits of issues raised by application for an accounting and answer. Probate Code, §§ 1120, 1121.

9. Courts ⚷37(3)

Where application for accounting by trustee of testamentary trust alleged that son of testator had converted stocks and bonds constituting corpus to his own use and that they were never inventoried or administered in the probate proceeding or placed in trust, trustee by filing an answer to application did not waive question of court's jurisdiction. Probate Code, §§ 1120, 1121.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of Leon Louis Rey, also known as Leon L. Rey, deceased, by Noel M. Rey against Leon M. Rey and another for an accounting on one of testamentary trusts and to secure administration of certain stocks and bonds referred to in a second testamentary trust. From an order settling the final account of Leon M. Rey, as sole trustee, and terminating the trust relative to certain stock by ordering distribution, and from an order denying application for an accounting, Noel M. Rey appeals.

Orders affirmed.

James M. Thomas, of San Francisco, for appellant.

Louis M. Piccirillo, of San Francisco, for respondents.

WARD, Justice.

On April 27, 1927, Leon Louis Rey died testate leaving real and personal property. The will, providing for the creation of certain trusts, was admitted to probate and Prosper L. Wolf and a son, Leon M. Rey, were appointed and qualified as executors. In December of the same year, after approval of a first and final account, a petition for distribution was ordered. On July 28, 1928, a decree of final discharge was granted. On May 20, 1937, the second son named in the will filed an application for an accounting on one of the testamentary trusts, and in addition alleged that certain stocks and bonds referred to in a second testamentary trust had not been administered. On December 2, 1937, the Anglo California Trust Company having refused to act, the court settled the final account of the sole trustee Leon M. Rey and terminated the trust relative to certain stock by ordering distribution. On January 13, 1938, an order was made denying the application for an accounting. This appeal is by Noel M. Rey, referred to in the will as Noel Rey, from the order settling the final account of the sole trustee and from the order denying the application for an accounting.

[1] The first question presented for determination arises from the construction placed upon the proviso clause in the sixth paragraph of the will reading as follows: "Sixth: The stock which I own and hold in L'Echo de L'Quest, a corporation, I give and bequeath to Anglo California Trust Company and Leon M. Rey, in Trust However, for the following uses and purposes and not otherwise: They are to hold the same and pay the income from said stock to my sons, Leon M. Rey and Noel Rey, for and during the period of ten (10) years from the date of my decease at which time said stock shall be divided equally amongst my two sons, Leon M. Rey and Noel Rey, share and share alike; subject However, that my two sons shall retain control of said newspaper corporation and if my said son Noel Rey should in anywise dispose of the stock which now stands in his name or vote the same so as to surrender control of said corporation to minority stockholders, then and in that event the share of stock which he would have received shall go to and vest in my son Leon M. Rey." The court divided the stock equally between the two sons and terminated the trust.

Appellant Noel M. Rey argues that the limitation in paragraph six is placed upon the two sons after distribution. In other words, that the distributees should have been directed to vote the stock jointly after distribution. Respondents contend that the limitation was upon the trustees for the ten-year period of the trust. Construing the intention from the words used in the will, and from the surrounding circumstances, we must agree with the contention of respondents that no restriction is placed on the beneficiaries after distribution and termination of the trust, otherwise the restriction could last forever. If such an intention was contemplated, why did not the testator leave the stock directly to the two sons without the ten-year trust limitation? The beneficiaries would have obtained immediate and absolute control upon distribution of the estate subject to the limitation that they should continue control of the corporation. Whether such a provision would have violated the rules against perpetuities or have been simply a continuance of limitation during the lives of the beneficiaries is not necessary to discuss in this proceeding. The trustees were empowered to vote the stock. In the absence of one, the other had the right to vote all shares unless the order appointing them directed otherwise. Civ.Code, § 320c. Leon M. Rey was named by the testator as one of the two trustees. In such capacity he might persuade the cotrustee, if appointment had been accepted, to take some action that might result in a relinquishment of control, but the real purpose which actuated the testator is that Noel, who held control of personal stock standing in his name, should be prohibited, at least for ten years, from voting his personal stock "so as to surrender control". If Noel violated this direction, his trust share should "go to and vest in my son Leon M. Rey". If the stock had been given directly to the sons, Noel Rey could have transferred his personal stock with the possible surrender by the sons of control of the corporation.

The words of the sixth paragraph, and the surrounding circumstances as gleaned from the whole will, evidence an intent on the part of the testator that the sons should retain control for at least ten years, therefore the limitation applied to Noel's personal stock and the trust stock. Though it may have been the hope of the testator that his sons would continue to control a majority of the stock in the corporation after the ten-year period, no limitation can be read into paragraph six of the will restricting the actions of either son after the termination of the trust. There is no merit in appellant's claim that the stock should have been distributed jointly. The will expressly provided that the stock should be divided equally, share and share alike.

[2-6] The second point urged by appellant is that the probate court should have heard the application for an accounting and the issues raised by the answer thereto, and should not have determined the matter upon a preliminary motion. The application for an accounting was particularly directed to the property mentioned in paragraph "Fifth" of the will, which provided that certain stocks and bonds were bequeathed to the Anglo California Trust Company and Prosper L. Wolf in trust. The net income from such property, and if necessary "advancements from the corpus" were to be paid to Marie Rey during her natural life, the accumulations thereafter to vest in the two sons. Marie Rey died on October 12, 1932. The application for accounting alleges that Leon M. Rey converted the stocks and bonds to his own use and that they were never inventoried or administered upon in the probate estate proceedings or placed in trust. Upon the preliminary motion, the court found that under and by virtue of the provisions of sections 1120 and 1121 of the Probate Code the court had no jurisdiction to order an accounting.

Section 1120 is an appropriate proceeding to be instituted by the trustee to determine to whom the property shall pass, and section 1121 is a measure given to a beneficiary or party interested in a trust to apply to the court for a citation directed to the trustee to show cause why such trustee should not file an account, but it is not so expansive that a personal judgment against the trustee may be rendered. Costa v. Superior Court, 137 Cal. 79, 69 P. 840. The citation upon the present application was directed to Prosper L. Wolf and Leon M. Rey "as trustees". From the application we learn that the trust referred to, namely, the stocks and bonds to be held for the support of Marie Rey, were never inventoried in the estate and were not placed in trust. Sections 1120 and 1121 confer jurisdiction in the probate court after distribution of the estate when the trust has been created, exists and survives the distribution of the estate. McAdoo v. Sayre, 145 Cal. 344, 78 P. 874; Estate of Smith, 4 Cal.App.2d 548, 41 P.2d 565; Gillette v. Gillette, 122 Cal.App. 640, 10 P.2d 760; Thomas v. Superior Court, 17 Cal.App.2d 40, 61 P.2d 496. If the court grants an application by a beneficiary for an accounting or denies the petition, it is "engaged in the exercise of its special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction". See Estate of Smead, Cal.Sup., 82 P.2d 182, 183, and cited cases; also Estate of Hubbell, 121 Cal. App. 38, 8 P.2d 530; Estate of Davis, 136 Cal. 590, 69 P. 412; Parkman v. Superior Court, 77 Cal.App. 321, 246 P. 334. The purpose of section 1121 is to determine disputes between beneficiaries and trustees (Estate of Smith, supra), but in the present instance there is no distributed trust and no trustee to whom a valid citation could be issued. The questions raised in the present application concern allegations of title, ownership and fraud and should be relegated to the "general law and equity" department of jurisprudence wherein a personal judgment could be rendered.

[7-9] Appellant contends that respondents, having filed an answer to the application for an accounting, waived all question of jurisdiction. The application was in the nature of a summary proceeding requesting the probate court to cite the parties nominated in the fifth paragraph of the will as trustees to show cause why an account should not be rendered. In the form in which it was filed it was not an action at law or a suit in equity. It purported to be an ancillary proceeding presupposing the existence of a trust. It alleged fraud. In Koerber v. Superior Court, 57 Cal.App. 31, 206 P. 496, the daughter of a decedent was accused of embezzling the property of an estate. At page 35, 206 P. at page 497, the court said: "Certainly, under those circumstances, she had the right to deny those accusations by written, verified answer, and to assert her own claim of ownership to said property, without forfeiting her right to have the question of the title to said property tried in the regular legal way." Appellant relies upon In re Guardianship of Garbini, Cal.App., 83 P.2d 508, but this case is not in point. In the Garbini matter, the filing of the answer did not bestow jurisdiction. The answer was in effect a petition, and from that answer petition, the court obtained jurisdiction. Appellant cites In re Clary's Estate, 112 Cal. 292, 44 P. 569. In that case a bill in equity for an accounting was filed in the probate proceeding and answered on the merits without objection to the form of the proceeding. The court held that the form of title was immaterial. In that case no objection was offered to the jurisdiction of the court.

In the instant case an answer was filed but an objection having been presented to the jurisdiction of the court, it came on regularly for hearing upon oral and written arguments of respective counsel. The court filed a written order denying the application. The superior court exercises its probate jurisdiction separate and distinct from its equity authority. It is true that the probate jurisdiction has power to control trustees in the management of testamentary trust estates, but when the trust does not exist, the special statutory power under sections 1120 and 1121 is not broad enough to cover general equity jurisdiction in the face of an objection presented prior to the hearing upon the merits of the issues raised by the application and answer. It appears from the briefs filed by appellant and respondents that simultaneously with the filing of this application for an accounting an action in equity was filed asking the determination and ownership of these stocks and bonds.

The orders appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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31 Cal.App.2d 691

PEOPLE v. WYNN.

Cr. 377.

District Court of Appeal, Fourth District, California.

March 24, 1939.

Criminal law ⚷1131(4)

Where, pending appeal by state from order quashing indictment, defendant was charged by information with same offense, entered pleas of guilty, and not guilty, by reason of insanity, and was tried on the latter plea and found sane, appeal was dismissed, since questions presented had become moot.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Robert Wynn was indicted and charged with murder in the first degree. From an order quashing the indictment, the People of the State of California appeal.

Appeal dismissed.

Earl Redwine, Dist. Atty., and Russell S. Waite, Deputy Dist. Atty., both of Riverside, for the People.

Joseph Seymour, of Riverside, for respondent.

MARKS, Justice.

This is an appeal from an order quashing an indictment returned by the grand jury of Riverside county charging defendant with murder in the first degree.

Since this appeal was perfected it has come to our attention that the district attorney of Riverside county filed an information charging defendant with the same crime; that defendant entered pleas of guilty, and not guilty, by reason of insanity; that he has been tried on the latter plea and has been found sane.

This renders all questions on this appeal moot as defendant cannot be tried a second time for the same offense.

The appeal is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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31 Cal.App.2d 568

In re KLOPSTOCK'S ESTATE.

Civ. 11005.

District Court of Appeal, First District, Division 2, California.

March 20, 1939.

Hearing Denied by Supreme Court May 18, 1939.

1. Wills 🔑21

In will contest based on alleged mental infirmity of testator, issue was whether testator was of sound mind at very time of execution of will.

2. Wills 🔑53(2)

In will contest based on alleged mental infirmity of testator, evidence to show testator's mental condition both before and after execution of will was admissible only to extent that it tended to show mental condition at time will was executed.

3. Wills 🔑55(1)

Mere proof of mental derangement, or even of an infirmity in a medical sense, is insufficient to invalidate a will, but complete mental degeneration denoting utter incapacity to know and understand those things which law prescribes as essential to making of a valid will, or the existence of a specific insane delusion affecting making of a will, must be shown.

4. Wills 🔑386

Where there was substantial evidence to sustain trial court's findings that testator was of sound mind at time of execution of will, appellate court could not interfere with findings on appeal.

5. Wills 🔑166(1)

In will contest, evidence of volition on part of testator sufficiently rebutted alleged prima facie case of undue influence.

6. Wills 🔑261

Widow who joined in offering will for probate and who served as executrix thereof until her death without offering later will in her possession for probate was not guilty of laches estopping those claiming under her from seeking to have later will admitted, notwithstanding that delay deprived contestants of widow's testimony.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Proceeding in the matter of the estate of Isaac D. Klopstock, deceased, between David Klopstock and others, contestants of the will of deceased, and Flora E. Short and Samuel M. Samter, as executor of the last will of Grace E. Klopstock, deceased. From a judgment admitting will to probate and setting aside prior order admitting earlier will, contestants appeal.

Affirmed.

Joseph T. O'Connor and Leo R. Friedman, both of San Francisco, for appellants.

H. U. Brandenstein and Samuel M. Samter, both of San Francisco, for respondents.

SPENCE, Justice.

The appellants, who are the three brothers of the deceased and are the contestants herein, appeal from the judgment of the trial court admitting to probate a will executed by the deceased in 1932 and setting aside an order previously made admitting to probate a will executed by the deceased in 1925.

The grounds of contest urged in the trial court were that Isaac D. Klopstock, deceased, was not of sound mind when he executed the 1932 will; that said will was the result of undue influence exerted upon said deceased by Grace E. Klopstock, who was the wife of said deceased and by Samuel Samter; and that said Grace E. Klopstock and all persons claiming under the will of said Grace E. Klopstock were guilty of laches and were estopped from asserting that the 1932 will was the last will and testament of said deceased. The trial court found against the contestants on all of these issues and judgment was entered accordingly.

Isaac D. Klopstock, deceased, died in 1933, some nine months after the execution of the 1932 will. He had married Grace E. Klopstock in 1902 and they had lived happily together throughout the thirty-one years of their married life. There were no children of this marriage. In 1930 the deceased suffered a stroke and he was a sick man from that time until his death. He had executed an holographic will in 1925 under which his three brothers, his sister and a friend would have received cash bequests amounting to $27,500. In that will, the residue of his estate was left to his wife Grace E. Klopstock and in the event that she predeceased him, then to his brothers and sister. His wife and his brother Frederick were named as executors. In 1932 he executed the will which was the subject of the contest by his three brothers. In that will, the cash bequests were reduced to a total of $10,000. The three brothers were omitted, the bequest to his sister was reduced and legacies of $1000 each were made to five nephews and nieces. The residue of his estate was left to his wife, and in the event that she predeceased him, then to his brothers and sister. His wife was named as executrix in this will. All of the property of the deceased was community property.

The will of 1932 was drawn by Samuel Samter, an attorney at law who had known the deceased for twenty-five or thirty years and who had acted as the attorney for the wife of the deceased. Mr. Samter and Mr. Berman, an attorney at law associated with Mr. Samter, were the subscribing witnesses. Mr. Samter had visited the deceased upon numerous occasions after the deceased became ill in 1930. In 1932, he was advised by the wife of the deceased that the deceased wanted to see him regarding the making of a new will. Mr. Samter called upon the deceased and obtained the necessary information for the purpose of making the will. Mr. Samter and the deceased were the only ones present on that occasion and the conversation lasted for about one hour. The deceased told Mr. Samter that he had previously made a will in 1925; that conditions had changed since that time and that he desired to make some changes; that his stocks had gone down and he was not as rich a man as he was in 1925; that he wanted to cut down the bequests which he had made in the 1925 will as he had to look out for his wife. They discussed the fact that all the property was community property and the deceased said he knew that one-half of the property would go to his wife in any event. The deceased did not have the 1925 will before him nor did he have any memorandum as to the provisions he desired made. He gave and spelled the names of the various legatees together with the amount to be specified in the will for each of said legatees.

Thereafter Mr. Samter drafted the will and again visited the deceased on September 16, 1932, when the will was executed. He was accompanied by Mr. Berman and there were no other persons present on that occasion. The deceased carefully read the entire will including the attestation clause and discussed its various provisions at some length with Mr. Samter. The deceased said that he understood it and was ready to sign it. In response to questions from Mr. Samter, he declared it to be his last will and requested Mr. Samter and Mr. Berman to sign as witnesses. These parties were with the deceased for about half an hour on this occasion. Both Mr. Samter and Mr. Berman testified that, in their opinion, the deceased was of sound mind at the time the will was executed.

Appellants produced numerous witnesses including relatives, employees, a doctor and a nurse. None of said witnesses could testify to having seen the deceased on the day that the will was executed and their testimony related to times either before or after that day or both. All of said witnesses expressed the opinion that the deceased was of unsound mind. They testified regarding the physical and mental condition of the deceased as it appeared to them over a long period of time, and regarding certain abnormalities in his conduct. They further testified that he had delusions at times. It should be stated, however, that appellants make no claim that the will was the product of any insane delusion or hallucination but they do make the claim that deceased "was suffering from insanity of such broad character as to establish mental incompetency generally" and that he lacked testamentary capacity as "he did not know, understand or appreciate the nature, character, quality or extent of his estate".

[1-3] Appellants contend that the evidence was insufficient to support the findings to the effect that the deceased was of sound mind but we find no merit in this contention. The issue before the trial court was whether the deceased was of sound mind at the very time of the execution of the will and while evidence was admissible to show his mental condition both before and after the execution of the will, such evidence was important only to the exent that it tended to show his mental condition at the time in question. Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Smith, 200 Cal. 152, 252 P. 325. It should also be noted that the authorities make it entirely clear that it is not every mental impairment or deviation from the normal which will deprive a testator of testamentary capacity. Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Chevallier, 159 Cal. 161, 113 P. 130. As was said in Estate of Shay, supra, at page 359, 237 P. at page 1080, "It is well settled that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a valid will, or the existence of a specific insane delusion which affected the making of the will in question."

[4] In the light of the foregoing authorities, it appears that it would serve no useful purpose to set forth all of the testimony introduced by appellants on the issue of soundness of mind. We may assume, without deciding, that said testimony was such that it would have sustained a finding that deceased was of unsound mind at the time the will was executed. The most that can be said however is that there was a conflict in the evidence but it appears that there was substantial evidence introduced by respondents to sustain the findings of the trial court upon this issue. Under these circumstances, it is well settled that an appellate court may not interfere with the trial court's findings on appeal. In this connection, appellants make the claim that the testimony of respondents' witnesses was inherently improbable but we find nothing in the record to sustain this claim.

[5] Appellants further contend that the trial court "erred in finding that the offered document was not procured as a result of undue influence". In support of this contention appellants claim that they made out a prima facie case of undue influence and that the effect thereof was "to impose upon proponents the obligation of presenting evidence of volition". It is a sufficient answer to point out that even assuming that appellants succeeded in making out a prima facie case, respondents presented ample evidence to show volition on the part of the deceased and to rebut any alleged prima facie case of undue influence made out on behalf of appellants. The trial court was therefore justified in finding in favor of respondents on this issue.

[6] The last contention of appellants is that "the document of 1932 should have been denied probate under the doctrines of laches and estoppel". A consideration of this contention requires the statement of further facts. The 1932 will was placed in the possession of Grace E. Klopstock after it was executed by the deceased. After the death of Grace E. Klopstock in 1935, said will was found in her safe-deposit box. In the meantime, Grace E. Klopstock had joined in offering the 1925 will for probate. In 1933 she was appointed executrix of the 1925 will and acted as such executrix until her death without offering the 1932 will for probate. It is now claimed that she was guilty of laches and that her conduct "was such as to create an estoppel against the 1932 will being offered for probate by anyone claiming through or under her". The only prejudice which appellants claim as a result of the delay in offering the 1932 will for probate until after the death of Grace E. Klopstock, is that they were thereby deprived of the testimony of said Grace E. Klopstock upon their contest of said 1932 will. Appellants state that they have been unable to find any authority in this jurisdiction to sustain their foregoing contention and the authorities cited from other jurisdictions appear to be clearly distinguishable on their facts. Hayes v. Simmons, 136 Okl. 206, 277 P. 213; Milligan v. Milligan, 145 Va. 184, 133 S.E. 672. Here the estate of the deceased was still in probate and we are of the opinion that the mere fact that the delay in offering the 1932 will for probate may have deprived appellants of the testimony of Grace E. Klopstock did not necessarily require the trial court to find that Grace E. Klopstock

was guilty of laches which would create an estoppel against those claiming under her.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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31 Cal.App.2d 716

ROBINSON et al. v. PISMO OIL DOME CO. et al.

Civ. 2281.

District Court of Appeal, Fourth District, California.

March 27, 1939.

Appeal and error 🔑395, 627(2)

Where no transcript or record was filed within statutory time, no extension of time therefor was ever granted, and no arrangements were made, nor undertaking or bond filed, to pay clerk's and reporter's fees, appeal must be dismissed on motion. Code Civ.Proc. § 953a.

Action by W. H. Robinson, A. E. Russell and others against the Pismo Oil Dome Company and others. From a judgment of dismissal, plaintiff Russell appeals. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

V. D. Manville, of Fresno, for appellant.

C. T. Walton, of Fresno, for respondents.

GRIFFIN, Justice.

This is a motion to dismiss the appeal. Notice of appeal from a judgment of dismissal in the above-entitled matter was filed by appellant A. E. Russell with the clerk of the superior court of Kings county on May 13, 1935. On the same day appellant filed a notice to the clerk to prepare a transcript under section 953a of the Code of Civil Procedure.

It appears from the certificate of the clerk and the official court reporter that since that date appellant has not prepared nor caused to be prepared and filed any transcript or record on appeal and that no extension of time for the preparation or filing of the same has ever been made or entered in said cause and that at no time has appellant or anyone else made any arrangements with either the clerk of the court or the official reporter for the fees for the preparation of such transcript and that no undertaking or bond has ever been presented or filed to cover such fees. On March 15, 1939, the trial court made and entered an order terminating all proceedings relating to the preparation of a record on appeal. The time for the filing of such record has long since elapsed. Under the authority of Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468, the motion is granted and the appeal is dismissed.

I concur: MARKS, Acting P. J.

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31 Cal.App.2d 579

JOHNSON v. LOS ANGELES COUNTY.

Civ. 11010.

District Court of Appeal, First District, Division 2, California.

March 21, 1939.

Commerce 🔑77

A tax on twine, rope and cordage imported by taxpayer from Philippine Islands and stored in his Los Angeles warehouse was illegal as tax on imports, notwithstanding that bill of lading designated as consignee the bank on which seller drew its draft, where bank paid draft and delivered bill of lading to taxpayer who executed trust receipt to pay amount of draft within 90 days. U.S.C.A.Const. art. 1, § 10, cl. 2.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by Victor Johnson, doing business under the name of Victor Johnson & Co., against Los Angeles County, to recover four separate items of taxes alleged to have been illegally collected. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Everett W. Mattoon, Co. Counsel, Los Angeles County, J. H. O'Connor, Co. Counsel, Los Angeles County, and Gordon Boller, Deputy Co. Counsel, all of Los Angeles, for appellant.

Thomas D. Aitken, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff sued to recover four separate items of taxes alleged to have been illegally collected. The defendant filed a general demurrer, it was overruled, and from the judgment entered in favor of the plaintiff the defendant has appealed. A statement of the facts, the defendant says, is as follows:

Plaintiff at all times herein concerned was the owner of, and did business under the name, Victor Johnson & Company, as a wholesale dealer in twine, rope and cordage. He had the exclusive agency in the United States for the product of, and was under agreement to buy exclusively from, Johnson-Pickett Rope Company, a Philippine corporation, manufacturer. The twine, rope and cordage herein taxed was brought into the United States from Manila, Philippine Islands, under the following circumstances: Plaintiff ordered his stock in trade, as needed, from Johnson-Pickett Rope Company, upon its quotation of C. I. F. prices. He maintained, for the purpose, an established credit of $25,000 with Pacific National Bank of San Francisco, California. The seller filled plaintiff's orders by shipment on the first available steamer from Manila to San Francisco, under bill of lading designating as the consignee "Order of the Pacific National Bank of San Francisco, California, ultimate destination, notify Messrs. V. Johnson and Company, San Francisco, California," and at the same time drew its draft on Pacific National Bank of San Francisco for the price, C. I. F., San Francisco.

After plaintiff's order of the goods herein taxed was filled and the draft therefor drawn, the seller discounted the draft with a Manila bank, a correspondent of Pacific National Bank of San Francisco, delivering with said draft the bill of lading and a policy insuring the shipment in favor of Johnson-Pickett Rope Company in San Francisco "as well as in his or their own name or names, as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in whole". The Manila bank mailed the draft with bill of lading attached and insurance policy to Pacific National Bank of San Francisco for acceptance and payment, by the same steamer that carried the goods, if said steamer carried mail, or by the next mail-carrying steamer leaving Manila for California. Said draft, bill of lading and insurance policy, in regular course of mail, were delivered to Pacific National Bank in San Francisco, which thereupon accepted and/or paid the draft and notified plaintiff. Plaintiff appeared at the office of Pacific National Bank in San Francisco and executed a trust receipt to pay said bank the amount of the draft, plus agreed charges, within ninety days. Thereupon said bank endorsed over and delivered to plaintiff said bill of lading, with which plaintiff then obtained the goods and transported them to his warehouse in Los Angeles, where, on the first Monday of March of the two years in question, they were in storage waiting sale in the original package.

The last sentence above set forth is a conclusion of the defendant. In the third paragraph of the complaint the plaintiff alleged "That during the months of June and July, 1934, and July, 1935, there were deposited in the warehouse of plaintiff in the city of Los Angeles twine, rope and cordage * * *." In paragraph 6 he alleged that he "* * * thereupon entered and caused to be entered the goods in the custom house at Los Angeles and secured the necessary and usual permit to discharge and land the same * * *." Those allegations imply that the ship which received the merchandise at Manila landed the shipment at Los Angeles and that the plaintiff received it at that port and placed it in a warehouse.

The defendant claims that under the facts this plaintiff was not the importer. Both parties admit that the merchandise was imported. Both parties concede that they are bound by the rule stated in Brown v. Maryland, 12 Wheat. 419, 6 L.Ed. 678. On page 440 Mr. Chief Justice Marshall, speaking of the meaning of article 1, section 10, clause 2 of the federal Constitution, U.S.C.A. said: "It has already been shown, that a tax on the article, in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port." In that case there being a controversy as to the meaning of "entering the port", on page 441, the writer continued: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution." From the date that Johnson-Pickett Rope Company accepted the order of this plaintiff to make the shipments the latter obtained an inchoate title which later ripened into an absolute title. As we understand the law we are not called upon, and do not attempt, to determine the exact date on which plaintiff's title became absolute. That, from and after his order was accepted, he had a property interest in the merchandise is perfectly clear.

The question then arises as to what effect, if any, did the execution of the shipping papers hereinabove referred to have on the status of the merchandise as imports. In so far as the record shows we think they had none. Discussing the nature of a conditional sales contract, in Walker v. Houston, 215 Cal. 742, commencing on page 746, 12 P.2d 952, on page 954, 87 A.L.R. 937, the court said: "The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose. Hence it follows that tender of the balance of the price should have the effect of discharging the title of the seller and vesting such title in the buyer, and it has been so held. Davies-Overland Co. v. Blenkiron, 71 Cal.App. 690, 236 P. 179; Dame v. C. H. Hanson & Co., 212 Mass. 124, 98 N.E. 589, 40 L.R.A.,N.S., 873, Ann.Cas.1913C, 329; National Cash Register Co. v. Wapples, 52 Wash. 657, 101 P. 227." A short time later the same court in the case of County of San Diego v. Davis, 1 Cal.2d 145, 33 P.2d 827, was called upon to review the judgment rendered in an action brought to recover a tax that had been levied on an automobile. The automobile was purchased under a conditional sales contract. The buyer took possession, remained in possession and had the beneficial use of the automobile. The county of San Diego claimed the right to recover the tax from the "legal owner" as distinguished from the "registered owner". Commencing on page 146, 33 P.2d on page 827, the court said: "The trial court determined that the registered owner was the party liable for the tax, and that the legal owner was not liable. This holding follows the established practice throughout the state, and is both sound and practical. The imposition of personal liability for the tax on finance companies which have no use or control over the car, instead of on the party having the beneficial use, finds no justification in the statutes. The tax must be levied on the owner of the property, but this does not necessarily mean the holder of the legal title. In a conditional sale, the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller, subject only to the seller's remedies in case of default. Both in a practical and a legal sense the buyer is the beneficial owner. See Walker v. Houston, 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937. The precise question at issue in this case was before the Alabama court in Ex parte State, 206 Ala. 575, 90 So. 896. The court there said: '* * * When a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use or enjoyment of the property as such.'" In other words, bearing in mind we are considering the allegations of the plaintiff's complaint as amended, we find nothing to show that the shipping papers contained anything showing that the merchandise "lost its distinctive character as an import". It follows that the tax imposed on the merchandise was illegally collected and that the plaintiff's complaint stated a cause of action.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

31 Cal.App.2d 593

PEOPLE v. BRAUN.

Cr. 3147.

District Court of Appeal, Second District, Division 1, California.

March 21, 1939.

Hearing Denied by Supreme Court April 20, 1939.

1. Criminal law 🔑510

The court has no control over subject of corroboration of accomplice's testimony, except to apply statute, which imperatively makes such corroboration essential prerequisite to conviction on criminal charge resting primarily and solely on accomplice's testimony. Pen.Code, § 1111.

2. Criminal law 🔑511(1)

More is required to corroborate accomplice's testimony than evidence merely casting suspicion, though grave, on accused. Pen.Code, § 1111.

3. Criminal law 🔑511(1)

Proof of mere opportunity to participate in crime raises no more than suspicion of guilt and is insufficient to corroborate accomplice's testimony as to accused's participation therein. Pen.Code, § 1111.

4. Criminal law 🔑511(5)

Evidence that one accused of crime, perpetration of which he was alleged to have advised and encouraged, had associated with actual perpetrators, raised only suspicion of guilt and hence was insufficient to corroborate accomplice's testimony against him. Pen.Code, § 1111.

5. Criminal law 🔑511(1)

An accomplice's testimony must be eliminated from case for purpose of determining whether it is corroborated by other evidence. Pen.Code, § 1111.

6. Homicide 🔑234(3)

In trial for murder and attempted murder in commission of robbery, evidence *held* insufficient to corroborate accomplice's testimony that one defendant advised or encouraged commission of robbery by other defendants. Pen.Code, § 1111.

7. Homicide 🔑234(3)

The prosecution had right to present accomplice's testimony in trial for murder and attempted murder even after dismissing charge of attempted murder against him.

8. Criminal law 🔑508(6)

An accomplice's testimony for prosecution after latter's dismissal of serious charge against him must be viewed in light of reward extended him so far as motives arising therefrom might prompt him in giving testimony.

9. Criminal law 🔑633(1)

Accused is entitled to have his case fairly tried according to established rules of law, whether he is guilty or innocent.

10. Criminal law 🔑82

It is court's duty to be watchful for constitutional and individual rights of citizen and against any stealthy encroachments thereon.

11. Criminal law 🔑372(1)

The prosecution may show that crime charged was committed in furtherance of conspiracy to commit series of like or other criminal acts, though such evidence shows that accused committed other and distinct crimes in furtherance of common object of conspiracy.

12. Criminal law 🔑673(5)

In trial for murder in commission of robbery, court should have limited application of testimony that defendants participated in commission of other robberies pursuant to conspiracy to defendants who actually participated in such other robberies and excluded such testimony as to defendant not shown to have participated in such offenses.

13. Criminal law 🔑673(5)

In trial for murder in commission of robbery, admission of evidence that defendants participated in other robberies pursuant to conspiracy, without instructing jury to consider such evidence only in determining whether defendants conspired to commit series of robberies, was error prejudicial to defendant not shown to have participated in such other robberies.

14. Criminal law 🔑673(5)

In trial for murder in commission of robbery, court should have instructed jury to consider evidence of other robberies previously committed by defendants for limited purpose of determining whether they conspired to commit series of robberies or like criminal offenses.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

George Braun and Harry Groves were convicted of first-degree murder and attempted murder, and defendant Braun appeals.

Reversed and remanded for a new trial.

Hearing denied by Supreme Court; SHENK and EDMONDS, JJ., dissenting.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

WHITE, Justice.

By an information filed against them by the district attorney of the county of Los Angeles, George Braun, Harry Groves, Ann Groves and John Roble were jointly accused in count I of the crime of murder and in count II of the offense of attempted murder. The defendants entered separate pleas of not guilty and went to trial thereon before a jury. During the progress of the trial defendant John Roble withdrew his plea of not guilty as to the charge of murder set forth in count I of the information and pleaded guilty thereto, at which time as to him count II was dismissed, and he later testified as a witness for the People. Upon completion of the trial as to the remaining defendants, the jury returned verdicts finding defendants George Braun and Harry Groves guilty of murder in the first degree as charged in count I and recommended life imprisonment as punishment therefor; and also found the same defendants guilty of the crime of attempted murder as set forth in count II. Defendant Ann Groves was acquitted on both counts. Judgments having been pronounced pursuant to the laws of this state, defendant George Braun alone prosecutes this appeal therefrom.

The facts disclosed by the record as necessary for a consideration of this case are substantially as follows: On the early morning of March 20, 1938, the deceased, Presley B. Stewart, was the owner of and operating a cafe known as "The Bee Hive" in Los Angeles county. Shortly after 1 o'clock the defendants Roble and Groves, together with one Waller, the latter of whom was not apprehended, entered the cafe and attempted to rob Stewart at the point of guns. At that time appellant, Braun, and defendant Mrs. Groves were present in the cafe, having entered some time previous, but neither of the last-named two actively participated in the attempted hold-up. Resistance being offered to the robbers, a fracas ensued, during which several shots were fired, resulting in the killing of the proprietor, Stewart, and the wounding of one Dan Preston, named as the victim in count II of the information. The three gunmen obtained some forty dollars from the cash register and fled the premises. Shortly thereafter on that same morning they, together with appellant Braun and defendant Mrs. Groves, met at the Groves apartment and departed for Arizona. While in Arizona, the party decided to disband, pursuant to which decision Waller and defendants Groves and Roble journeyed eastward, while appellant Braun and defendant Mrs. Groves returned to California via San Diego, in which latter city they surrendered themselves to officers of the law; while defendants Harry Groves and Roble were apprehended in Kansas City and returned to Los Angeles county for trial.

Appellant first challenges the sufficiency of the evidence to sustain the conviction on the ground that the same is totally lacking in any corroboration of the testimony of the accomplice Roble, as required by section 1111 of the Penal Code. The theory of the prosecution was not that appellant Braun participated in any overt act at the time of the hold-up and murder, but that he planned the robbery and advised, counseled and encouraged Roble, Waller and Groves to rob the cafe in question. Direct testimony in this regard was supplied solely by defendant Roble, an admitted accomplice, when he testified as a prosecution witness. This witness testified that on the night of the hold-up he, appellant Braun, Harry Groves and Waller rode around in two automobiles, one a Pontiac and the other a Plymouth; that they stopped at Alhambra; that appellant Braun said that he knew Mr. Stewart, who operated the Beehive Cafe on Whittier boulevard; that Mr. Stewart carried money in his wallet. The accomplice further testified that appellant Braun also said that he would go to the cafe first and be in the place and put up his hands, which would cause others in the place to do likewise. The witness testified that he, Waller and Groves went to the cafe in the Pontiac automobile, while appellant Braun preceded them in his Plymouth automobile; that when the accomplice, Waller and Groves arrived at the cafe, they saw Braun's car standing on the boulevard. The accomplice then related the occurrences at the Beehive Cafe as hereinabove set forth. He then testified that after leaving the cafe, he, Waller and Harry Groves went to the latter's apartment, and that later Mrs. Groves and appellant arrived there; that appellant said, "We had to mope," meaning, according to the witness, that they had to leave; that thereupon he, the accomplice, divided the money he had taken with Groves and Waller; that they packed their clothes and left the apartment, appellant Braun and Mrs. Groves going in the former's Plymouth automobile, while Harry Groves, Waller and the witness left in the Pontiac car. According to the testimony of this accomplice, when they arrived in Arizona they went to a cafe operated by one Tony Damiano, from whence they proceeded to Phoenix, Arizona, where they rented cabins. While there, according to the testimony of the accomplice, appellant suggested that it would be best for Mrs. Groves and appellant to separate and go to Yuma, where they would try to get money for the remaining people in the party. The witness further testified that in another conversation appellant said to him, Waller and Groves that they had "committed one murder" and "we might as well go out and get some guns and go first class".

The accomplice also testified that he first met appellant in the early part of March, 1938, and that appellant was a frequent visitor at the Groves apartment. The accomplice also testified that he had stolen a few cars before he had met appellant; that he stole the Pontiac car on March 16, and also a Buick about that date; and that on Thursday or Friday, March 17 or 18, three days before the robbery of the cafe, he, the witness, went to Alhambra and robbed two places en route, but did not involve appellant therein.

Appellant Braun took the witness stand in his own behalf at the trial; admitted he had previously been convicted of a felony in January, 1931, for which he served a term in an eastern penitentiary, having been discharged therefrom September 27, 1937; that he met one of the robbers, Leo Waller, in 1936, while both were confined in the penitentiary. He further testified that he arrived in Los Angeles during November, 1937, and lived with Waller for a few days during the interim until February 18, 1938; that he knew Mr. and Mrs. Groves, two of his codefendants; that he first met the codefendant Roble March 15, 1938. With reference to the night of March 19 and the early morning of the 20th, when the hold-up in question occurred, appellant testified that he was with Waller, codefendants Mr. and Mrs. Groves and Roble around 3 or 4 o'clock in the afternoon of the 19th; that subsequently an argument ensued between the defendant Groves and his wife, following which, appellant testified, he drove away with Mr. Groves, Waller and Roble, letting Groves and Roble out of the automobile, after which he drove around with Waller, finally arriving at the home of a Mrs. Martinsen, where all of the defendants and Waller were present. That Mr. and Mrs. Groves again engaged in an argument, which culminated in Mrs. Groves saying she was going to leave her husband, and appellant drove her to her apartment to get her belongings. Thereafter, appellant testified, he and Mrs. Groves drove around, finally arriving at the Beehive Cafe about midnight. Appellant further testified that he had frequented the Beehive Cafe since November, 1937, and was fairly well known there. He then related how a commotion started at the cafe and he observed Waller and another man struggling with each other while defendant Roble was grappling with still another man when the shooting started. Appellant further testified he was not armed and that he did not participate in the hold-up, and he related how defendant Mrs. Groves became hysterical when the shooting started, and that he finally drove her to the Groves apartment and there encountered Waller, Harry Groves and Roble. Appellant testified that he had been drinking considerably, and finally the entire party left the apartment in two automobiles, appellant testifying that he believed Waller was driving him home to his apartment; that he went to sleep in the rear seat, and when he awoke he found himself in Indio, California. Appellant testified that he was then in a stupefied condition, and the party proceeded eastward into Arizona; that after arriving at Phoenix, he and Mrs. Groves left the party to return to California. At Yuma, Arizona, appellant testified, he talked with a friend of his who was a police officer, and following that conversation he and Mrs. Groves decided to return and surrender to the authorities. Arriving in San Diego by automobile, appellant and Mrs. Groves accosted a police officer, showed the latter a newspaper with an account of the hold-up therein, and advised the officer that they were two of the people wanted by Los Angeles authorities in connection therewith; whereupon they were arrested. Appellant denied his participation in any criminal activities with his codefendants or Waller, and also disclaimed any knowledge on his part of the intended hold-up of the Beehive Cafe, and further denied that he had advised, counseled or encouraged the hold-up which culminated in the killing of the cafe proprietor and the wounding of Dan Preston.

[1] There is no direct evidence connecting appellant with the crimes charged in the information, for the reason that he did not actually participate in the robbery or the shooting in connection therewith. He could be convicted, therefore, only on the ground that though inactive during the commission of the offenses, he had previously advised and encouraged the hold-up in the perpetration of which one man was killed and another wounded. The only direct evidence that appellant knew of the contemplated robbery or that he had previously advised and encouraged it is supplied by the witness Roble, and he concededly being an accomplice, his testimony must be corroborated. "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *" Pen. Code, sec. 1111.

It will thus be seen that the statute imperatively makes corroboration of the testimony of the accomplice an essential prerequisite to the conviction of the defendant, where the crime charged rests primarily and solely upon the testimony of an accomplice; and it is apparent, therefore, that the court has no control over the subject except to apply the statute. In People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611, our Supreme Court quoted with approval the following language found in Welden v. State, 10 Tex.App. 400: "* * * eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." In the same case of People v. Morton, supra, our Supreme Court voices its approval of the rule as stated in Simms v. State, 8 Tex.App. 230: "The evidence must tend directly and immediately to connect the defendant with the commission of the offense."

In New York, under a code provision similar to our own (Code Crim.Proc. sec. 399), it was said in People v. Ryland, 28 Hun. 568, 570, "The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail."

[2] That more is required by way of corroboration than mere suspicion is firmly established in the law of this state. People v. Kempley, 205 Cal. 441, 456, 271 P. 478, and cases therein cited; People v. Davis, 210 Cal. 540, 293 P. 32; In People v. McLean, 84 Cal. 480, 24 P. 32, we find the following: "But, although more is required by way of corroboration than to raise a mere suspicion (see People v. Thompson, 50 Cal. 480), yet the corroborating evidence is sufficient if it of itself tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration."

The query of how much is required in order to constitute corroboration has been answered by many cases wherein it is decided that "corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused". People v. Robbins, 171 Cal. 466, 470, 154 P. 317, 319; People v. Woodcock, 52 Cal.App. 412, 417, 199 P. 565; People v. Janssen, 74 Cal.App. 402, 407, 240 P. 799. In People v. Allison, 200 Cal. 404, 253 P. 318, the court is given no alternative but to set aside the conviction unless the testimony of the accomplice is corroborated in accordance with section 1111 of the Penal Code as that statute has been interpreted by the courts. See, also, People v. Robbins, supra, at page 469, 154 P. 317.

[3-6] Having in mind the foregoing legal principles, we now turn to the record to discern in what respects, if at all, the testimony of the accomplice Roble was sufficiently corroborated. Through the testimony of other witnesses, including that of appellant himself, numerous facts were proved. There was evidence that Braun was present in the Beehive Cafe when the hold-up and homicide took place, by reason whereof he had an opportunity to participate in the crimes; but proof of mere opportunity raises no more than a suspicion of guilt, and that is insufficient. People v. Robbins, supra; People v. Morton, supra;

People v. Koening, 99 Cal. 574, 34 P. 238. It was also established that appellant had associated with the actual perpetrators of the crime, but such conduct again gives rise only to a suspicion of guilt that he advised, encouraged and participated in the crimes. People v. Long, 7 Cal.App. 27, 93 P. 387; People v. Koening, supra; People v. Fagan, 98 Cal. 230, 33 P. 60. It is admitted by appellant that following the commission of the crimes he drove to the apartment of his codefendant Groves, and a few hours later accompanied the actors in the hold-up to Arizona, but in this connection it should be remembered that Mrs. Groves was with appellant and that when he drove to the apartment of her husband he was taking her home. It is contended that by accompanying the codefendants to Arizona appellant evidenced a consciousness of guilt, but such an inference is more or less negatived by the testimony as to his drunken condition, coupled with the fact that he immediately returned from Arizona and surrendered to the police. However, we think that neither singly nor collectively do these circumstances lend any weight to the conclusion that appellant advised or encouraged the robbery which resulted in the murder and attempted murder with which he was charged; and his guilt thereof is dependent upon legal evidence that he did advise or encourage the commission of the robbery. We have carefully read the entire record, and upon a consideration thereof we are compelled to state that when the testimony of the accomplice is eliminated from the case, as it must be for the purpose of determining the question of corroboration (People v. Robbins, supra), the other evidence in the case furnishes no substantial proof that appellant either advised or encouraged the commission of the robbery in question. That it arouses a suspicion, even a grave suspicion, may be conceded, but that is insufficient to establish the corroboration required by law. In every instance the allegedly corroborative circumstance requires recourse to the testimony of the accomplice to give it direction. Without the aid of the accomplice's testimony, and standing alone, the circumstances, while generating a suspicion of guilt, are as compatible with innocence as they are with guilt. As was said in People v. Morton, supra, quoting from Childers v. State, 52 Ga. 106, speaking of defendants convicted on the testimony of an accomplice, "It may be these men are bad, guilty men, but if they are convicted it ought to be under the rules of law. To justify this verdict would be, in our judgment, to make the best men in the land subject to the danger of conviction by any guilty scoundrel who might attack them."

[7–9] The accomplice in the case before us acknowledged from the witness stand his own infamy. He admitted committing a series of robberies and the larceny of two automobiles; he also exhibited resentment against appellant for the reason, as stated by him, that appellant had advised him to commit crime and had failed to send him money in accordance with appellant's alleged promise. Probably also the fact that after he surrendered to the police appellant made a statement to them of the happenings in the Beehive Cafe on the night of the crime influenced the accomplice in his hostile attitude toward appellant. We do not refer to these matters for the purpose of arriving at a conclusion that the accomplice's story ought not to be believed by the jury, but for the purpose of emphasizing the duty imposed upon us to scrutinize other evidence in the record which the prosecution claims measures up to that standard of corroborative evidence demanded by our law. The prosecution undoubtedly had the right to present the testimony of an accomplice even though, as in this case, they dismissed a serious charge against him, to-wit, that of attempted murder as charged in count II of the information, before he took the stand; but when they do avail themselves of that right they must expect the testimony of such a witness to be viewed in the light of the reward extended him, in so far as the motives arising therefrom might prompt him in the giving of his testimony. Neither are we unmindful of the profligate and more or less dissolute character of appellant, who admitted a prior conviction of felony and a course of personal conduct not consistent with good morals, but we are not now concerned with the guilt or innocence of appellant, further than to say that without the testimony of the accomplice the prosecution made no case against him of advising or encouraging the commission of the robbery of the Beehive Cafe. Whether guilty or innocent, the appellant was entitled to have his case fairly tried according to the established rules of law, and as said by a learned judge, "Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained, is unjust and dangerous to the whole community." Hurd v. People, 25 Mich. 405. The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions.

[10] Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from established legal modes of procedure. In a strong dissenting opinion delivered by Mr. Justice Sutherland of the Supreme Court of the United States, in Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 659, 81 L.Ed. 953, we are counseled to "withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of those fundamental legal principles such as the one with which we are here concerned, would be a tragedy. It is the duty of the courts to be watchful for the constitutional and individual rights of the citizen and against any stealthy encroachments thereon.

[11, 12] It is next contended by appellant that the court erred in permitting evidence of other offenses allegedly committed by defendants, and particularly in admitting evidence of the commission of other crimes by some of the defendants other than appellant. At the outset of the trial, the district attorney stated that he intended to prove that "these defendants, George Braun, John Roble, Harry Groves, Ann Groves, and one Leo Waller, were in a conspiracy, and had a general plan, system and scheme to commit a series of robberies in and around the County of Los Angeles; that included in this general scheme, conspiracy and plan was the robbery of the Beehive Cafe on Whittier Boulevard, in the City and County of Los Angeles, State of California". Summarized, the salient features of such evidence were as follows:

That on February 14, 1938, the defendants Roble and Harry Groves, at the point of guns, held up and robbed a cafe located between the cities of Pomona and Ontario. There was evidence of the presence of a third but unidentified man on this occasion. Appellant, however, was not identified as being present. That on March 16 defendants Waller and Roble stole an automobile from a parking station. That on January 31, 1938, appellant, Harry Groves and Roble, armed with deadly weapons, held up and robbed employees of the United Independent Dairies. That on March 16 Harry Groves, Roble and Waller robbed Mr. and Mrs. Harry Salman in their home.

It is now definitely settled as the law of this state that upon the trial of an accused for the commission of a particular crime, the prosecution may show as a part of its case that such crime was committed in furtherance of a conspiracy to commit a series of like or other criminal acts People v. Schmidt, 33 Cal.App. 426, 165 P. 555; People v. Arnold, 199 Cal. 471, 250 P. 168; and such evidence is not rendered inadmissible because it shows that the accused committed other and distinct crimes in furtherance of the common object of the conspiracy. People v. Zimmerman, 3 Cal.App. 84, 84 P. 446; People v. Anderson, 59 Cal.App. 408, 211 P. 254. However, in the instant case, there is no testimony whatever, other than the insufficiently corroborated testimony of the accomplice, that appellant participated in or advised or encouraged the commission of any of the aforesaid offenses, except as to the United Independent Dairies holdup, where appellant was identified by one of the victims. Timely objections and appropriate motions to strike were made on behalf of appellant, and this testimony should have been limited by the court in its application to the defendants who participated in the respective robberies, and therefore should have been excluded as to the appellant, except in the Dairy case, in connection with which there was competent evidence of appellant's participation.

[13, 14] That this line of testimony was prejudicial to appellant cannot be questioned and is evidenced by the fact that Mrs. Ann Groves, one of the defendants whose participation in the Beehive Cafe robbery was akin to that of appellant, was acquitted, while the latter was convicted. Moreover, and in connection with this type of evidence, the court if a retrial is had should be careful to instruct the jury that the defendants are on trial solely for the offenses charged in the information, to-wit, murder and attempted murder, alleged to have been committed on March 21, 1938, as set forth in the information, and are not on trial for conspiracy, nor for any offenses other than the ones charged in the information; and that as to evidence concerning

other crimes happening before the 21st of March, such evidence should be considered by the jury for the limited purpose of determining whether a conspiracy existed between the defendants to commit a series of robberies or like criminal offenses. People v. Sampsell, 104 Cal.App. 431, 440, 286 P. 434. No such instructions were given, and as to this appellant such failure was prejudicial error, both from the standpoint of the lack of evidence to show his participation in any except one of the other offenses, and as to the other offense in connection with which appellant was identified; for in the absence of the admonition just suggested, the jury was free to erroneously consider such evidence as corroborative of the testimony of the accomplice and as proof of defendant's guilt of the offenses for which he was on trial.

No other questions presented demand our consideration.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

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31 Cal.App.2d 574

DAVIS v. STEWART.

Civ. 11028.

District Court of Appeal, First District, Division 2, California.

March 21, 1939.

Rehearing Denied April 20, 1939.

Hearing Denied by Supreme Court May 19, 1939.

1. Mortgages 🔑32(2)

In order to convert a deed absolute in terms into a mortgage, understanding and intention of both parties to that effect must be concurrent and the same, and mere secret intention of one party, not disclosed or communicated, will be ineffective.

2. Mortgages 🔑32(1)

Where preliminary contract called for deed absolute with option to repurchase and such deed was executed, and only evidence of different intention was testimony of one grantor that he knew that stipulation that the transaction was not a mortgage was "just words," the deed would not be deemed a mortgage in absence of evidence of fraud, misrepresentation or unfair advantage.

3. Mortgages 🔑33(4)

A sale and delivery of fee simple by debtors to creditor, with an option to repurchase, is not contrary to public policy and is effective as a deed absolute.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Alice Maud Davis against C. L. Stewart to have a deed absolute in form declared an equitable mortgage. From a judgment for plaintiff, defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS and HOUSER, JJ., dissenting.

Carlos R. Freitas, of San Rafael, and Leander L. James, of San Francisco, for appellant.

Martinelli & Gardiner, of San Rafael, for respondent.

NOURSE, Presiding Justice.

The defendant appeals from an adverse judgment holding that a deed absolute in form was in fact an equitable mortgage. The grounds of the appeal are that the evidence does not support this finding, and that as the defendant extinguished the debt which the documents are claimed to have secured when, under the same agreement, he dismissed with prejudice a pending suit to foreclose a lien upon the property for that debt, there is no mortgage securing the indebtedness which plaintiff concedes is unpaid. Objection is also made to the order of the trial court charging the defendant with negligence in the operation of the property and his failure to procure adequate rental and income while in possession, as a result of which the obligation, which the trial court held was secured by the transfer, was reduced something over $2,000. The real property was owned jointly by the plaintiff and her husband both of whom executed the documents herein involved. Thereafter the husband conveyed all his interest to the wife, and she alone sues as plaintiff.

The first point raised by the appellant is the one which presents the real difficulty. The undisputed facts are that the plaintiff and her husband, while in possession of the property which is located on the San Rafael highway at its junction with the San Quentin highway and occupied by a filling station and auto rental camp, were deeply in debt upon obligations, some of which were secured by liens upon the property. They were also obligated to the defendant in the sum of $6,788 for work and labor performed on the premises, which sum was the subject of a mechanic's lien filed upon the property, suit to foreclose which was pending at the time of the agreement hereinafter referred to. The owners had endeavored to secure a loan from local banks to finance their property, but this assistance was denied them, and on September 27, 1932, an agreement prepared by their respective counsel was executed by these owners with the defendant, reciting these various obligations and encumbrances upon the land. In this contract the defendant agreed to dismiss with prejudice his action to enforce his mechanic's lien and to pay off and cause to be released all existing liens and encumbrances upon the property, and in consideration therefor the owners agreed to sell, assign and transfer by good and sufficient deed all their rights and interest in the property. The defendant agreed to give to them an option to repurchase the property for the total sum of "$13,479.29, plus all recording charges, title insurance charges, taxes and other assessments, insurance of all classes on said property, including public liability insurance, attorney's fees, court costs and other charges reasonably convenient and/or necessary for the maintenance and preservation of said property * * * together with interest thereon at the rate of 7% per annum from date of each respective advance or investment by first party until date of the exercising of said option". It was further provided that all income produced by said property should be applied first to the payment of expenses of operation and that the remainder thereof "shall be applied on such purchase price as a credit thereon to the second party upon the exercise of said option".

The stipulation in the contract upon which the appellant strongly relies reads: "It is understood and agreed that first party shall become, upon execution and delivery of said deed the absolute owner of said property, together with all improvements thereon and that this transaction does not constitute a mortgage, subject only however to said option for said five year period." It appears that on the execution of the contract the defendant entered into immediate possession of the premises, caused his action to foreclose his lien to be dismissed with prejudice, borrowed sufficient money to pay off all other liens and encumbrances against the property as required by his contract and employed plaintiff's husband to manage the property as his agent, which he did until February 15, 1933. He then voluntarily retired as agent and employee of the defendant. There was no agreement between the parties, and no request on the part of the plaintiff, that the defendant assume possession of the premises as mortgagee. From the delivery of the documents the defendant took possession as grantee and owner with the full consent and acquiescence of the former owners. We find no material conflict in the evidence. It is agreed that the parties executed the documents with full and independent legal advice. There is no suggestion of fraud, misrepresentation or unfair advantage on the part of the defendant. There is no evidence that the plaintiff or her husband misunderstood the terms or the legal effect of their deed. The plaintiff was not placed upon the witness stand to tell her intention. The testimony of the defendant as to the mutual intention of the parties stands uncontradicted, except to the extent that plaintiff's husband testified in reference to the stipulation in the agreement that the transaction did not constitute a mortgage: "I have studied law myself; I knew they were just words."

[1] Briefly the appellant presents a case where the written declaration of the parties and all the competent evidence in reference to the intention of the parties discloses that the transaction was intended to be an absolute transfer. The respondent shows no more than that one of those who engaged in the transaction had the undisclosed intention to treat it differently. The appellant relies upon Harp v. Harp, 136 Cal. 421, 69 P. 28, and authorities cited in 17 California Jurisprudence, pages 742, 754–756 holding that, when the intention of the parties is clear from the language of the instrument, a deed will be construed to be a mortgage only upon clear and satisfactory proof thereof. The rule is thus stated in 41 Cor.Jur., page 332: "But in order to convert a deed absolute in its terms into a mortgage it is necessary that the understanding and intention of both parties, grantee as well as grantor, to that effect be concurrent and the same. A mere secret intention on the part of one of the parties, not disclosed or communicated to

the other, will not have the effect of changing the character of the transaction."

[2] Applying these rules to the case at hand we find a preliminary written contract wherein the parties agree to execute a deed absolute and also agree that the transaction is intended to be an absolute transfer of title and possession and not a mortgage. This is followed by the execution and delivery of a deed absolute, by the delivery and transfer of possession. The only competent evidence of the intention of the parties at the time of the transaction is in harmony with that expressed in the agreement. There is no evidence of fraud, misrepresentation or unfair advantage taken of the debtors. The evidence of the secret intention of one of the parties, not disclosed to the other, will not have the effect of changing the character of the transaction. "Still less, of course, will this result where the parties testify to directly contradictory intentions." Wehle v. Price, 202 Cal. 394, 397, 260 P. 878, 879; 41 Cor.Jur. pp. 331, 332.

[3] By the terms of the agreement of September 27th the appellant undertook to "cause all liens and encumbrances now existing against said property * * * to be released and withdrawn, either by payment of moneys or otherwise" and, in consideration therefor, the owners agreed to "sell, assign and transfer by a good and sufficient deed" all their interest in the property. The owners did not, either by this agreement, or otherwise, undertake to repay the appellant the amount of his lien for $6,788 or the amount of the other existing debts which appellant paid for them. If the owner had treated the transaction as a mortgage and had sought to foreclose it, the answer would have been that there had been a retraxit as to the claim of $6,788 by his voluntary dismissal with prejudice, and that there was no promise, written or oral, to pay the moneys advanced to satisfy the other liens except the promise to pay those sums if and when the owners should elect to exercise their option. It should also be noted that there was no obligation to pay interest during the five year period unless the option was exercised, and that all income from the property went directly to the vendee from the date of transfer. Thus if appellant should have elected to treat the transaction as a mortgage and had sued to foreclose, he would have been met by the answer that it presented none of the elements of a mortgage, and that the only obligation assumed by respondent was to pay the stipulated purchase price if and when she elected to exercise the option to purchase. When we add these facts to the written declaration of the intention of the parties, the delivery of immediate possession to the appellant, and the complete lack of any express obligation on the part of respondent to repay any portion of the principal sum or any interest thereon if the option should not be exercised, we have nothing but a simple sale and delivery of the entire fee, with an option to repurchase. Such a transaction is not unusual and is not contrary to public policy. In the absence of fraud, misrepresentation, or unfair dealing, the courts will uphold the contract of the parties as written. Discussion of other points is not necessary.

The judgment is reversed.

We concur: STURTEVANT, J. SPENCE, J.

PEOPLE v. STRALLA et al.*

Cr. 3161.

District Court of Appeal, Second District,
Division 1, California.

March 20, 1939.

Hearing Granted by Supreme Court
April 18, 1939.

1. Criminal law 🔑304(1, 2)

In determining whether ship, anchored in ocean four miles from end of city pier, is within state and county boundaries, so as to give superior court jurisdiction of prosecution for maintaining or occupying such vessel for gambling purposes, courts may consider their judicial notice of political history of world, as well as whatever is established by law, resort to appropriate books or documents of reference, and inquire of others or have recourse to any other source of information deemed authentic. Pen.Code, § 337a, subd. 2; Code Civ.Proc. § 1875, subds. 2, 8; Pol.Code, § 3927; Const. art. 21.

2. States 🔑12(2)

The mere fact that water area constitutes indentation between two headlands or points does not necessarily make it a "bay," but to constitute "bay" within constitutional provision defining ocean boundary of state as including all bays along coast, given area must be semilandlocked body of water, afford shelter from prevailing adverse winds and swells, and have unquestioned historical background and designation as bay or inland body of water. Const. art. 21.

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*For subsequent opinion see 96 P.2d 941.

[Ed. Note.—For other definitions of "Bay," see Words & Phrases.]

3. Criminal law 🔑97(2)

To give superior court of county bordering on ocean jurisdiction of prosecution for maintaining or occupying vessel, anchored within certain area of water, for gambling purposes, there must be legislative declaration definitely fixing right to assert such dominion over such area. Pen.Code, § 337a, subd. 2.

4. States 🔑12(2)

Recourse must be had to reason in determining whether body of water is semilandlocked and hence inland water in practical, as well as historical and geographical, sense, as required to constitute "bay" within constitutional provision defining state's ocean boundary as including all bays along coast. Const. art. 21.

5. Constitutional law 🔑68(1), 70(1)

Pending controversies as to doubtful questions, such as territorial limits and boundary lines of political subdivisions, must be settled by political or legislative department of government, not judicial branch thereof.

6. Constitutional law 🔑70(1)

The court's duty is to construe and give effect to expression of legislative will, not to usurp Legislature's power under guise of judicial decisions.

7. Constitutional law 🔑70(1)

The establishment of political boundaries rests primarily with legislative, not judicial, branch of government.

8. Constitutional law 🔑68(1)

Reversal of judgment on superior court's finding of defendant's guilt of maintaining or occupying vessel for gambling purposes on ground that such court was without jurisdiction because vessel was anchored in ocean over three miles from coast would not amount to judicial cession of valuable part of state, in absence of legislative or other enactment asserting state's dominion over body of water involved beyond three mile limit. Pen.Code, § 337a, subd. 2; Pol.Code, § 3927; Const. art. 21.

9. Constitutional law 🔑70(1)

When desirability, practicability and necessity of including certain area of water within state's boundary is open to question, and determination thereof must be based on consideration of many matters and principles which court cannot take into account in single action, it is for legislative, not judicial, branch of government to decide such question in first instance. Const. art. 21.

10. States 🔑12(2)

The westerly territorial limit of state must be held to be three English miles oceanward from Pacific Coast, as fixed by Constitution, until Legislature establishes different boundary by affirmative action. Const. art. 21.

11. Criminal law 🔑97(2)

The superior court of Los Angeles county was without jurisdiction of prosecution for maintaining or occupying vessel, anchored over three miles oceanward from end of municipal pier in city of Santa Monica, for purpose of recording or registering bets on horse races. Pen.Code, § 337a, subd. 2; Pol. Code, § 3927; Const. art. 21.

YORK, P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Anthony Stralla and Harold Adams were indicted for maintaining or occupying a vessel for the purpose of recording or registering bets on horse races, and from a judgment on the court's decision finding defendant Adams guilty of such offense, he appeals.

Reversed and remanded, with directions.

Joseph L. Fainer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Thomas F. O'Brien and Jere J. Sullivan, Deputy Dist. Attys., all of Los Angeles, for the People.

WHITE, Justice.

In an indictment returned by the grand jury of Los Angeles county, appellant and one Anthony Stralla were jointly charged with a violation of subdivision 2 of section 337a of the Penal Code, which section denounces as a crime the maintenance or occupancy of a "room * * * vessel, place * * * or inclosure" for the purpose of recording or registering bets on horse races. The indictment further alleged that said offense was committed "4 English miles oceanward from the end of the municipal pier. Said pier was and is in the City of Santa Monica, County of Los Angeles, State of California, and on a course or bearing South 45, West from said pier, from end of said pier". The vessel referred to in the indictment was known as the ship "Rex", which vessel possessed no motive power, either steam, Diesel or sail, and for some five or six years had been anchored at the point alleged in the indictment.

On September 26, 1938, the defendant Stralla alone was tried before a jury which, being unable to agree upon a verdict, was discharged, and the cause was dismissed as to defendant Stralla. On October 17, 1938, defendant Adams appeared in court and entered a plea of not guilty, following which, by stipulation and appropriate waiver of a jury trial, the cause was submitted to the court for decision, based upon all the evidence heard and adduced at the trial of the co-defendant, Stralla. Thereafter the court rendered its decision, finding the defendant Adams guilty of the offense charged in the indictment. Following the denial of a motion for a new trial, judgment was pronounced against defendant Adams, who prosecutes this appeal from both the judgment and the order denying his motion for a new trial.

[1] The sole issue presented to us on this appeal is whether the superior court of Los Angeles county was possessed of jurisdiction. Therefore the question before us for solution is whether the ship "Rex", upon which vessel appellant admittedly was receiving, recording and registering bets on horse races, is at its admitted place of anchorage within or without the boundaries of the state of California.

It is well settled that in solving the problem with which we are here confronted, the trial court was, and this court is, entitled to bring to our assistance so far as it may prove helpful our judicial notice of the political history of the world, as well as of whatever is established by law (sec. 1875, subds. 2 and 8, Code Civ.Proc.), which section is also authority for our power, in aid of our judicial notice, to have resort to appropriate books or documents of reference; while the case of Rogers v. Cady, 104 Cal. 288, 290, 38 P. 81, 43 Am.St.Rep. 100, upholds our right to inquire of others or to have recourse to any other source of information which we deem authentic.

In aid of our judicial notice of whatever is established by law, it is pertinent here to quote from article 21 of our state Constitution, as follows: "The boundary of the state of California shall be as follows: * * * thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude; * * *. Also, including all the islands, harbors, and bays along and adjacent to the coast."

So far as applicable hereto, we may say that section 3927 of the Political Code declares that Los Angeles county is bounded on the north by Ventura county; on the south by Orange county; and on the west by the state line of California, which state line, as set forth in the constitutional provision, extends three English miles into the Pacific ocean; including also all islands, harbors and bays along and adjacent to the coast.

A map introduced in evidence at the trial discloses that the position of the ship "Rex" was landward from a straight line drawn between Point Dume and Point Vicente approximately eight miles; but approximately four miles seaward from the shore line of the city of Santa Monica in Los Angeles county, well beyond the "three-mile limit"; and that it was anchored upon the high seas if what has been denominated "Santa Monica Bay" is to be regarded as not within the territorial limits of the state of California. This map also discloses that the distance between Point Dume and Point Vicente is approximately 29.2 statute miles, and the distance from a line connecting these "headlands" shoreward is approximately 11.8 statute miles to the shore line of the city of Santa Monica.

From a review of cases extending back many years, as well as from an examination of textbooks, it does not appear that jurists and text writers are agreed as to what are the rules as to dimension and configuration which, apart from other considerations, would lead to the conclusion that a body of water constitutes a bay; and, where such conclusion has been one of judicial determination, it would seem to be based upon the fact that the government, nation or state possessing the adjoining coasts has for varied periods of time exercised dominion over the body of water in question, or the political or legislative branch of the government has by appropriate act declared the particular body of water to be a bay, or otherwise part of the territory of the political entity asserting jurisdiction thereover.

[2, 3] Merely because an area of water constitutes an indentation between two headlands or points does not necessarily make such area a bay. United States v. Carrillo, D.C., 13 F.Supp. 121, 122. As we contemplate the Constitution of California together with the principles of international and other law, it seems to us that in determining whether any given area constitutes a "bay", certain facts must appear, such as (1) that it is a semi-landlocked body of water; (2) that it affords shelter from prevailing adverse winds and swells, thereby affording reasonably safe anchorage for ships of commerce; (3) that it has an unquestioned historical background and designation as a "bay" or inland body of water; and, for the purpose of determining jurisdiction, a legislative declaration definitely fixing the right to assert such dominion over the area in question.

[4] As to the first of these requisites, the rule of reason must be applied, for as was said in United States v. Carrillo, supra, "If the whole of the land bordering the Gulf of Mexico were under one sovereignty the whole of such vast sea could not well be considered as within such country's sovereignty." And with equal force it could be said that a line might be drawn between two headlands along many sections of the Pacific coast, thus forming a body of water around which the land makes a curve, just as does the area between Point Dume and Point Vicente. But if this is the definition of a bay, it could be satisfied by the entire Southern California coast, with Point Conception and Point Loma as headlands. It follows, therefore, in the light of the facts as well as varied opinions, that recourse must be had to reason in order to determine whether the body of water in question is truly inland waters in a practical, as well as a historical and geographical sense, or whether it is merely a part of the open sea and what is known as an open roadstead.

Respondent relies upon the case of Ocean Industries, Inc., v. Superior Court, 200 Cal. 235, 252 P. 722, to sustain the claim that the area between Point Dume and Point Vicente constitutes the bay of Santa Monica. In our judgment, however, that case is not decisive of the question here involved, for there is a vital difference between the facts upon which the conclusion reached in that decision was based, and which determined that the entire bay of Monterey within its headlands and thence into the ocean for a distance of three nautical miles, was within the sovereignty of the state of California, and the facts presented to us herein. The distance between the headlands forming Monterey bay is approximately eighteen miles, while the distance between the headlands forming Santa Monica bay, so called, is twenty-nine miles. Although this difference may be regarded as merely a matter of degree, it does nevertheless offer some slight resistance to the contending argument of respondent, in effect, that the matter of degree is without limitation. Especially is this so when the difference is not nominal, but substantial.

It is also particularly important to note in the decision just mentioned that the fact is that Monterey bay consists of a body of water having headlands approximately eighteen miles apart, *with receding shores, giving a total width of twenty-two miles inside the headlands,* while in the case before us the so-called Santa Monica bay does not have a receding shore line back of the headlands that form the entrance to the "bay". That is to say, Monterey bay, proper, is wider than the distance between its headlands. In the absence of such a condition, at least to some extent, where is the protection against adverse winds, storms and swells that would give to shipping and commerce that safety which a bay has always been regarded as supplying? That there was no protection from winds coming in directly from seaward, that is, from the sea toward the land, in the entire area between Point Dume and Point Vicente, was not controverted at the trial of the case now before us.

Historically speaking, it is true that the body of water between Point Dume and Point Vicente has been designated as a "bay", but there is also creditable authority for the conclusion that the area in question is but an indentation of the shore line, or a bight, and consequently part of the high seas, and therefore without the territorial limits of the county of Los Angeles beyond the three-mile limit from the shore line. For example, the Encyclopedia Americana, volume 23, records the city of Monterey as being "on Monterey bay"; Oakland, California, "on the eastward side of San Francisco bay"; the city of San Francisco is characterized as being situated "between the Bay of San Francisco and the Pacific Ocean"; and the city of San Diego as being located "on San Diego bay"; while the cities of Santa Monica and Redondo Beach, which are located between Point Dume and Point Vicente, and with which area we are here concerned, are described as being "on the Pacific Ocean", no reference being made to the existence of Santa Monica bay.

We have also referred to the discussion on the floor of the United States Senate on May 8, 9 and 12, 1896, when that body had under consideration a proposal to create a board of engineers for the purpose of selecting a proper location for a deep sea harbor at Santa Monica or San Pedro. During this senatorial discussion many master mariners who had sailed the Pacific ocean and who were familiar thereby with California coastal points were quoted with reference to the comparative advantages and disadvantages of the San Pedro and Santa Monica locations respectively. Among these quotations we find many of which the following are typical: "Santa Monica has a constant westerly swell, with very poor holding ground." "Santa Monica has poor holding ground and but little shelter. I dragged my anchors in Santa Monica bay and was forced to go back to San Pedro bay for protection." Another master mariner said, "In 1876 in Santa Monica bay I came near losing the schooner Hayes, a new vessel. Had all my lines out, and also many lines furnished by the company, and barely escaped destruction." Another master mariner of long and varied experience on the Pacific coast said, "Santa Monica is an open ocean and no shelter. * * * Santa Monica is exposed to all quarters of the compass, and the undertow there is severe on the ship's ground tackle." One of the senators from California, speaking on the resolution before the senate, said:

"You will observe upon the photograph of the Santa Monica shore, which is upon the background, the real character of that so-called bay. It is nothing but an open roadstead; there is a twelve-mile indentation, and it must be between thirty and forty miles from Vicente to Dume, and looking from the shore out to the ocean the exposure is absolute; the waves roll in, as appearing upon the photograph, comparatively uninterrupted. There is but slight evidence of an actual bay in this case. * * *"

Of particular interest are the expressions made to the Senate by Professor George Davidson who had charge of the Coast and Geodetic survey on the Pacific coast for forty years. He said: "During the hydrographic survey of Santa Monica Bay from Point Vicente to Point Dume by the coast survey, the officer commanding the surveying vessel reported that when at anchor in the vicinity of Santa Monica, with a strong westerly breeze blowing, and the inshore eddy current running to the northward along the shore, the vessel rode to the current, and her rolling in the swell falling directly on shore was so large and disagreeable that the vessel had to weigh anchor and seek a more comfortable berth."

The United States Department of Commerce, in its rules adopted to prevent collisions of vessels, defines the boundary lines of the high seas. These rules designate certain harbors or bays as "inland waters", and upon such waters the "inland rules of the road" prevail, while upon waters not within the lines prescribed in the aforesaid rules as "inland waters" the international rules applicable to vessels upon the high seas apply. On the Pacific ocean, so far as it adjoins the California coast line, only San Francisco harbor, San Pedro bay and San Diego harbor are designated as "inland waters". Therefore it is at once manifest that the United States Department of Commerce regards the so-called Santa Monica bay, or that area between Point Dume and Point Vicente, as part of the high seas.

In the United States Coast Pilot (Pacific coast), issued by the Department of Commerce, we find the following significant language: "*Anchorage,* affording shelter from the severe northwesterly winds of summer, may be had in a number of places along the coast. In southeast and southwest weather there are few places where shelter may be had; San Diego bay, Los Angeles harbor, the lee side of the islands off the southern coast, and Monterey bay are the *only* places south of San Francisco bay * * *" (italics added); thereby eliminating the area with which we are here concerned, in the judgment of the United States Department of Commerce, as affording protection from certain severe winds.

It is also noteworthy that in the case of Muchenberger v. City of Santa Monica, 206

Cal. 635, 275 P. 803, 804, the trial court found that "the boundary of the city of Santa Monica on the west is a line three miles westerly of the line of the *mean high tide* of the Pacific Ocean"; and in speaking of the findings in this case the Supreme Court observed: "Not only does the evidence appear to support the findings, but the trial judge made a personal inspection of the water front, which we must assume further convinced him of the correctness of his views."

From a consideration of the facts, it is obvious that whether such area, namely, so-called Santa Monica bay, should be regarded as a bay within the meaning of the Constitution and thus included within the territorial limits of the state, is a matter which can easily give rise to honest differences of opinion. In that connection it is significant that there has been no legislative action by which the body of water lying between Point Dume and Point Vicente ever was included within the territorial limits of the state of California or the county of Los Angeles, nor are we able to discover any legislative declaration or other official exercise of dominion by or through which this state assumed jurisdiction over the so-called Santa Monica bay waters beyond the three-mile limit. In this regard it is well to note that the Supreme Court in Ocean Industries, Inc., v. Superior Court, supra, places considerable stress upon the legislative action in connection with Monterey bay (page 244 of the decision, 252 P. page 725) when, after commenting upon the ambiguities of the Act of 1850 determining the boundaries of Monterey county, the court says:

"The state Legislature apparently had discovered this hiatus when it came to adopt the provisions of the Political Code in 1872, since, while it left the boundary of the county of Santa Cruz substantially unchanged on its oceanward side (Pol.Code, § 3952), it changed the boundary description of the county of Monterey so as to make it read: 'Beginning *in the Pacific Ocean* at the southwest corner of Santa Cruz,' etc., to the place of beginning. Pol.Code, § 3935. The entire bay of Monterey within its headlands and thence into the ocean for a distance of three nautical miles was thus, we think, definitely placed within the sovereignty of the state of California, and within the boundaries and jurisdiction respectively of the counties of Santa Cruz and Monterey."

In thus determining the status of Monterey bay, the Supreme Court was merely interpreting an act of the legislative branch of the government by which dominion was asserted by the state over the waters of the bay which were placed within the boundaries of Monterey and Santa Cruz counties by section 3935 of the Political Code. In other words, the foregoing opinion of the Supreme Court determined that the boundaries of Monterey county as fixed by the Political Code section included Monterey bay. In the case of the Santa Monica area, there is an entire absence of such legislation. In fact, when adopting section 3927 of the Political Code, fixing the boundaries of the county of Los Angeles, it was provided that Los Angeles county is bounded on the west by the "state line of California", and the westerly state line of California is declared in article 21 of our state Constitution to extend three English miles into the Pacific ocean, including also all islands, harbors and bays along and adjacent to the coast. But for courts, under the guise of judicial construction, to establish jurisdiction for the state over such a wide ocean area as Santa Monica bay, so-called, is, to say the least, of doubtful judicial propriety. It requires no stimulant to the imagination to contemplate possible events occurring within such area, the supervision and control of which could be more expeditiously, economically and successfully effected by the federal government, which may account for the failure of the legislative branch of the government to assume dominion over the area here in question. There are many and varied considerations, including that of sound public policy, involved in a matter such as this. And it should be emphasized that the rights and interests of the Federal government, of commerce, industry, navigation, fisheries, policing, and those connected therewith are all without representation in the proceeding now before us. And it is impossible in the instant proceeding to give consideration to either likely contingencies. In a legislative hearing, however, upon the question of fixing territorial limits of the state, each and all of these several interests, including the Federal government, could be represented and could participate.

[5-7] The constitutional structure at which we as a nation have been nourished has separated and divided governmental functions into three branches—executive, judicial and legislative—each intradependent upon the other, it is true, like the sides

of a triangle, but each independent, nevertheless, of the other, and each without authority to encroach upon the prerogatives of the other. In keeping with that governmental set-up, it is proper that in pending controversies of doubtful questions, such as fixing territorial limits and defining the boundary lines of political subdivisions which are undecided, they must be met by the political or legislative department of the government. As was said of such questions by the United States Circuit Court of Appeals for the Ninth Circuit, which judicial circuit embraces the state of California, in the case of Whitelaw v. United States, 75 F. 513, 518, "They are beyond the sphere of judicial cognizance," and "if a wrong has been done, the power of redress is with congress, not with the judiciary." The duty of courts is to construe and give effect to the expression of the legislative will and not to usurp the power of the legislature under the guise of judicial decisions. The establishment of political boundaries rests primarily with the legislative and not the judicial branch of the government.

[8-11] Respondent's contention that a reversal of this judgment would be "a judicial cession of a very valuable part of the state" cannot be upheld. No question of cession is here involved, for the reason that the state has not by any legislative or other enactment asserted dominion beyond the three-mile limit over the body of water here under consideration. When and where, as in the case at bar, the desirability, practicability, and necessity of including a certain area within the state boundaries is open to question, and the determination of that question obviously must be based on a consideration of many matters and principles which, from the very nature of things, a court in a single action cannot take into account, it is for the legislative and not the judicial branch of the government to decide that question in the first instance. So far as the area here under consideration is concerned, unless and until the legislature by affirmative action establishes a different boundary, the westerly territorial limit of the state must be held to be the Pacific ocean and extending therein three English miles. This being so, the trial court was without jurisdiction and the judgment is therefore void.

For the foregoing reasons, the judgment and the order by which the defendant's motion for a new trial was denied are, and each of them is, reversed, and the cause remanded with directions to the court below to dismiss the indictment.

I concur: DORAN, J.

YORK, Presiding Justice (dissenting).

I dissent. The Constitution of the state of California has definitely fixed the western boundary of the state, and the legislature has declared the boundary of the county of Los Angeles on the west to be the said western boundary of the state between certain lines. The Constitution fixed the western boundary of California as extending into the Pacific ocean "three English miles; thence running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; * * *. *Also all the islands, harbors, and bays along and adjacent to the coast.*" Section 1, art. 12, Const. of 1849. The present Constitution has changed this last clause to read: *"Also, including all the islands, harbors, and bays along and adjacent to the coast."* Section 1, art. 21, Const. of 1879. In 1827, before the boundary of the state of California had been fixed, it was commonly conceded that the bay of Santa Monica was a bay, and it should therefore be assumed that the legislature intended to include it within the westerly boundary of the county of Los Angeles, as it should also be assumed that the people of the state intended to include it within the westerly boundary of the state.

In the instant case, it was necessarily left to the determination of the court whether the crime charged was committed in the county of Los Angeles, and because the position of the vessel here in question was well within the headlands of the bay of Santa Monica, the trial court decided that such crime was committed within the said county.

It was the opinion of several of the justices of the Supreme Court in the case of Ex parte Keil, 85 Cal. 309, 24 P. 742, that the channel between Santa Catalina island and the mainland was wholly within the United States and, therefore, within the state of California. We do not have to determine whether or not the westerly boundary of the state extends to a point three English miles seaward from San Clemente and Santa Catalina islands (as I so believe), or whether it also extends in a line outside of and including the Santa Barbara islands and San Nicolas island. That question is not before this court, unless the court determines that Santa Monica bay is not one of the *bays* referred to in the Constitution, supra. However, we do have to determine whether or not the decision of the trial court that the ship in question was in the county of Los Angeles when it was located in the bay of Santa Monica is binding upon this court.

The various definitions of the word *"bay"* to which we have been referred bear out the fact that the physical and geographical position of the said vessel in Santa Monica bay was well within the confines of a *"bay"* indenting the coast line of the state of California. To say the least, it is an indentation in the shore line, and there is no authority for any limitation of either the width or depth of a bay, excepting only as limited by the definition of a "gulf". That Santa Monica bay was for many years used as a harbor for ocean-going vessels cannot be disputed. All of the available coast and geodetic survey maps issued by the Department of Commerce of the United States delineating that portion of the westerly coast of California within Los Angeles county show the bay of Santa Monica and name it as such bay. The fact that the city of Santa Monica in defining its boundaries fixed its westerly boundary line as a line three miles westerly of the line of mean high tide of the Pacific ocean cannot affect the case before this court. It cannot be claimed that the city of Santa Monica can limit the westerly boundary of Los Angeles county as fixed by section 3927 of the Political Code. The same is true as to the limits of most fish and game districts to three miles from certain shores, because these districts do not have to include all of the state waters unless the legislature decides it best so to do.

As heretofore stated, it is not necessary for this court to fix or determine the extreme extent of the boundaries of either the state of California or the county of Los Angeles. They have heretofore been established by section 1 of article 21 of the Constitution and section 3927 of the Political Code. But, when it is alleged that a crime has been committed in Los Angeles county, and the question is thereafter raised on appeal from a conviction of said crime as to whether or not the acts complained of took place within the boundaries of Los Angeles county, it then becomes the duty of this court to determine whether or not such acts were committed within such boundaries in order to decide whether or not the trial court had jurisdiction to try the defendant for the commission of the alleged crime.

The crime here involved was committed practically in the center of Santa Monica bay, and miles within the headlands thereof. Therefore, in my opinion, it was committed within the boundaries of the county of Los Angeles, for the reason that it was committed in one of the *bays* included within the westerly boundary line of the state of California, as fixed by the constitution, which boundary line was followed by the legislature in fixing the westerly boundary line of Los Angeles county.

The historical authority for the belief that Santa Monica bay is a *bay*, as defined by the constitution, supra, can be gathered from hundreds of sources, only a few of which I will here refer to:

Quoting from Ingersoll's Century History of Santa Monica Bay Cities, at page 121: "The Bay of Santa Monica extends along the coast from Point Vicente, latitude 33° 40′, to Point Dume, latitude 34°, a distance of 17 miles north by west. The coast line of the *bay* makes an inward sweep which is some ten miles deep at its extreme point, in the neighborhood of Port Los Angeles, * * * (p. 122:) The first explorer of the California coast, Cabrillo, after spending six days in San Diego harbor which he named San Miguel, sailed along a 'mountainous coast overhung with smoke', landed at Catalina, to which he gave the name of Victoria, then anchored in a bay which he called 'Bahia de Fumos' (Bay of Smoke), San Pedro Bay, and on October 9, 1542, he dropped anchor in an 'ensenada' or bight which is generally granted to have been Santa Monica Bay. * * *" (p. 124:) The name Santa Monica is legendary. Two Spanish soldiers on furlough came upon two sparkling springs near the ocean and after refreshing themselves with the water and while absorbed in viewing the scenery, "One of them said: 'What shall we call this spot, brother?' Straightway came the answer: 'We will call it Santa Monica for the springs resemble the tears the good Saint Monica shed for her erring son.' * * * Whether we accept the legend or not, *the bay and the region were certainly named for the good Santa Monica whose day in the calendar was May 4th. The name does not seem to appear upon record until the petition for the grant known as San Vicente y Santa Monica was made by Don Francisco Sepulveda and Augustin Machado in 1827.*"

Practically the same account appears in Charles Sumner Warren's History of Southern California, while a slightly different version of the so-called legend appears in the California Blue book for 1932 at page 520: "Tradition has it that a group of Spanish soldiers discovered two springs with water so pure and transparent that they were called 'The tears of Santa Monica' for the mother of Saint Augustine who grieved over her son's lack of faith in his youth. It is also said that Santa Monica (for 'Saint Monica') was named after the *bay* when a portion of the old San Vicente Rancho was purchased in 1875 for the purpose of laying out town lots."

Quoting from Guinn's Historical and Biographical Record of Southern California, printed in 1902, at page 139: "The Los Angeles and Independence Railway Company was incorporated in January, 1875. The purpose of the company was to build a railroad beginning at Santa Monica and passing through Los Angeles and San Bernardino, and from there by way of Cajon Pass to Independence, Inyo county. * * * A long wharf was built at Santa Monica and ocean steamers stopped there for passengers and freight. * * * (p. 141:) Early in 1875, Senator John Percival Jones of Nevada, and Col. R. S. Baker subdivided a portion of the Rancho San Vicente lying on the mesa adjoining the Bay of Santa Monica. The town was named after the *bay* and on July 16, 1875, a great sale of lots was held at the townsite. * * * Santa Monica was becoming a shipping point of great importance. Then a financial blight struck the fortunes of Senator Jones. The railroad was sold to the Southern Pacific Railroad; the wharf was pulled down and the town fell into a decline. * * * (p. 143:) The Southern Pacific Company in 1891 built a long wharf in the bay of Santa Monica at Port Los Angeles." With reference to this "long wharf", Ingersoll (supra, at p. 200) says: "The Southern Pacific Wharf constructed at Port Los Angeles was completed July 14, 1893 and was 4,700 feet from the shore * * * and undoubtedly cost a million dollars."

When the question of a free harbor came up, Collis P. Huntington, then the president of the Southern Pacific Company, used all his powerful influence in congress to secure an appropriation for the harbor at Port Los Angeles. During the first session of the 54th Congress, on May 8, 1896, Senator Stephen M. White of Los Angeles offered an amendment to the river and harbor appropriation bill in connection with the deep-water harbor at Port Los Angeles in Santa Monica bay, California, and talked upon the amendment for several days. The argument of Senator White was not as to whether Santa Monica bay was a bay or even a harbor, but only as to which of the two bays, Santa Monica or San Pedro, would make the better harbor; therefore, his argument can only be considered here as being directed to that question, although he repeatedly referred to Santa Monica bay as a bay, in his speech before the Senate more than twenty times. During this argument, there was presented for filing the report of the board of engineers of the United States army, countersigned by Brigadier-General Thomas Lincoln Casey, chief of engineers, with maps appended thereto, with reference to the proposed deep-sea harbor to be located at San Pedro bay or at Santa Monica bay. This report consists of twenty-five pages describing and comparing the two bays as to topography, hydrography and meteorological conditions, etc., in which report reference is made to "Santa Monica bay" at least thirty-five times. (U. S. House Executive Document No. 41, dated December 6, 1892.)

The fact that the constitution of this state in defining the westerly boundary of California uses the general term "running in a northwesterly *direction* and following the *direction* of the Pacific Coast", and then provides, "Also, including all the islands, harbors, and *bays* along and adjacent to the coast", would indicate that the People in adopting both of the constitutions hereinbefore referred to, must have intended to include within said boundary Santa Monica bay, and all of the bodies of water then known as bays, as well as all of the waters lying between the islands adjacent to the coast. It would be hypercritical to say that by this general term it was intended to indicate that only the contour line or the meander line of the coast of California should be exactly followed. The description of the westerly boundary of the State of California specifically mentions the islands of Santa Catalina and San Clemente. Section 3927, Pol.Code. It has since been finally determined that they are both islands along and adjacent to the coast and that they were part of the territory ceded by Mexico to the United States, and that therefore they were and are a part of the county of Los Angeles. Ex parte Keil, supra.

Therefore, when the Constitution was adopted by the People of the State of California, they must have had in mind the fact that Santa Monica bay was a *bay;* consequently, it was and is one of the *bays* referred to therein. This is true, even though some supertechnical definitions of a bay might not exactly define the bay of Santa Monica as a bay. Such intention is manifested by reason of the well-known characterization of Santa Monica bay as a *bay,* as far back as 1827. That it was a *bay* was never questioned, and when San Pedro bay became its rival for the location of a deep-sea harbor in the early nineteen hundreds, it was then only a question as to which bay was the better one upon which to spend many millions of dollars in landlocking a harbor for Los Angeles city. (All italics added.)

In my opinion, the judgment and order of the trial court appealed from should be affirmed.

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31 Cal.App.2d 642

MONTANYA et ux. v. BROWN et al.

Civ. 10578.

District Court of Appeal, First District, Division 1, California.

March 22, 1939.

Hearing Denied by Supreme Court May 19, 1939.

1. Automobiles 🔑242(6)

Under statute imposing liability upon automobile owner for negligent operation of vehicle with permission of owner, an inference of agency may be drawn from facts of ownership and permissive use which, if uncontradicted by substantial evidence, remains as evidence in the case and will support a judgment in excess of $5,000. St.1935, p. 153, §§ 402, 402(a, b).

2. Automobiles 🔑245(28)

Under statute imposing liability upon automobile owner for negligent operation of vehicle with permission of owner, if opposition evidence is conflicting, vague or uncertain, or is weakened by contradictions or improbabilities, the inference of agency from facts of ownership and permissive use remains, and question of agency is for jury. St.1935, p. 153, §§ 402, 402(a, b).

3. Automobiles 🔑242(6), 244(26)

Under statute imposing liability upon automobile owner for negligent operation of vehicle with permission of owner, a prima facie case of agency is made out from proof of ownership and permissive use, but the prima facie case, being based on an inference and not a presumption, falls and inference of agency is dispelled when it is rebutted by clear, positive, and uncontradicted evidence, even though such evidence is produced by opposite side. St.1935, p. 153, §§ 402, 402(a, b).

4. Automobiles 🔑244(23), 249

In action against partners and sister of partner's wife for injuries received by pedestrian in automobile accident, prima facie case arising from inference of agency based solely upon facts of ownership and permissive use was overcome by direct, uncontradicted evidence that accident occurred while automobile was being used on pleasure trip by partner's wife and her sister after partner permitted wife, who could not drive, to take partnership automobile to be driven by sister; and hence liability of partners was limited to $5,000. St.1935, p. 153, §§ 402, 402(a, b).

5. Appeal and error 🔑994(2)

Application of rule that in action against owner for injuries received while automobile is negligently operated by another, the inference of agency arising from ownership and permissive use is dispelled when rebutted by clear, positive and uncontradicted evidence did not permit reviewing court to invade right of jury by passing on credibility of witnesses, since reviewing court could deal with the question only when presented by proper record. St.1935, p. 153, §§ 402, 402(a, b).

6. Automobiles 🔑242(6)

In action against owner for injuries received while automobile is negligently operated by another person, rule that the inference of agency arising from ownership and permissive use is dispelled as a matter of law when rebutted by clear, positive and uncontradicted evidence was applicable, although rebuttal testimony was given by interested parties. St.1935, p. 153, §§ 402, 402 (a, b).

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Montio Montanya and Louise Montanya, his wife, against Grace Brown, K. B. Towne and others, doing business as copartners under the firm name and style of Towne Motor Company, to recover for injuries sustained by the last-named plaintiff in an automobile accident. Judgment for plaintiffs for $35,000, and defendants K. B. Towne and others, doing business a copartners under the firm name and style of Towne Motor Company, appeal.

Judgment modified and, as modified, affirmed.

Prior opinion, 84 P.2d 161.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

H. W. Call, of San Mateo, and R. J. Dolwig, of South San Francisco, for respondents.

KNIGHT, Justice.

The plaintiff Mrs. Louise Montanya was struck and injured by an automobile owned by K. B. Towne, F. L. Towne and M. B. Towne, copartners doing business under the firm name of Towne Motor Company. At the time of the accident the automobile was being driven by Miss Grace Brown; and on account of the injuries sustained by Mrs. Montanya she and her husband brought this action for damages against the owners of the automobile and the driver thereof. At the opening of the trial, which took place before a jury, it was admitted by all defendants that the Townes were the owners of the automobile, that on this particular occasion it was being driven by Miss Brown with the express permission of the owners, and that the negligent operation thereof by her was the proximate cause of the accident. However, at the conclusion of the evidence a motion was made in behalf of the owners to instruct the jury that any verdict rendered against them should be limited to $5,000, the ground of the motion being that the evidence failed as a matter of law to establish any agency between the owners and the driver, and that therefore by virtue of section 402 of the Vehicle Code St.1935, p. 153 (formerly section 1714¼ of the Civ. Code) their liability as such owners was limited to $5,000. The trial court denied the motion and the jury returned a verdict against the owners and the driver for $35,000. Thereupon the owners moved that notwithstanding the amount awarded, judgment against them should be entered for only $5,000. The motion was denied, and following the entry of judgment on said verdict, the owners' motion for new trial based on similar grounds was also denied. From the judgment so entered the owners have taken this appeal.

The undisputed facts of the case are these: The Townes as such copartners were engaged in the automobile business in Redwood City, and K. B. Towne and his wife made their home in that city. They had no car of their own, and for their own pleasure and convenience they used one belonging to the partnership. On Friday, September 4, 1936, K. B. Towne left on a deer hunt, and shortly before he left his wife asked for the use of a car the next evening. Since she did not drive, her husband asked her who would do the driving, and she replied that either her sister, Grace Brown, or a friend, Mrs. Thompson, would do so. He consented to let her have the car, and told her he would instruct the manager of the firm to let her have the "green demonstrator". Towne left on his hunting trip as planned, and sometime during Saturday afternoon Mrs. Towne and her sister took the car. After first driving about to do some personal shopping, they visited friends in Belmont, and from there drove to San Mateo, where they dined at a cafe. Thereafter they visited a roadhouse in Millbrae, and another in South San Francisco, and it was while they were returning home early Sunday morning, Miss Brown still doing the driving, that the car struck and injured Mrs. Montanya.

Section 402 of the Vehicle Code makes "*every owner* of a motor vehicle * * * liable and responsible for death of or injury to person or property resulting from negligence in the operation of such motor vehicle, *in the business of such owner or otherwise*, by any person using or operating the same with the permission, express or implied, of such owner." (subd. (a), italics ours). Therefore, every action brought as a result of the negligent operation of a motor vehicle driven by one other than the owner, with the owner's consent, comes within the provisions of said section. Said section further provides, however, that if the liability is proved to have arisen *other* than through the relationship of principal and agent or master and servant, the liability is limited, in the case of death or injury to one person, to

$5,000 subd. (b); and it follows, therefore, that if such relationship does not exist, the liability of the owner is not so limited.

In the present case, to establish a relationship of agency, respondents rely entirely on an inference which they contend arose from the admitted fact that Miss Brown was driving appellants' car with appellants' permission, it being argued by them in this regard that such inference alone is sufficient to support a finding to that effect, even against clear and uncontradicted evidence to the contrary. On the other hand, it is appellants' contention that in the face of the clear, positive, uncontradicted evidence that Miss Brown was not acting as appellants' agent in driving the car, the inference of agency which might have been drawn from said admitted facts is completely dispelled from the case, leaving the evidence without conflict on that point; and therefore that the jury should have been instructed that appellants' liability could not exceed $5,000.

[1-3] It is true, that from the facts of ownership and permissive use an inference of agency may be drawn (Du Bois v. Owen, 16 Cal.App.2d 552, 60 P.2d 1019; Squires v. Riffe, 211 Cal. 370, 295 P. 517; Fahey v. Madden, 56 Cal.App. 593, 206 P. 128; McWhirter v. Fuller, 35 Cal.App. 288, 170 P. 417; Maupin v. Solomon, 41 Cal. App. 323, 183 P. 198; Bourne v. Northern Counties T. Ins. Co., 4 Cal.App.2d 69, 40 P.2d 583; Strasburger v. Prescott, 111 Cal.App. 104, 295 P. 357), which if uncontradicted by substantial evidence remains as evidence in the case (McWhirter v. Fuller, supra; Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747) and will support a judgment in excess of $5,000; or if the opposition evidence is conflicting, vague or uncertain, or is weakened by contradictions or improbabilities, the inference likewise remains, and the question of agency is still one of fact for the determination of the jury. (Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550; Wagnitz v. Scharetg, 89 Cal.App. 511, 265 P. 318; Grantham v. Ordway, 40 Cal.App. 758, 182 P. 73; Dierks v. Newsom, 49 Cal.App. 789, 194 P. 518; Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358). But if clear, positive and uncontradicted evidence is introduced in opposition to the prima facie case, then the inference is as a matter of law dispelled and disappears from the case, which leaves the evidence establishing that there was no such relationship as the only evidence on the point, without conflict; and in such case the judgment must be limited to $5,000. In other words, it has been definitely held that a prima facie case of agency is made out from proof of ownership and permissive use, but that such prima facie case, being based on an inference and not a presumption (Maupin v. Solomon, supra, opinion of Supreme Court in denying hearing; Fahey v. Madden, supra; Kruse v. White Brothers, 81 Cal.App. 86, 253 P. 178; Pozzobon v. O'Donnell, 1 Cal.App. 2d 151, 36 P.2d 236), falls and the "inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side". Engstrom v. Auburn Automobile Sale Corp., 11 Cal. 2d 64, 77 P.2d 1059, 1063; Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 54 P. 2d 709; Maupin v. Solomon, supra; Fahey v. Madden, supra; Bourne v. Northern Counties T. Ins. Co., supra; Ransford v. Ainsworth, supra; Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Martinelli v. Bond, 42 Cal.App. 209, 183 P. 461; Rock v. Orlando, 100 Cal. App. 498, 280 P. 377; Hammel v. Keehn, 18 Cal.App.2d 387, 63 P.2d 1165; McCammon v. Edmunds, 114 Cal.App. 36, 299 P. 551; Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311.

[4] Applying the foregoing rules to the facts here presented, it is apparent that the direct, uncontradicted evidence introduced in opposition to the prima face case of agency, as to the circumstances under which the car was being driven, was of such a nature as to leave no reasonable ground for an inference based solely on the facts of ownership and permissive use that at the time of the accident the driver was acting as appellants' agent; and therefore, under the provisions of subdivision (b) of said section 402, the judgment against appellants in excess of $5,000 cannot be allowed to stand.

[5, 6] Respondents object to the application of the rule laid down in the Engstrom case, supra, as to the probative value of inferences, upon the ground that the statement of the rule therein is mere dictum. An examination of the opinion in that case clearly shows, however, that the rule set forth therein, as above quoted, is in substance and effect a restatement

and reaffirmance of the doctrine previously declared in Maupin v. Solomon, supra, and Crouch v. Gilmore Oil Co., Ltd., supra, and the other cases cited above. Respondents also contend that the application of the Engstrom case rule to a state of facts such as we have here would amount to an invasion by the reviewing court of the right of the jury to pass upon the credibility of the witnesses; and that in any event said rule should not be applied where, as here, the rebuttal testimony is given by interested parties. We are of the opinion that there is no merit in either point. As to the former, the decision in the Engstrom case makes it clear that the reviewing court may deal with the question only when it is presented as a matter of law, that is, only when, as here, it appears from the record itself that the inference "is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt * * *"; and the answer to the latter point is to be found also in the decision in the Engstrom case, wherein it is expressly declared that such rebuttal testimony may be produced by the "opposite side".

It is ordered, therefore, that the judgment against the appellants Towne be modified by reducing the amount thereof to $5,000, and as so modified it is affirmed. Appellants will recover their costs on appeal.

We concur: TYLER, P. J., WARD, J.

31 Cal.App.2d 692

HOHNEMANN et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 10809.

District Court of Appeal, First District, Division 1, California.

March 27, 1939.

Rehearing Denied April 26, 1939.

Hearing Denied by Supreme Court May 25, 1939.

1. Appeal and error 🔑653(1)

Where an appellant has complied with jurisdictional requirement of statute by filing notice of appeal and requesting transfer of evidence in lieu of bill of exceptions, and respondent claims that there has been an unreasonable delay in procuring transcript, respondent's only remedy is by way of motion in trial court to terminate proceedings for preparation of transcript. Code Civ. Proc. § 953a.

2. Appeal and error 🔑607(1)

Whether appellant's delay in procuring transcript after notice of appeal has been unreasonable or is justifiable is largely within trial court's discretion, which should be liberally exercised against terminating proceedings for preparation of transcript. Code Civ.Proc. § 953a.

3. Appeal and error 🔑985

Whether trial court grants or denies respondent's motion to terminate proceedings for preparation of transcript of evidence on ground of lack of diligence of appellant, its decision will not be disturbed unless abuse of discretion clearly appears. Code Civ. Proc. § 953a.

4. Appeal and error 🔑939

Where trial court overruled respondent's motion to terminate proceedings for preparation of transcript on ground of unreasonable delay by appellants, the District Court of Appeal, in passing on respondent's motion to dismiss the appeal on ground that the trial court abused its discretion in overruling the motion, would take the facts averred in affidavits filed by appellants in opposition to the motion as true. Code Civ. Proc. § 953a.

5. Appeal and error 🔑607(1)

Appeal would not be dismissed on ground that trial court abused its discretion in denying respondent's motion to terminate proceedings for preparation of transcript of evidence merely because more than two years had elapsed between the date of filing of request for transcript, and filing of motion to terminate proceedings for the preparation thereof, where it appeared that appellants' counsel had been given unlimited time by respondent's counsel to prepare, serve, and file the transcript. Code Civ. Proc. § 953a.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charlotte M. Hohnemann, by Annie Doud, her guardian, and William H. Hohnemann, by Annie Doud, his guardian, minors, against the Pacific Gas &

Electric Company, to recover damages on account of the death of their mother, who was fatally injured by an explosion of gas. From a judgment in favor of the defendant, the plaintiffs appeal and the defendant moves to dismiss the appeal.

Motion to dismiss denied.

J. A. Bardin, of Salinas, and Paul C. Dana, of San Francisco, for appellants.

Thomas J. Straub, W. H. Spaulding, and Bronson, Bronson & McKinnon, all of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiffs brought an action for the recovery of damages on account of the death of their mother, who was fatally injured by an explosion of gas. The trial court directed a verdict in favor of the defendant, and judgment was entered accordingly. Plaintiffs took an appeal pursuant to the alternative method provided by section 953a of the Code of Civil Procedure, and in conformity with the requirements of said section filed a request for a transcript. Thereafter defendant moved that the proceedings for the preparation of the transcript be terminated, the ground of the motion being lack of diligence on the part of plaintiffs in prosecuting the proceedings to obtain the transcript. The motion was denied, and shortly afterwards the transcript was duly settled and certified by the trial judge and filed in this court; and subsequently plaintiffs filed their opening brief. In the meantime, defendant took an appeal from the order denying its motion to terminate said proceedings; but the appeal was dismissed on motion of plaintiffs upon the ground that said order was not appealable. Hohnemann v. Pacific Gas & Electric Co., Cal.App., 85 P.2d 151. However, such dismissal was entered without prejudice to the right of defendant to proceed by way of motion for the dismissal of plaintiffs' appeal, and to use as the basis therefor the record upon which defendant had taken its ineffectual appeal. Such a motion was made, and is now before this court for determination.

[1-3] As to the law governing a proceeding of this kind, it is well settled that when, as here, an appellant has complied with the jurisdictional requirement of said section 953a by filing the notice and request mentioned therein, and it is claimed by the respondent that on account of lack of diligence on the part of the appellant or the court officers, or for any other cause, there has been unreasonable delay in procuring the transcript, the respondent's only remedy is by way of motion in the trial court to terminate the proceedings for the preparation of the transcript; that neither by statute nor court rule is there any mandatory provision prescribing a limit to the time within which the transcript is to be prepared, and that the determination of the question of whether the delay complained of has been unreasonable or is justifiable is committed very largely to the discretionary power of the trial court, which power should be liberally exercised against terminating the proceedings for the preparation of the transcript; and that whether the trial court grants or denies the motion therefor, its decision in the matter will not be disturbed by a reviewing court unless it clearly appears from the record upon which the trial court's decision is based that its discretionary power has been abused; also that it is seldom that the facts of any particular case can be used as a precedent for the determination of another proceeding of like character. Crocker v. Crocker, 76 Cal.App. 606, 245 P. 438; Smith v. Jaccard, 20 Cal.App. 280, 128 P. 1023, 1026; Town of Mill Valley v. Massachusetts etc. Co., 189 Cal. 52, 207 P. 253; Laykin v. Karsh, 117 Cal.App. 687, 4 P.2d 619; Shutz v. Western Wholesale L. Dist., 24 Cal.App.2d 659, 76 P.2d 135.

[4, 5] In the present case, as defendant points out, there was a lapse of two years between the dates of the filing of the request for the transcript and the filing of its motion to terminate the proceedings for the preparation thereof; but it appears from the affidavits filed in behalf of plaintiffs in opposition to the motion to terminate that counsel for defendant granted them leave orally to take whatever time they desired to obtain said transcript. In this regard it was averred that shortly after plaintiffs filed their request for the transcript, and on August 31, 1935, counsel for defendant signed a stipulation extending plaintiffs' time for 30 days to procure said transcript, and at the same time advised plaintiffs' counsel that plaintiffs could have as much time thereafter as they desired to prepare, serve and file said transcript, and that it would not be necessary for them to secure any further written stipulation therefor. Continuing, it was averred that relying upon said verbal stipulation and due to the fact that the attorney

who tried the case for plaintiffs and was in charge of the appeal was engaged almost constantly for the ensuing two years in the trial of jury cases in some nine or ten different counties in the state, and having received no word of dissatisfaction from defendant's counsel about the delay, counsel for plaintiffs allowed the matter of the preparation of the transcript to lie dormant until August 14, 1937; that on that date plaintiffs made full payment of $275 to the reporter for a completed transcript, but for reasons given by the reporter at the time, he was unable to begin the transcription until October 20, 1937, and on November 24, 1937, when the transcript was just about completed, defendant filed its motion to terminate the proceedings for the preparation thereof. Said motion was noticed for hearing on December 2, 1937, but the hearing thereof was postponed from time to time, by consent of the parties, and was not heard until the end of January, 1938. Meanwhile the transcript had been completed and at the time of the hearing of the motion was on file in the trial court. It further appears from said affidavits that up to the time defendant filed its motion to terminate, it had made no complaint whatever about the delay, nor indicated in any manner that it intended to invoke such remedy. A counter-affidavit was filed by counsel for defendant wherein he denied having granted any such leave, or any additional time beyond that called for by the written stipulation. But in view of the trial court's adverse ruling on defendant's motion to terminate, the facts averred in the affidavits filed by plaintiffs in opposition to said motion must here be taken as true; and accepting the same as true, we are not prepared to hold as a matter of law that the trial court abused its discretionary power in denying defendant's motion.

It is doubtless true, as defendant argues, that the mere fact that an attorney has been devoting his entire attention to other cases will not serve as legal justification for a delay of two years in obtaining a transcript, especially where the only thing necessary to be done to start the transcription is to make arrangements with the reporter for the payment thereof. But in the present case, as will be noted, there is an implied finding by the trial court supported by affidavits that defendant's counsel agreed that plaintiffs could have unlimited time, without written stipulation, to obtain the transcript. Therefore, since it appeared that the filing of defendant's notice of motion to terminate was the first indication of its intention to revoke said agreement, and that at the time said motion was heard the completed transcript was actually on file and ready for certification, it would seem that the trial court was not unwarranted in concluding that the motion should be denied.

In none of the cases cited by defendant does it appear that there was any such agreement between the parties as we have here; nor does defendant make any contention that the agreement here relied on by plaintiffs was not binding because it was not in writing.

The motion to dismiss is denied.

We concur: TYLER, P. J.; WARD, J.

PEOPLE v. BRAUN.*

Cr. 3149.

District Court of Appeal, Second District, Division 1, California.

March 28, 1939.

Hearing Granted by Supreme Court April 27, 1939.

1. Criminal law 🔑741(2), 1159(3)

A conflict in evidence identifying accused as one by whom offense was committed presents question solely within jury's province and their conclusion may not be disturbed on appeal.

2. Criminal law 🔑1158(1)

An appellate court cannot disturb trial court's finding as to identity of accused unless testimony proffered by the people is so weak as to constitute practically no evidence in support of identification.

3. Criminal law 🔑1158(1)

Appellate courts may not review evidence except when on face thereof it may justly be held that the evidence is insufficient to support ultimate issue involved, in which case the review is not a review of a question of fact, but is purely one of law. Const. art. 6, § 4½.

4. Criminal law 🔑741(2)

Jury were authorized to reject any testimony contradictory to testimony of identity offered by the people, and to disbelieve testimony of accused and witnesses corroborative thereof and to accept that of other witnesses in contradiction, however weak such latter testimony might be or however seriously their testimony on other important points might conflict with testimony of witnesses of accused. Code Civ.Proc. §§ 1847, 2061; Const. art. 6, § 4½.

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*For subsequent opinion see 92 P.2d 402.

5. Robbery ⚿24(3)

Evidence identifying accused as participant in robbery was sufficient to sustain conviction notwithstanding alleged uncertainty and improbability thereof.

6. Criminal law ⚿553

A statement, to preclude reliance thereon to sustain conviction because improbable or unbelievable per se, must involve claim that something was done which would seem impossible under circumstances or involve conduct that only one of seriously calentured mentality would be likely to do.

7. Criminal law ⚿1170½(3)

In robbery prosecution, question on cross-examination inquiring whether accused had been convicted of murder arising out of robbery at a designated place, to which objection was sustained before question was answered, whereupon question was reframed in manner to which no objection could be made, was not prejudicial.

8. Criminal law ⚿1036(2)

Where no assignment of misconduct in asking of question on cross-examination inquiring whether accused being tried for robbery had been convicted of murder arising out of robbery at designated place was made at trial and trial judge was not requested to admonish jury to disregard question, whether asking of question was prejudicial was not open to review on appeal.

9. Criminal law ⚿1037(1)

It is only when alleged prejudicial action or conduct is of such character that admonition to jury would not remove its effect, if any, that absence of assignment of error during trial will not preclude raising point on appeal.

10. Criminal law ⚿1036(2)

In robbery prosecution, asking accused on cross-examination whether he had theretofore been convicted of robbery when in fact conviction was for rape did not constitute prejudicial misconduct on part of district attorney warranting reversal in absence of objection to question or request that jury be admonished in regard thereto.

11. Criminal law ⚿1170½(6)

In robbery prosecution, asking accused on cross-examination whether place at which accused spent day of robbery was a hangout for exconvicts was not prejudicial misconduct on part of district attorney warranting reversal, where objection to question was promptly sustained and court without suggestion from counsel for accused admonished jury to disregard the question.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

George Braun was convicted of robbery of the first degree, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for the People.

WHITE, Justice.

An information was filed against defendant, charging him with the crime of robbery and with having been previously convicted of a felony and having served a term of imprisonment therefor in the Illinois state penitentiary, to which the defendant entered a plea of not guilty to the charge of robbery and admitted the prior conviction.

After a trial by a jury, defendant was found guilty of the crime of robbery of the first degree, and now prosecutes this appeal from the judgment based thereon and from an order denying his motion for a new trial, claiming insufficiency of the evidence and prejudicial misconduct on the part of the district attorney.

Epitomized, the facts are that early on the morning of January 31, 1938, three men entered the United Independent Dairies in the city of Los Angeles, armed with deadly weapons, and held up three employees of the concern, obtaining from Kenneth Weston, one of such employees, the sum of thirty dollars in cash and other personal property.

At the trial one of the victims of the robbery positively identified the defendant as one of the participants in the robbery. In the record we find the following:

"Q. Now, I will ask you to look around this courtroom and tell me if you see the man that came in there on this particular morning, the man with the rifle? A. Yes, sir.

"Q. Where is he, please? A. He is right there at the table.

"Q. Indicating the defendant, Braun? A. Yes, sir.

"Q. Now, after the defendant Braun came in with a rifle, what if anything did he do or say? A. He didn't say anything.

"Q. All right. What was the next thing that took place when the defendant Braun came in? A. Well, Braun stayed in there with the rifle while I was on the floor. He stayed in there with me and there was another man that came in too, and they went in the back room and brought in one of the other boys that worked there at the dairy, at the creamery. * * *

* * * * * *

"Q. Now, Mr. Weston, calling your particular attention to the defendant, George Braun, did you notice anything in particular about him on the night of the robbery, so as to make your identification positive at this time? A. Yes, his size and his gray hair around the temples and at the time—well, after the holdup, I kept thinking that there was something that I should remember about him. I couldn't just think what it was though, and in the meantime the deputy sheriff had been showing me numerous pictures of suspects, and as soon as they showed me the pictures, why I picked it out right away because he had a scar on his nose, and I felt sure that that was what I should have remembered about it.

"Q. Now, at the time that you picked this defendant out of these photographs, his picture, about how many photographs did you look at?

"Mr. Jonesi: I object to that as not material, if your Honor please.

"The Court: Overruled. Answer the question.

"A. Oh, approximately 30 or 40."

Supporting the powers of observation on the part of the witness Weston, we quote from the reporter's transcript of his testimony in connection with the identification of Harry Groves, who admitted being one of the robbers, as follows:

"Q. And then you saw Mr. Groves in the room? A. Yes, sir; that is right.

"Q. Do you see Mr. Groves in the courtroom now? A. No.

"Q. Would you know Harry Groves if you should see him? A. Yes, sir.

"Mr. Jonesi: May I ask the Court's permission to have Mr. Groves brought into the courtroom?

"The Court: Yes. (Harry Groves brought in by bailiff and stands at end of counsel table.)

"Q. By Mr. Jonesi: Is that the man you say you saw at that time? A. Yes.

"Q. And that is Harry Groves? A. Yes, sir."

Concerning his opportunity to observe, form impressions of, and identify the defendant, this same witness gave the following testimony:

"Q. At the time that you say that you saw him" (referring to defendant, Braun) "enter, could you see his whole person? A. Yes, he came and stood right at the desk, right beside me. He was in there altogether approximately 15 minutes, I guess.

"Q. Now, how far were you from that desk? A. Oh, three or four feet, four or five feet, not more than five feet.

"Q. How far was Mr. Braun from the desk? A. He stood between the desk and me.

"Q. In other words, he was about one or two feet from you? A. Well, about three feet from me, I should say.

"Q. And at that time you got a good view of him? A. I didn't get as good a look then as I did when they had me get up to open the safe, or try to open the safe the second time, and then they had me lay down in another place."

The two other dairy company employees who were present at the hold-up also identified appellant, although their identification was not as positive as that of the witness Weston, but their opportunity for identification was not as good as was afforded Weston. But notwithstanding their hesitancy to positively identify appellant on occasions preceding the trial, they did nevertheless at the trial persist in their claim that appellant was one of the robbers.

Notwithstanding the foregoing testimony, it is earnestly urged that appellant is the victim of mistaken identity, in connection with which it is argued that the identification of appellant is uncertain and unsatisfactory. This argument is inspired by the fact that the robbery took place at 4:30 o'clock in the morning, when it was still dark; that the victim Weston was hit on the head and made to lie down; that shortly after the robbery the witness Weston, in a conversation with deputy sheriffs, described the robbers as being foreigners and otherwise different in appearance from the defendant. Further, that the robber identified as the defendant wore a muffler over a part of his face, thus rendering invisible his countenance, except from the upper lip to the eyebrows, and that he wore a hat that obscured part of his face. Appellant predicates further infirmity in the identification upon the fact that two of the robbers who admitted their part in the hold-up took the witness stand at the trial of appellant and swore positively that the latter had no part in the robbery and was not present thereat; and finally, that appellant as a witness in his own behalf asserted his innocence.

[1-4] As to the testimony offered in opposition to the identifying witnesses, it has been frequently held that a conflict in the evidence as to the identity of one on trial accused of having committed an offense presents a question solely within the province of the jury, and their conclusion may not be disturbed on appeal. People v. Seawright, 72 Cal.App. 414, 237 P. 796. The witnesses for the prosecution were entitled to full credit, and apparently from the verdict of the jury, they believed their testimony. Before an appellate court can disturb the finding of the trial court on such a question, the testimony proffered by the people as to the identity must be so weak as to constitute practically no evidence at all to support the identification. People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Friday, 18 Cal.App.2d 197, 63 P.2d 303. The testimony in the case at bar cannot be thus strictured. While the alleged variances or inconsistencies in the testimony undoubtedly afforded opportunity for a persuasive argument to the jury against the reliability of such testimony, we find nothing in the evidence from which a reviewing court could justly conclude that the testimony of these witnesses is per se unbelievable and that it was therefore the jury's duty not only to disregard it, but to accept defendant's denial of any wrongdoing on his part and the testimony of other witnesses in his behalf that he was not present at the time of the commission of the offense. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly for that reason our Constitution, art. 6, § 4½, provides that the appellate courts are not authorized to review evidence, except when on its face it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Carrying out the spirit and intent of this constitutional provision, the legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ.Proc. § 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive. Code Civ.Proc. § 2061. It necessarily follows from the rules just stated that the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that of the witnesses who testified for the people (People v. Phelan, 123 Cal. 551, 557, 56 P. 424; People v. Wright, 4 Cal.App. 704, 706, 89 P. 364; People v. Turpin, 10 Cal.App. 526, 530, 102 P. 680; Clark v. Tulare Lake Dredging Co., 14 Cal.App. 414, 432, 112 P. 564), and therefore to disbelieve the testimony of the defendant and witnesses corroborative thereof and accept that of other witnesses in contradiction, however weak in places the testimony of the latter may have been made to appear, or however seriously their testimony on other important points might have conflicted with the testimony of defendant's witnesses.

[5, 6] Appellant's claim that the testimony of the prosecution's witnesses identifying the former as a participant in the robbery was so inherently improbable as to constitute no evidence at all, finds its answer in the case of People v. Haydon, supra, where, at page 555, 123 P. at page 1108, the court said: "A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of

a seriously calentured mentality would be likely to do."

[7-9] The second point urged by appellant for a reversal is that his rights were prejudiced by asking him a certain question on cross-examination. In that connection, the record discloses the following:

"Q. Isn't it a fact, Mr. Braun, that you have been convicted of the crime of murder, arising out of a robbery at the Bee Hive Cafe?

"Mr. Jonesi: I object to that, your Honor, as incompetent, irrelevant, and immaterial, and it is also improper cross-examination.

"The Court: Reframe your question and ask him if he has been convicted of a felony.

"Q. By Mr. Galliano: Isn't it a fact that in the last part of July of this year you were convicted of the crime of murder? A. I will not know until I hear from my appeal.

"Mr. Jonesi: Just a minute; I object to that as improper cross-examination, and having no bearing upon this case.

"Mr. Galliano: I have a right to impeach this witness, if your Honor please.

"Mr. Jonesi: It is not proper impeachment.

"The Court: I will overrule the objection.

"Q. By Mr. Galliano: Just answer the question, Mr. Braun. A. What is that?

"Q. Isn't it a fact that you have been convicted of the crime of murder in the first degree? A. Yes, sir.

"Q. And isn't it a fact also that you have been convicted of the crime of attempted murder? A. Yes, sir."

Inasmuch as the trial court in effect sustained the objection of defense counsel to the question and it was never answered, but was reframed in a manner in no wise objectionable, we cannot conceive how the asking of the question in the first instance prejudiced any substantial rights of appellant. Moreover, no assignment of misconduct in the asking of this question was made at the trial, nor was the trial judge requested to admonish the jury to disregard the question as originally asked; and consequently the matter is not open to review upon appeal. It is only when the action or conduct complained of is of such a character that no admonition to the jury would have removed its effect, if any, that the absence of an assignment of error during the trial will not preclude one from raising the point on appeal. The present case does not come within the exception. People v. Russo, 133 Cal.App. 468, 474, 24 P.2d 580.

[10] Finally, appellant urges a reversal on the ground that the district attorney was guilty of prejudicial misconduct when on cross-examination he asked the defendant whether he had theretofore been convicted of robbery, when in truth and in fact the conviction was for the crime of rape. No objection was made to this question, nor was any request made to the trial judge to admonish the jury in regard thereto. In fact, appellant answered the question in the affirmative. If the interrogatory was asked in the form indicated by the transcript, it apparently made little if any impression upon either the appellant or his counsel, the former of whom answered it, and the latter of whom made no objection thereto.

[11] The following extract from the record affords the basis for the final claim by the appellant of prejudicial misconduct on the part of the district attorney:

"Q. Mr. Braun, you spent the day of the 31st of January with Mrs. Kessler, is that right? A. Mrs. Kessler and Mr. Woodson and Mrs. Gerber.

"Q. Please answer my questions and do not volunteer any information. You spent the day with Mrs. Kessler? A. Yes, sir, I did.

"Q. And she runs the Spanish Kitchen on East 1st Street? A. She did at one time.

"Q. And that is a hang-out for ex-convicts?

"Mr. Jonesi: I object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

"The Court: I will sustain the objection, and I will admonish the jury to disregard the statement of the District Attorney, the Deputy District Attorney.

"Mr. Galliano: I will withdraw it, if the Court please."

Objection to the improper question was promptly sustained, and without any suggestion from defendant's counsel the court nevertheless admonished the jury to disregard the same. We cannot assume that such admonition was ignored, and certainly the particular interrogatory complained of was not of such character that the prejudicial effect, if any, involved in the asking thereof could not be removed from the minds of the jury by the appropriate admonition given by the court.

The record shows that at all times the learned trial judge was alert in seeing that the trial was fairly conducted and that appellant was accorded all his legal rights. In fact, the judge in the trial court was extremely liberal in allowing appellant great latitude in the cross-examination of the witnesses for the prosecution, particularly with reference to their testimony concerning identification of appellant. From our examination of the record, we are impressed that appellant received that fair and impartial trial which the law allows him, and we cannot say that the verdict has resulted in a miscarriage of justice.

The judgment and order are therefore affirmed.

We concur: YORK, P. J.; DORAN, J.

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31 Cal.App.2d 680

In re MARTIN'S ESTATE.

ORR et al. v. RILEY, State Controller et al.

Civ. 6221.

District Court of Appeal, Third District, California.

March 24, 1939.

1. Escheat 🔑6

The superior court's power to distribute decedent's estate to the state is predicated on initiation and prosecution of escheat proceedings in conformity with statute. Code Civ.Proc. § 1269.

2. Escheat 🔑6

The superior court had no power or jurisdiction to distribute decedent's estate to the state before order to show cause why estate should not vest in the state was filed in pending probate proceedings. Code Civ. Proc. § 1269.

3. Courts 🔑40

"Excess of jurisdiction," as distinguished from entire absence thereof, means that act, though within judge's general power, is unauthorized and hence void in particular case because conditions authorizing exercise of such power in that case are wanting.

[Ed. Note.—For other definitions of "Excess of Jurisdiction," see Words & Phrases.]

4. Escheat 🔑6

A decree for distribution of decedent's estate to the state in proceeding wherein no order to show cause why estate should not vest in the state was filed should be given effect only of order, provided for by statute, that all moneys and effects in administrator's hands be paid into state treasury in absence of heirs or other claimants. Code Civ.Proc. §§ 1269, 1737.

5. Escheat 🔑8(2)

The statute barring claim to decedent's estate five years after date of decree distributing property thereof to the state is inapplicable to proceeding by decedent's heirs to recover such property, where no escheat proceedings were taken before entry of such decree. Code Civ.Proc. § 1269.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of John Robert Martin, deceased, wherein George Orr and others, deceased's heirs, filed a petition for an order directing Charles G. Johnson, Treasurer of the State of California, to deliver the whole estate to petitioners. From a judgment ordering Harry B. Riley, State Controller, to draw warrants on the treasurer in petitioners' favor for a sum held by the treasurer under a distribution decree and awarding realty of the estate to petitioners, the Controller and Treasurer appeal.

Affirmed.

Earl Warren, Atty. Gen., and Albert F. Zangerle, Deputy Atty. Gen., for appellants.

W. A. Brandenburger and William A. White, both of Sacramento, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought by the heirs of John Robert Martin, deceased, to recover certain real and personal property held by the state of California, under and by virtue of an order made by the superior court of the county of Colusa, on the 23rd day of July, 1920.

On the last mentioned date there was distributed to the state of California, in the absence of known heirs, several parcels of real property, and also the sum of $8,579.40; that said property is now in the custody of the State Treasurer of California.

On January 4, 1938, a petition was filed in the superior court, in and for the county of Sacramento, in the matter of the estate of John Robert Martin, deceased, by five persons, who alleged that they were the sole heirs of said decedent. The petitioners prayed for an order directing the State Treasurer to deliver the whole of said estate to petitioners, pursuant to the provisions of sections 1272 and 1272a of the Code of Civil Procedure. An answer was filed on behalf of the state of California, admitting all the allegations of the petition, except as to the matter of heirship, and also setting up as a bar to said proceeding the provisions of sections 1269, 1272 and 1272a of the Code of Civil Procedure, and section 1027 of the Probate Code. The action came on regularly for trial, and the court found that all the allegations of the petition were true, and that the action was not barred by reason of the provisions of the code sections set up in the answer. Judgment was entered ordering the state controller to draw his warrants on the Treasurer of the state of California in favor of the petitioners. It was also adjudged that the real property of the estate was the property of the petitioners. This appeal is taken from the judgment so rendered.

It is the contention of the state that petitioners were barred from appearing and claiming the estate on account of the fact that more than five years had elapsed between the date of the decree of distribution in said estate and the date of the filing of the petition herein. In this connection appellants Harry B. Riley, Controller of the state of California, and Charles B. Johnson, Treasurer of the state of California, rely upon the provisions of section 1269 of the Code of Civil Procedure, which in 1917 read, and still reads as follows: "If proceedings for the administration of such estate have been instituted, a copy of such order must be filed with the papers in such estate in the office of the county clerk where such proceedings were had. If proceedings for the administration of any estate of any such decedent have been instituted and none of the persons entitled to succeed thereto have appeared and made claim to such property, or any portion thereof, before the decree of final distribution therein is made, or before the commencement of such proceeding by the attorney general, *or if the court shall find that such persons as have appeared are not entitled to the property of such estate, or of any portion thereof, the court shall, upon final settlement of the proceedings for the administration of such estate, after the payment of all debts and expenses of administration, distribute all moneys and other property remaining to the state of California. The property so distributed shall be held by the state treasurer for a period of five years and from the date of the decree making such distribution within which time the same may be claimed in the manner in this title hereafter provided,* but a nonresident foreigner claiming succession in any case must appear and claim within five years from the death of the decedent, *and any person who does not appear and claim as herein required shall be forever barred, and such property, or so much thereof as is not so claimed, shall vest absolutely in the state.* * * *"

At the time of the death of Martin, and at the time that his estate was being probated, said section 1269 was the first section of title 8, part 3 of the Code of Civil Procedure under the title of "Escheated Estates". Immediately following the number of the section and in large black capital letters, the following caption appears: *"Manner of commencing proceedings relative to escheated estates."* Following the first paragraph there are four other paragraphs, unnumbered, but each bearing a preface in small black type. These are as follows: *"Description of property"; "Order to * * * appear"; "If proceedings for administration have been instituted"; "State treasurer to hold property".* The portion of the section relied upon by appellants comes under the last two paragraphs above mentioned. Section 1737 of the Code of Civil Procedure at the times mentioned, provided as follows: "After a final settlement of the affairs of any estate, if there are no heirs, or other claimants thereof, the county treasurer must pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates."

The question to be decided is whether or not the provision for a five year limitation under section 1269 above quoted, is a bar to any relief in these proceedings. This in turn requires a construction of the language found in the section last mentioned with respect to the "distribution" of the estate to the State of California.

[1-4] It is the contention of the respondents that all the provisions of section 1269 of the Code of Civil Procedure must be read together, and that the power of the court to make a distribution of an estate was there predicated upon the initiation and prosecution of escheat proceedings in conformity with the provisions of said section. We are of the opinion that this contention must prevail. It is expressly provided in the portion of the section relied upon, that "if proceedings for the administration of such estate have been instituted, *a copy of such order must be filed with the papers in such estate*". The "order" mentioned is obviously and manifestly a reference to the order to show cause mentioned in the preceding paragraph of the section, requiring all persons to appear and show cause why the estate should not vest in the State. It is our opinion that until such an order was filed in the pending probate proceedings, the court had no power or jurisdiction to distribute the estate to the State of California. Such a decree, in excess of jurisdiction, is void. "Excess of jurisdiction, as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in that particular case are wanting, and hence, the judicial power is not in fact lawfully invoked." 15 C.J. p. 729, par. 24. The most that can be said with reference to the purported decree of distribution in said estate would be that it would have the effect of the order provided for in section 1737 quoted above, requiring the payment into the state treasury of all moneys and effects in the hands of the administrator, if there be no heirs or other claimants to said property, and we hold that it should be given that effect.

At the time of the death of Martin, and during the course of the probate of his estate, there was no provision in the law authorizing the distribution of an estate, where there were no known heirs, *directly to the state of California*, except the portion of section 1269 of the Code of Civil Procedure quoted above, and only then could it be done, as we have pointed out, after proceedings had been filed by the attorney-general of the state for the purpose of securing a judgment of escheat, and the "order" filed in the pending probate proceedings. No such proceedings were ever instituted with respect to this estate. Consequently, the provisions of section 1269, supra, authorizing a distribution to the State, are not applicable. It may be said in passing, that the situation today would be otherwise, as the legislature in 1933 added section 1027 to the Probate Code. This section provides, irrespective of the filing of escheat proceedings, for a direct distribution of an estate, where there are no known heirs, to the State of California, with a five year limitation upon the right of any heirs to claim the estate.

[5] In answer to the question propounded under the heading "Statement of Question Involved" in appellants' opening brief,—"When an estate is distributed to the state of California pursuant to the provisions of section 1269 of the Code of Civil Procedure, are not claimants thereto barred from appearing and claiming said estate five years after the date of the decree making such distribution to the state of California?" we conclude by holding that under the provisions of said section there could be no lawful distribution to the state until escheat proceedings had been filed, and no such proceedings having been taken in this case, it follows that the provisions of said section are in no wise applicable to the present proceeding, and petitioners here are not barred by the five year limitation set up in said section, which is the sole question presented by appellants in their briefs under the heading "Statement of Question Involved".

The judgment is affirmed. Petitioners-respondents to recover costs.

We concur: PULLEN, P. J., THOMPSON, J.

31 Cal.App.2d 625

PEOPLE v. MARTINEZ.

Cr. 381.

District Court of Appeal, Fourth District, California.

March 21, 1939.

1. Homicide ⚷253(1)

Evidence sustained conviction of murder in the first degree.

2. Criminal law ⚷675

In homicide prosecution, objection to question calling for description of club used by victim on accused in previous altercation was properly sustained where club had already been described by same witness, and further description would have been cumulative.

3. Criminal law ⚷1168(2)

In homicide prosecution, sustaining objection to question, inquiring whether victim had struck witness with the same club with which victim had struck accused, presented no error, where witness answered affirmatively before objection was made and response was left in record and no prejudice appeared.

4. Homicide ⚷190(1)

Record *held* not to reveal any instances of improper exclusion of testimony regarding alleged threats against accused by homicide victim.

5. Criminal law ⚷829(1)

Refusal of instructions covering subject matter which was amply covered in given instruction was proper.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Joe Martinez was convicted of murder in the first degree with a recommendation of life imprisonment, and he appeals.

Affirmed.

P. E. Bingman, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was found guilty of murder in the first degree with a recommendation of life imprisonment. He appeals from the judgment and from an order denying his motion for a new trial.

[1] It is first contended that the evidence is not sufficient to support the verdict. The defendant admitted that he shot and killed one Venturo Romero but claimed that he acted in self defense. There is evidence of the following facts. The appellant and the deceased engaged in a fist fight on October 9, 1938, which the appellant says he won. He was six inches taller than Romero. Half an hour later Romero returned and struck the appellant with a piece of iron pipe.

On the evening of October 14, 1938, the appellant, accompanied by two others, was proceeding easterly on a street in Cucamonga when they met Romero and two companions, who were traveling westerly along the same street. It was dark but the scene was partially lighted by electric lights some 90 or 100 feet away. As the two groups approached each other the appellant said: "Venturo, come over here." Romero went over "a little ways" and the appellant said: "That is just where I want to get you". The appellant then fired the first shot which went into the ground. At that time Romero was standing still with his hands by his side and with nothing in his hands. When he fired the first shot Romero said, "You can't scare me with a gun", and immediately thereafter the appellant fire a second shot which struck Romero in the abdomen, causing his death some thirty minutes later. All of this took place within a few seconds. Romero, clutching his abdomen walked or ran to a store some 150 feet away. The appellant followed and, pointing his gun at him, asked if he wanted another shot. Romero collapsed in front of the store and died without making a statement. There were no powder marks on Romero's body or on his clothing and a grape or vineyard knife was found in his right front pocket.

There was evidence on behalf of the appellant to the effect that when the two groups met the appellant called to Romero and asked "Was he looking for him?" to which Romero replied: "Yes"; that Romero had a knife in his hand and took a step toward the appellant with his arm held back; and that the appellant then shot twice in rapid succession, the first shot being aimed at the ground. The appellant testified that he was afraid of Romero; that he believed his life to be in danger when he fired each shot; that he saw a knife in Romero's hand before the first shot was fire; that Romero started toward him before he fired the first shot; that he carried the pistol that night because he was afraid of Romero; that he had owned the pistol for a year but had never carried it before; that he went home to get the gun some twenty or twenty-five minutes before they met Romero; that he checked to make sure the gun was loaded before he went out; that Romero was four or five feet from him when he fired the first shot; that Romero took another step forward between the first and second shots; and that he was carrying the gun for the purpose of "making friends" with Romero. Shortly after the shooting the appellant told an officer that on October 9, he had picked a quarrel with Romero because Romero had been in a quarrel with his (the appellant's) father. He admitted on the stand that a story he had previously told the officers about the gun was not true.

While there is a conflict in the evidence, a portion thereof discloses every element of first-degree murder and is entirely sufficient to support the verdict and judgment.

[2, 3] It is next contended that the court erred in sustaining objections to two questions asked of a certain witness. These questions related to what had happened on October 9 when Romero had struck the appellant with an iron club or piece of pipe. After the witness was asked for a general statement of what had occurred on that occasion the court told appellant's counsel that he could go into that matter for the purpose of showing the appellant's attitude of mind, but suggested that he bring out what he desired by pursuing the usual course of asking the witness questions to be answered by him. This course was pursued and the court allowed every question to be answered with two exceptions. The first of these called for a description of the club used on that occasion. This club had already been described by this witness and a further description would have been cumulative. The other question was as to whether Romero, on that occasion, had also hit the witness with this club. An objection was sustained although the witness had answered, before the objection was made, "he did". This was left in the record and no prejudice appears.

[4] It is next argued that the court erred in excluding certain testimony regarding alleged threats against the appellant made by the deceased. The contention is that it was unnecessary for the appellant to show that such threats had actually been made by the deceased, that it was sufficient to show that the appellant believed that such threats had been made, and that the court erroneously ruled out evidence which would have supported the latter proposition. The appellant admitted on the stand that no threats against him had been made by Romero prior to the evening on which the shooting occurred. The only contention is that such threats were communicated to him on that evening by one Garcia and by one Charlie Flynn.

The appellant fails to point out any instance in which evidence along this line was rejected. We have, however, made a careful examination of the transcript. The appellant was first asked by his counsel whether Garcia had warned him that the deceased "was out to get him". The court told counsel not to leave it to the witness to determine what was or was not a warning but told him "You may call out whatever you contend was a warning so that we may know just what was communicated to the witness at that time". Shortly thereafter the court told counsel to bring out the exact conversation so that the jury might be able to tell whether or not a threat had been made. A little later the court cautioned counsel to be definite as to what person had told something to the witness and just what this person had told him. The witness was then asked whether on October 14, Charlie Flynn had told him that "Venturo Romero was looking for you with a knife". His reply was stricken because he inserted statements of his own and immediately thereafter said that Charlie Flynn had not made these statements but that he had said "to be careful". The witness was then asked if he knew the deceased was making threats against him. An objection was overruled. The witness was then asked who communicated threats to him and he replied: "Garcia and Charlie Flynn". The witness was then asked what Garcia had told him. His reply to that question was stricken with the express consent of his counsel. The court then informed appellant's counsel that he would be given an opportunity to show what statements had been made and who made them, and counsel replied that he would do so later. Later, Garcia testified that he had had no conversation with the appellant on October 14 other than to say hello to him. Flynn was then asked whether he had said to the appellant, "You had better look out they are looking for you". An objection was sustained to this question as not referring in any way to the deceased and no attempt was made to ask further questions on this subject of this witness. On cross examination, Flynn testified that he had never heard Romero make any threats against the appellant. No offer of evidence along this line was made and we are unable to find where any such evidence was improperly rejected.

[5] It is further contended that the court erred in refusing to give five instructions requested by the appellant. The brief contains nothing but this bare statement and no attempt is made to point out in what respect error occurred. An examination of the record discloses, however, that the subject matter of these instructions was amply covered in other instructions which were given. Complaint is also made because the court gave one instruction which was requested by the appellant. We are pointed to no error in that particular and the instruction appears to be quite correct.

It is finally urged that the court erred in refusing to reduce the degree of the crime of which the appellant was convicted, it being contended that the evidence does not support the conviction of any crime greater than manslaughter. This point has been sufficiently considered in connection with the sufficiency of the evidence to support the judgment as rendered.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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31 Cal.App.2d 660

SNYDER v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 11769.

District Court of Appeal, Second District, Division 1, California.

March 23, 1939.

Rehearing Denied April 8, 1939.

Hearing Denied by Supreme Court May 22, 1939.

1. Limitation of actions 🔑34(1), 37(2), 100(7)

Limitation period, for action against custodian of a will for failure to timely deliver will to executor or clerk of court having jurisdiction of the estate, is three years, but, if action is further predicated on ground of fraud, the action is not deemed to have accrued until discovery by aggrieved party of the facts constituting the fraud. Probate Code, § 320; Code Civ.Proc. § 338, subds. 1, 4.

2. Corporations 🔑428(1)

A corporation is not chargeable with knowledge of an officer or agent who has no authority to bind the corporation.

3. Corporations 🔑428(1)

Notice to an officer or authorized agent of a corporation is generally considered as notice to the corporation.

4. Wills 🔑211

In action brought in 1937 for damage resulting to legatee by failure of corporation as custodian of will to timely produce the will upon death of testator in 1930, wherein defense of limitation was raised by corporation, legatee had right to establish actual or constructive knowledge of corporation as to existence of the will. Probate Code, § 320; Code Civ.Proc. § 338, subds. 1, 4; Civ.Code, §§ 18, 1572.

5. Fraud 🔑4

The suppression of that which is true by one having knowledge or belief of the fact constitutes "actual fraud," whether suppression is intentional or accidental and inexcusable. Civ.Code, § 1572.

[Ed. Note.—For other definitions of "Actual Fraud," see Words & Phrases.]

6. Limitation of actions 🔑100(7)

Action brought in 1937 for damage resulting to legatee by failure of corporation as custodian of will to timely produce the will upon testator's death in 1930 was not barred by limitation where legatee did not discover existence of the will until 1936, since limitation was tolled by corporation's suppression of truth which constituted "fraud," even though concealment of the will was unintentional and resulted merely from corporation's blunder. Probate Code, § 320; Code Civ.Proc. § 338, subds. 1, 4; Civ.Code, §§ 18, 1572.

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

7. Wills 🔑211

The statute requiring custodian of will to deliver the will to clerk of court having jurisdiction of the estate or executor within certain time after testator's death was designed to exact the discovery of wills. Probate Code, § 320.

8. Wills ⚿211

Custodian of will had duty to comply with mandate of statute requiring custodian to deliver will to executor or clerk of court having jurisdiction of the estate within certain time after testator's death, even though the custodian was named as the executor. Probate Code, § 320.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Willene Dodd Snyder against the Security-First National Bank of Los Angeles for damage sustained by the plaintiff as a result of defendant's failure to deliver a will which was in custody of the defendant at time of testator's death. From a judgment of dismissal following an order sustaining demurrer to second amended complaint without leave to amend, and from an order denying plaintiff's motion to vacate the judgment, and from an order denying motion for leave to file a third amended complaint, plaintiff appeals.

Judgment and order denying motion to vacate judgment reversed and cause remanded, with directions to proceed in accordance with opinion, and order denying motion for leave to file third amended complaint dismissed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Emmett E. Doherty, of Los Angeles (R. G. Blanchard, of Los Angeles, of counsel), for appellant.

Jennings & Belcher, of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for respondent.

DORAN, Justice.

This is an appeal by plaintiff from a judgment of dismissal following an order sustaining a demurrer to the second amended complaint without leave to amend; an appeal is also taken from the order denying plaintiff's motion to vacate the judgment, and from the order denying a motion for leave to file a third amended complaint.

The facts as alleged in the second amended complaint are substantially as follows: That for some time before February 13, 1930, defendant corporation was the custodian of the will of one William E. Dodd, dated August 4, 1919, in which will defendant was named as executor, and under which will plaintiff, a daughter of the testator, was named as sole beneficiary; that said William E. Dodd died on February 13, 1930; that subsequent to the death of William E. Dodd, letters of administration of the estate of said decedent were petitioned for and granted on March 3, 1930, to Metals Bank and Trust Company, a Montana corporation, by the District Court of the Second Judicial District of Montana; that the defendant was informed of such death on March 8, 1930; that on March 20, 1930, the administrator demanded of defendant all papers, bonds and documents which defendant might have belonging to decedent; that thereafter, pursuant to said request, defendant delivered to said administrator various papers, bonds and documents and that defendant professed thereby to have delivered all of such documents then in its possession; that defendant knew at that time that it had in its possession and under its control the said will, but "falsely and fraudulently represented that it had so delivered all and every one of such documents then in its possession and that it had retained no papers, bonds, or documents whatsoever which belonged to the decedent, William E. Dodd, during his lifetime"; that until April 14, 1936, defendant failed to deliver the will to the clerk of the court having jurisdiction of the estate; that plaintiff did not know of the existence of said will until April 14, 1936; that during the pendency of the administration a purported will, executed in 1917, was filed by other relatives of the decedent, providing for various specific bequests and legacies; that the corpus of the estate was not sufficient to permit the payment of said specific bequests; that the administrator thereafter negotiated a settlement of all claims with certain of the beneficiaries under the purported will, thereby depleting the liquid assets of the estate and causing the discontinuance of the payment of a monthly allowance to plaintiff; that as a result thereof plaintiff was left without income and was compelled to permanently abandon her college education.

The action herein, commenced on April 14, 1937, was for damages alleged to have resulted from the failure of the defendant to deliver the will as provided in section 320 of the Probate Code.

The judgment of the trial court, appealed from, recites in substance that the demurrer of the defendant to the second amended complaint was submitted upon written argument; that the written argument of plaintiff in opposition to the demurrer sets forth that plaintiff "does not impute any corrupt motive or deliberate intention to defraud, to the defendant"; that from plaintiff's admissions upon written argument plaintiff could not truthfully amend the complaint to allege that any act or omission of defendant was made with intent to defraud, or that there was any intentional concealment; that therefore the order sustaining the demurrer was made without leave to amend.

Appellant concedes that no amendment could cure the alleged defects, in the event respondent's position as to the law governing the statute of limitations is sustained; that therefore the appeal raises but two substantial issues, namely: when does the statute of limitations commence to run on a cause of action for failure to deliver a will; and, is the statute of limitations tolled by the act of a corporation in concealing the existence of a cause of action by means of false representations where knowledge of the falsity thereof is imputed to the corporation.

Section 320 of the Probate Code is as follows: "Delivery of will after death. The custodian of a will, within thirty days after being informed that the maker thereof is dead, must deliver the same to the clerk of the superior court having jurisdiction of the estate, or to the executor named therein. Failure to do so makes such person responsible for all damages sustained by any one injured thereby."

It is respondent's contention that whatever rights might have accrued to appellant by virtue of the above section, the enforcement thereof is foreclosed by the statute of limitations which, as further contended by respondent, commenced to run at the end of the thirty-day period within which the will is required to be delivered; that inasmuch as defendant corporation was the named executor, and was in possession of the will, no requirement of section 320 of the Probate Code remained unfulfilled.

[1] Appellant's action was commenced within the statutory period. The complaint recites facts which appear to justify the action under section 320 of the Probate Code. The period of limitations for such actions is three years unless it is further predicated upon the ground of fraud, in which case the cause of action is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Sec. 338, Code Civ. Proc., subds. 1 and 4.

Fraud may be either actual or constructive. The suppression of that which is true, by one having knowledge or belief of the fact, is actual fraud. Sec. 1572, Civ. Code. That the defendant corporation had such knowledge with regard to the will, there can be no question.

[2-4] It is well established that a corporation is not chargeable with the knowledge of an officer or agent who has no authority to bind the corporation (Bourne v. Root, 125 Cal.App. 461, 464, 13 P.2d 1066), but, the contrary is also regarded as the general rule, namely, that notice to an officer or authorized agent of a corporation is notice to the corporation (1 Cal.Jur., p. 848; Jefferson v. Hewitt, 103 Cal. 624, 629, 37 P. 638). The foregoing applies to actual knowledge, which appellant manifestly had the right to allege. Not only was such fact material to the issue plaintiff and appellant sought to create, but, as well, appellant was further fortified with the right to establish constructive notice. Sec. 18, Civ.Code. That a corporation can have knowledge only through its officers and agents is elementary. It would appear from the record and from an examination of respondent's brief that for respondent to deny either actual or constructive notice of the possession of the will would be extremely difficult, if not, indeed, impossible. Whether the concealment of the will by respondent was intentional, under the circumstances, is immaterial.

[5] Section 1572 of the Civil Code is unqualified, and hence the "suppression of that which is true", whether intentional, or accidental and inexcusable, comes within the meaning of the provision. Appellant, therefore, was entitled to the opportunity to allege accordingly. In that connection plaintiff sought to allege fraud, which, as hereinbefore mentioned, would suspend the operation of the statute of limitations until the discovery of such fraud. Plaintiff's right to incorporate the element of fraud was vital. Fundamentally, all causes of action, as to the time within which the same may be commenced, are, according to the character of each, governed by the several statutes of limitation. The cause of action created by section 320 of the Probate Code is no exception and if, in whatever connection with such a cause of action, the element of fraud is relevant, it may be relied upon.

[6] Respondent argues as follows: "In the present case, as illustrating even more plainly the lack of reality in the charge of 'fraud', it is to be noted that the defendant bank had nothing to gain and is not claimed to have gained any profit or consideration at all. In fact, the complaint alleges that respondent was named as executor in the will and that decedent 'had property and an estate in Los Angeles County, California.' If this be true, then it is plain the respondent could only profit by offering the will for probate, obtaining issuance to it of letters testamentary as executor, and receiving the statutory fees for so acting. In other words, it is not alleged in this case that 'the bank received any benefit from the transaction' but the facts alleged show it actually suffered a loss of executor's fees by not filing the will and having letters testamentary issued to itself. In this case, then, not only is there no fraudulent intent, but it was, under the facts, all to the benefit of the respondent to do what plaintiff alleges it failed to do." The argument is only plausible, and constitutes no defense to the action sought to be established by appellant. Although respondent may be indifferent to small profits, nevertheless the opportunity for profit was there but was lost as the result of respondent's own blunder. Having assumed the responsibility imposed by the provisions of section 320, by accepting the will as the custodian thereof, respondent's blunder affords no escape from the liability created by the same section.

[7, 8] With regard to respondent's contention above noted, that inasmuch as defendant company was the named executor and was in possession of the will, no requirement of section 320 of the Probate Code remained unfulfilled, it should be noted that the section is designed to exact the discovery of wills, and in no sense is intended to encourage their concealment. To adopt respondent's construction would, in effect destroy its purpose. It was respondent's duty to comply with the mandate of the section even though named as the executor.

For the foregoing reasons the judgment of dismissal following the order sustaining the demurrer to the second amended complaint without leave to amend, and the order denying plaintiff's motion to vacate the judgment, are, and each of them is, reversed, and the cause remanded with directions to the trial court to proceed in accordance with the views herein expressed.

It is unnecessary to give consideration to the appeal from the order denying the motion for leave to file the third amended complaint, and the appeal from such order is therefore dismissed.

We concur: YORK, P. J.; WHITE, J.

31 Cal.App.2d 619

GLENN-COLUSA IRR. DIST. v. OHRT et al.

Civ. 6189.

District Court of Appeal, Third District, California.

March 21, 1939.

1. Taxation 🔑217

An irrigation district organized under the Irrigation District Act is an agency of the state and hence district's share of grain raised on farms owned by district is "property of the state" within constitutional provision exempting such property from taxation. St.1897, p. 254, as amended; St.1933, p. 1629, § 43; Pol.Code, § 3804a; Const. art. 13, § 1.

[Ed. Note.—For other definitions of "Property of the State," see Words & Phrases.]

2. Taxation 🔑217

Irrigation districts organized under Irrigation District Act are state agencies and their property, both real and personal, used for benefit of districts, is "property of the state" within constitutional provision exempting such property from taxation. St. 1897, p. 254, as amended; St.1933, p. 1629, § 43; Pol.Code, § 3804a; Const. art. 13, § 1.

3. Taxation 🔑217

As respects exemption from taxation, generally, the term "operative property" of an irrigation district includes both realty and personalty, and proceeds from sale of crops derived from land belonging to an irrigation district may become operative property if land is used exclusively for benefit of conducting the business of such enterprise.

[Ed. Note.—For other definitions of "Operative Property," see Words & Phrases.]

4. Taxation ⚷251

In mandamus proceeding by irrigation district to cancel assessment of taxes wrongfully levied upon grain owned by district, on ground that grain was state's property within constitutional exemption, if exemption required exempted property to be "operative property," allegation that grain was exempt from taxation under constitutional provision sufficiently averred that grain constituted operative property. Const. art. 13, § 1.

5. Taxation ⚷213

The constitutional exemption of state's property from taxation makes no distinction between operative and nonoperative property. Const. art. 13, § 1.

◆

Mandamus proceeding by the Glenn-Colusa Irrigation District against J. C. Ohrt and others, as members of and constituting the Board of Supervisors of the County of Colusa, State of California, and another to cancel an assessment of taxes wrongfully levied upon grain owned by petitioner.

Writ issued.

Hankins & Hankins, of San Francisco, for petitioner.

Hudson Ford, Dist. Atty., of Colusa, for respondents.

Earl Warren, Att'y. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., amici curiæ.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of a writ of mandamus the petitioner seeks to cancel an assessment of taxes wrongfully levied upon grain owned by it, on the ground that the property is exempt from taxation under article 13, section 1, of the Constitution, for the reason that it belongs to a branch of the state.

The petitioner is an irrigation district organized and existing in Glenn and Colusa counties under the Statutes of 1897 and amendments thereto. Stats.1897, p. 254; 1 Deering's Gen.Laws of 1937, p. 1792, Act 3854. Certain farms were sold and deeded to the irrigation district for delinquent assessments pursuant to section 43 of the California Irrigation District Act (St.1933, p. 1629). Those sales of land were never thereafter redeemed. Subsequently separate tracts of these lands were leased by the district in consideration of specified shares of the crops to be produced thereon and retained by the district as annual rental for the property. In 1938 the petitioner received as rental from those farms 758 sacks of wheat and barley which were stored in its warehouses in Colusa county. In 1938 the assessor of Colusa county levied an assessment of taxes on the grain in question in the petitioner's warehouses. In October, 1938, the irrigation district filed with the board of supervisors a sworn petition for cancellation of the tax assessment on the grain under the provisions of section 3804a of the Political Code, on the ground that the grain belongs to the district which is a branch of the state and that it was therefore erroneously and illegally assessed. The application was denied by the board of supervisors. This petition for a writ of mandamus was then filed in this court to compel the cancellation of the taxes assessed and the lien created thereby. An alternative writ was issued. To that petition the respondents have demurred. The attorney-general has filed in this proceeding an able and comprehensive brief, as amicus curiae.

This is a friendly proceeding on the part of respective parties to determine primarily whether the Glenn-Colusa Irrigation District is a branch of the state of California and whether its property is therefore exempt from taxation under the provisions of article 13, section 1, of the Constitution.

[1] We are of the opinion the irrigation district is a branch and agency of the state government and that the grain in question, as the property of that district, is exempt from taxation. The courts of this state have repeatedly held that irrigation districts organized pursuant to the California Irrigation District Act are political subdivisions and agencies of the state. Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72; Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 P. 668; People v. Richards, 86 Cal.App. 86, 260 P. 582; Argyle Dredging Co. v. Chambers, 40 Cal.App. 332, 181

P. 84; El Camino Irr. Dist. v. El Camino Land Corp., Cal.Sup., 85 P.2d 123; Laguna Beach County Water Dist. v. County of Orange, Cal.App., 87 P.2d 46; 24 Cal. Jur. 102, sec. 85. In the Turlock Irrigation District case, supra, the appellant, who was the tax collector of the county, was enjoined from attempting to collect taxes levied upon property of the district. The judgment was affirmed. The appellant contended that the property was not exempt from taxation under article 13, section 1, of the Constitution, because the district did not constitute a "municipal corporation" as that term is used in the section. The Supreme Court held that the district was not a municipal corporation, but that its property was nevertheless exempt from taxation under the proviso of that section which specifically exempts from taxation "property used for" and such as "belong to * * * this state". The court said, at page 189 of the opinion, 198 P. at page 1063, in that regard:

"Such exemption existed because of the express exemption of the property of 'the state,' and contained in that section because of the implications in favor of the exemption of public property. See Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 P. 668, and cases therein cited for a discussion of the principle applicable. See, also, Webster v. Board of Regents, 163 Cal. 705, 126 P. 974, and cases cited. Reference may also be made to Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 P. 825, and Lindsay-Strathmore Irr. Dist. v. Superior Court [182 Cal. 315], 187 P. 1056, for a discussion of the similarity of the organization of reclamation and irrigation districts."

Reclamation District No. 551 v. County of Sacramento, supra, was a suit to recover taxes paid by the district under protest. Judgment was rendered for the district for failure on the part of Sacramento county to answer the complaint after a demurrer thereto had been overruled. That judgment was affirmed on appeal. In that case the same question which was determined in the Turlock Irrigation District case was raised, regarding the nature of a reclamation district. It was there asserted the district was not a "municipal corporation", but that it was nevertheless exempt from taxes under the constitutional provision. The Supreme Court said at page 479, 66 P. at page 669, of its opinion in that regard: "It is not necessary to hold this property, thus acquired, to be the property of a municipal corporation, in order to make it exempt from taxation. It would be sufficient to hold that it is public property of the state, within the meaning of the constitution. The whole scheme of reclamation originates with the state, and is carried to a conclusion by agents of the state—the district, as we have already seen, being a public agency—in furtherance of public policy. The property mentioned in section 3471 [of the Political Code] is public property acquired by the agents of the state for state purposes, and, we, think, is exempt from taxation as such."

In the case of El Camino Irr. Dist. v. El Camino Land Corporation, supra, it is said regarding the nature of irrigation districts: "State agencies such as irrigation or reclamation districts * * * are agencies of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense." [85 P.2d 125.]

[2] To the same effect is the late opinion in the case of Laguna Beach County Water District v. County of Orange, supra, and several other cases in this jurisdiction. There are no decisions to the contrary. In considering the purposes and method of organizing irrigation districts under the statute it appears to be entirely logical and in accordance with reason to hold that irrigation districts, like reclamation districts, are agencies of the state, and that their property, both real and personal, used for the benefit of the districts, therefore "belong to the * * * state" and are exempt from taxation under the provisions of article 13, § 1, of the Constitution, which reads in part: "All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. * * * Provided, that * * property used exclusively for public schools, and such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation."

[3, 4] One other question is suggested for determination as to whether the grain involved in this proceeding is operative

or nonoperative property of the district. It is suggested that if it is nonoperative property it may still be subject to taxation. Generally speaking, the term "operative property" includes both real and personal property. The proceeds from the sale of crops derived from land belonging to an irrigation district may become operative property if the land is used exclusively for the benefit of conducting the business of that enterprise. The allegations of the petition indicate that the grain was operative property, for it is alleged that it is exempt from taxation under the constitutional provision. If it were necessary under the Constitution that it should be operative in its nature as distinguished from nonoperative property, in order to render it nontaxable, then the allegation infers that it belongs to that class. There is no demurrer for uncertainty in this proceeding. We should therefore assume that it is sufficiently alleged that the grain constitutes operative property.

It appears that the question as to whether nonoperative property of an irrigation district might be subject to taxation was specifically reserved for future determination by the express language of the opinion in the case of La Mesa Lemon Grove & Spring Valley Irrigation District v. Hornbeck, 216 Cal. 730, 17 P.2d 143. It is there said at page 739, 17 P.2d at page 147, in that regard: "Property impressed with a public use, standing in the name of an irrigation district, cannot be assessed or sold for delinquent general taxes. Whether nonoperative property or property held under a mere tax title and not devoted to the public use may be assessed is not here involved. Section 1, article 13, of the Constitution, defining what property may be assessed for taxes, speaks prospectively, and, when a cause arises where such property of an irrigation district, or other agency, is assessed for general taxes, we can then, if required, treat that specific question."

[5] We are of the opinion article 13, § 1, of the Constitution makes no distinction between operative and nonoperative property belonging to this state, which shall be exempt from taxation. It is true that section does provide that the property of "public schools" which becomes exempt from taxation under the express terms of that section is "property used exclusively" for that purpose. But no such limitation is employed with relation to such property "as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state". The Constitution seems to make a clear distinction between the property of public schools and property belonging to the United States, this state and certain enumerated subdivisions thereof. The section reads in that regard: "Provided that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, * * * shall be exempt from taxation."

There is sound reason for distinguishing between property belonging to the United States, the state of California, or its political subdivisions, and such institutions as public schools, museums, etc., in providing for exemption from taxation. If the intention were to exempt from taxation only such property of the United States or the state of California as is actually used exclusively for the operation of those political entities, it would have been very easy to have thus expressed it. The intention appears to have been clearly otherwise expressed.

For the reasons stated we are of the opinion the grain in question belongs to the petitioner as a branch or agency of the state and that it is therefore exempt from taxation. Let the writ issue as prayed for.

We concur: PULLEN, P. J.; TUTTLE, J.

31 Cal.App.2d 685

PEOPLE v. MUNDT.

Cr. 1667.

District Court of Appeal, Third District, California.

March 24, 1939.

1. Criminal law 🔑798½

It is not trial judge's duty to furnish forms of verdict to jury, but jurors are presumed to be able to formulate their own conclusions.

2. Criminal law 🔑1038(2)

Defendant, not objecting to trial judge's failure to submit form of verdict covering second degree robbery to jury, waived right to contend on appeal from conviction of first-degree robbery that such failure was error.

3. Criminal law 🔑1038(2)

The trial court's failure to submit certain form of verdict to jury must be called to his attention, and question of error therein cannot be first raised on appeal.

4. Criminal law 🔑798½

The trial court did not err in failing to submit to jury form of verdict covering second degree robbery, where uncontradicted evidence showed that crime committed by defendant, if any, was first-degree robbery. Pen.Code, § 211a.

5. Robbery 🔑24(3)

Prosecuting witness' testimony in conformity with statement of facts, showing beyond dispute that robbery was perpetrated by defendant and another while armed with revolver, warranted conviction of first-degree robbery, though defendant testified that he was never at scene of crime and knew nothing about it. Pen.Code, § 211a.

6. Criminal law 🔑706

Error cannot be predicated on district attorney's conduct in showing revolver to several witnesses and asking them whether they had ever seen it, on trial for robbery while armed with deadly weapon, in absence of proof that he acted from improper motives.

7. Criminal law 🔑706

An offer of proof, made by district attorney in good faith and not for wanton purpose of raising prejudice against defendant, by showing revolver to witnesses and asking them whether they had ever seen it before, does not constitute misconduct.

8. Criminal law 🔑1037(1)

A question as to improper remark by district attorney in jury's presence cannot be raised by defendant on appeal, where it was not properly raised at trial and trial court had no opportunity to give jury proper admonition respecting effect of language used.

9. Criminal law 🔑857(1)

Proof of defendant's guilt of first-degree robbery *held* so strong as to preclude holding by appellate court that jury's deliberation for only six minutes before returning verdict of conviction indicated that they did not act after mature deliberation, but were motivated by some ulterior consideration.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

William Mundt was convicted of robbery in the first degree, and he appeals.

Affirmed.

Johnson & Curtright and C. K. Curtright, all of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

The defendant in this case was tried before a jury and convicted of the crime of robbery in the first degree. He now appeals from a judgment of conviction and an order denying motion for a new trial.

The main witness for the prosecution was John Hill. Mr. Hill had been at a dance-hall in Sacramento, and at about 2:00 o'clock a. m. on January 8, 1936, had left the dance-hall to get into his automobile which was parked on Fifth street, just south of the corner of Fifth and J streets. He had in his possession approximately $450 which he had drawn from the bank, with which to purchase some horses. As he came towards his automobile, the defendant and one Henry Harris stepped out, each with a drawn revolver, pointed their revolvers at him, ordered him into the automobile and got in with him. They drove over the main bridge toward the Yolo causeway, Hill driving while the defendant and Harris covered him with their guns.

After proceeding a couple of miles they ordered Hill to stop, and the defendant took the wheel, with Hill placed in the front seat between defendant and Harris. Defendant then drove to a point just past the Davis end of the causeway. They stopped the car, ordered Hill out, took the $450 from him, tore his raincoat into strips, with which they bound him, and left him lying bound under the end of the causeway trestle; they then took his automobile and drove away. Hill finally broke his bonds, and spent two and a half hours walking back to Sacramento (over seven miles). Upon his arrival in Sacramento he notified the police.

Henry Harris was caught, tried and convicted of first degree robbery and sentenced to Folsom Prison, he having a former felony record. The defendant was subsequently arrested in Colorado, and served a term in the Colorado state prison for grand theft. Upon the expiration of that sentence he was returned to Sacramento for trial upon this charge.

[1-4] It is first urged as a ground for reversal that the court erred in failing to submit to the jury a form of verdict covering robbery in the second degree. In concluding his instructions upon the law of the case, the court used the following language: "Upon retiring to your jury room, you will first select one of your number to act as your foreman. I have directed and caused the clerk to prepare the different forms of verdict for you to take with you into the jury room. These forms have no significance in or of themselves. They are prepared by the clerk merely for the purpose of saving you the trouble of preparing it when you find a verdict. When all twelve of you have agreed upon a verdict, all your foreman will do will be to sign the particular verdict that you have all agreed upon. You can take the one which you find, on arriving at your conclusion, and return into court with the same. I read these forms of verdict to you. After the title of court and cause they are: 'We, the jury in the above entitled cause, find the defendant William Mundt guilty of the crime of robbery as charged in the information, of the first degree.' 'We, the jury in the above entitled cause, find the defendant William Mundt not guilty as charged in the information'."

There is a well recognized rule that "the law makes it no part of the duty of the judge to furnish forms of verdict to the jury, but the latter are presumed to be able to formulate their own conclusions, and in practice most usually do so". People v. Hill, 116 Cal. 562, 570, 48 P. 711, 713; People v. Corbin, 118 Cal.App. 392, 396, 5 P.2d 460. No doubt the trial judge in the instant case had this rule in mind when he expressly instructed the jury as follows: "These forms have no significance in or of themselves; they are prepared by the clerk merely for the purpose of saving you the trouble of preparing it when you find a verdict." Furthermore, it does not appear that defendant at any time requested that such a form of verdict be submitted to the jury; neither does it appear that at the time said forms of verdict were given to the jury as above set forth, any objection whatever was made by counsel for defendant, nor was any request made for permission to submit any other form or forms of verdict. We are of the opinion that the defendant, by failing to so object, waived his right to make the contention here made. It is an elementary rule that such matters must be called to the attention of the trial court, and that they cannot be raised for the first time upon appeal. Moreover, having read the entire record in this case, we are of the opinion that the submission of a form of verdict with respect to robbery in the second degree would not be proper under the facts of the case. The record shows without contradiction that if any crime at all was committed, it was robbery in the first degree, which is defined as follows: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree." Pen.Code, § 211a.

[5] The defendant took the witness stand and testified that he never was at the scene of the crime, and knew nothing whatever about it. The testimony of the prosecuting witness is in conformity with the statement of facts set forth above, which shows beyond dispute that the robbery involved herein was perpetrated by defendant and another man who were armed with a deadly weapon—that is, a revolver. We are of the opinion that this contention is without merit. See People v. Woods, 147 Cal. 265, 81 P. 652, 109 Am. St.Rep. 151; People v. Lionberger, 19 Cal. App.2d 284, 65 P.2d 99.

[6, 7] It is next contended that the District Attorney was guilty of miscon-

duct. It appears that during the trial the latter had before him, and in the presence of the jury, a revolver, and that he showed this revolver to several witnesses and asked them: "Have you ever seen this gun before?" No witness was able to identify the weapon. We are of the opinion that the district attorney was proceeding in a legal and lawful manner in the presentation of the People's case, and in the absence of proof that he was acting from improper motives, we do not see how any error can be predicated upon the incident mentioned. Such an offer of proof, made in good faith, and not for the wanton purpose of raising a prejudice against the defendant, does not constitute misconduct on the part of the district attorney. People v. Barbera, 29 Cal.App. 604, 607, 157 P. 532.

[8] It is further contended that the district attorney made an improper remark during the course of the trial, in the presence of the jury. It appears, however, that this remark must have been made in a very low tone, because it was neither heard by the stenographic reporter or by the trial judge. The incident taken from the record appears as follows:

"Q. What other fellow? A. The one that was with him.

"Q. Who is he?

"The Court: You have gone into that. Proceed.

"Mr. Johnson (After some remark made by District Attorney which was not audible to reporter): I object to that sort of remark from the District Attorney.

"The Court: Proceed with the trial of the case, I have ruled.

"Mr. Johnson: If the Court please—

"The Court (interposing): I don't care to hear from either one of you; proceed with the trial of the case.

"Mr. Curtright: It is nothing your Honor said.

"The Court: Go on."

There is nothing in the record to show that the questioned remark was communicated to the trial judge in order that he might rule upon it intelligently and take such action as might be advisable under the circumstances. We are told in appellant's brief, however, that the district attorney made the following remark: "You know who he is all right; he's the man that is in the penitentiary." It is difficult to see how such a contention can be raised, and error predicated upon such an incident, where the trial judge had no notice or knowledge of the same. Conceding that there may have been some prejudice resulting from the fact that the jury might have heard the questioned remark of the district attorney, we do not believe that defendant can raise the point here, when it was not properly raised at the trial, and where the court was given no opportunity to give a proper admonition to the jury with respect to the effect of the language used.

[9] It is lastly contended that the jury deliberated only six minutes, and that this comparatively short interval indicated that the jury did not act after mature deliberation, but were motivated by some ulterior consideration. If the case were a "close" one, where evidence of guilt was very slight and inconclusive, the inference sought to be made by defendant would have some rational basis, although there ordinarily does not appear to be any relation between the length of time taken for deliberation and the strength or weakness of the evidence. The whole matter is in the realm of speculation. But here, the proof of guilt is so strong that we cannot say that the short period taken is indicative of anything but the sole fact that the jury were thoroughly convinced, when they retired, that further deliberation would be a waste of time.

The appeal is without merit, and the order denying motion for new trial and the judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

31 Cal.App.2d 606

AMERICAN STATES WATER SERVICE CO. OF CALIFORNIA v. JOHNSON, State Treasurer.

Civ. 6038.

District Court of Appeal, Third District, California.

March 21, 1939.

Hearing Denied by Supreme Court May 19, 1939.

1. Taxation 🔑165

A tax on franchise of corporation doing business in California, based on corporation's annual net income, is an "excise tax" made for privilege of conducting business in California. Const. art. 13, § 16, subd. 2(a).

[Ed. Note.—For other definitions of "Excise," see Words & Phrases.]

2. Taxation 🔑117

A "franchise" is property for tax purposes. Const. art. 13, § 1.

[Ed. Note.—For other definitions of "Franchise," see Words & Phrases.]

3. Taxation 🔑117

A franchise tax authorized by Bank and Corporation Franchise Tax Act is levied and paid by corporation as "license" or "permit" to conduct its business for period of entire calendar year in state of California. Gen.Laws 1937, Act 8488.

[Ed. Note.—For other definitions of "License" and "Permission; Permit," see Words & Phrases.]

4. Taxation 🔑37

That 1935 amendment to Bank and Corporation Franchise Tax Act changing method of computing franchise tax was retrospective with relation to its application to that portion of 1935 which had elapsed prior to adoption of amendment did not of itself invalidate the amended act. St.1935, p. 998, § 14; p. 1246, § 4(3); p. 1247, § 4(8).

5. Constitutional law 🔑188

A "retrospective law" is one which affects rights, obligations, acts, transactions, and conditions which are performed or exist prior to adoption of statute, and the terms "retrospective" and "retroactive" are interchangeable.

[Ed. Note.—For other definitions of "Retroactive" and "Retrospective Law," see Words & Phrases.]

6. Constitutional law 🔑188

A statute is not invalid merely because it operates retrospectively, although it may be invalid if it deprives one of vested rights which are bound to be respected or protected by state, or if it impairs obligations of contract.

7. Statutes 🔑263

Statutes are construed to operate prospectively rather than retrospectively unless the contrary intention clearly appears.

8. Taxation 🔑365

Where 1935 amendments to Bank and Corporation Franchise Tax Act changing methods of computing franchise tax provided that amendments should apply to taxable years beginning after December 31, 1934, amendments operated retrospectively as applied to levying of franchise taxes for calendar year beginning January 1, 1935. St. 1935, p. 998, § 14; p. 1246, § 4(3), p. 1247, § 4(8).

9. Constitutional law 🔑101
Taxation 🔑37

The 1935 amendment to Bank and Corporation Franchise Tax Act changing method of computing franchise tax for year 1935 did not unlawfully interfere with vested right of corporation to conduct its business in California during year 1935, notwithstanding that corporation had paid tax for such privilege before amendment became effective. St.1935, p. 998, § 14.

10. Constitutional law 🔑101
Taxation 🔑37

The Legislature can change or increase an excise tax during the term for which it is imposed without thereby interfering with vested rights.

11. Constitutional law 🔑92

The term "vested rights," which cannot be interfered with by retrospective laws, means interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice.

[Ed. Note.—For other definitions of "Vested Right," see Words & Phrases.]

12. Constitutional law 🔑137
Taxation 🔑37

The 1935 amendment to Bank and Corporation Franchise Tax Act increasing the franchise tax which corporation was compelled to pay in 1935 is not invalid as impairing obligation of contract. St.1935, p. 998, § 14.

13. Constitutional law ⚷137

The payment of excise taxes for privilege of doing business does not constitute a "contract" prohibiting state from changing rate or increasing taxes during term for which license or permit is issued.

[Ed. Note.—For other definitions of "Contract," see Words & Phrases.]

14. Constitutional law ⚷190
Taxation ⚷37

The Legislature could amend Bank and Corporation Franchise Tax Act to increase taxes or change method of computing them so as to become effective retroactively for entire calendar year during which amendment occurred. St.1935, p. 998, § 14; p. 1246, § 4(3); p. 1247, § 4(8).

15. Constitutional law ⚷101
Taxation ⚷37

Statutes providing for excise taxes for privilege of conducting business are subject to change or increase at any time during term for which they are imposed, to provide for necessary financial needs of the state without impairment of vested rights.

16. Constitutional law ⚷101, 283
Taxation ⚷37

An increase of excise taxes for privilege of conducting business, after beginning of term for which taxes are imposed, does not interfere with vested rights nor deprive taxpayer of property without due process of law.

17. Taxation ⚷508

The lien provided for in provision of Bank and Corporation Franchise Tax Act that franchise tax was a lien on taxpayer's property on March 1 was for the benefit and security of the state to enable it to enforce payment of whatever tax might be lawfully imposed under act, and gave taxpayer no added rights. St.1933, p. 703, § 29; Civ. Code § 2874.

18. Constitutional law ⚷101
Taxation ⚷37

A corporation's payment of franchise tax for 1935 computed under Bank and Corporation Franchise Tax Act as it existed prior to 1935 amendment increasing tax for year 1935, and the vesting of lien, prior to amendment, to secure tax, did not confer on corporation vested rights which prevented legislature from increasing taxes during 1935. St.1935, p. 998, § 14; p. 1246, § 4(3); p. 1247, § 4(8).

19. Constitutional law ⚷101
Taxation ⚷37

The filing of 1935 franchise tax report under Bank and Corporation Franchise Tax Act as act existed prior to 1935 amendment increasing tax for year 1935 did not give corporation filing report any vested rights with respect to amount of tax which could be lawfully levied after amendment, since report was merely received as evidence for purpose of computing tax and was not controlling. St.1935, p. 998, § 14; p. 1246, § 4(3); p. 1247, § 4(8).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by the American States Water Service Company of California against Charles G. Johnson, as Treasurer of the State of California, to recover franchise taxes paid by the plaintiff in the sum of $10,178.97 for the privilege of conducting its business in California during the year 1935. From the judgment, the plaintiff appeals.

Affirmed.

Paul Overton and R. G. Blanchard, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for appellee.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered against the plaintiff after a demurrer to the complaint had been sustained without leave to amend the pleading. The suit was commenced to recover franchise taxes paid by the appellant in the sum of $10,178.97, for the privilege of conducting its business in California during the year 1935. The taxes were paid under protest.

The appellant is a California corporation affiliated with its parent company, the American States Public Service Corporation of Delaware, which owns the entire capital stock of the American States Water Service Company. March 15, 1935, the appellant filed with the state a consolidated report of the business of both corporations transacted in California during the year 1934, as authorized by the Bank and Corporation Franchise Tax Act of California, prior to its amendment in June, 1935. Stats.1929, p. 19, and amendments, Deering's Gen.Laws of 1937, p. 3851, Act 8488.

In first computing the franchise tax for the year 1935, based on the consolidated report of the business transacted during the previous year, at the rate of 2 per cent of the net income, as provided by section 4 of that act as it existed prior to the amendment, St. 1933, p. 870, it appeared that although the appellant earned profits in the year 1934, the consolidated report indicated that the affiliated corporations sustained a net loss of $296,338.98. Since the act then permitted the profits of one affiliated company to be offset by the losses of another, it was assumed there was no net profit upon which a tax could be lawfully computed for the year 1935, and a nominal tax of $25, as provided by the act, was therefore paid by the appellant March 15, 1935, for the privilege of doing business in California for that entire calendar year. Section 29 of that act, as amended by St.1933, p. 703, then provided that the franchise tax became a lien on appellant's property on March 1st, to secure its payment.

In June, 1935, after payment by the appellant of $25 as franchise tax for that year the Bank and Corporation Franchise Tax Act was amended by increasing the rate of the tax from 2 per cent to 4 per cent of the net income for the previous year, by abolishing the permit for affiliated corporations to file a consolidated report of their receipts and disbursements, and by revoking the right to offset the profits of one affiliated corporation with the losses of another, as provided in section 14 thereof. Stats. 1935, sec. 4 (3), p. 1246, Stats. 1935, sec. 14, p. 995, 998.

The second paragraph of section 14 of the act, as it existed prior to the amendment of 1935, read in part: "An affiliated group of * * * corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for any taxable year in lieu of separate returns." St.1933, p. 690.

The third paragraph of section 14 then read in part: "If a consolidated return is made subject to the provisions of this section the tax imposed under this act *shall be computed as a unit upon the consolidated net income of the group* except as hereinafter provided."

The preceding deleted portions of section 14 were restored by the adoption of section 13½ of the act in 1937. Stats.1937, p. 2335. But the last-mentioned amendment has no application to the present suit.

Section 14, as amended in 1935, which is the subject of controversy on this appeal, read in part:

"In the case of two or more corporations * * * owned or controlled directly or indirectly by the same interests, the commissioner is authorized to distribute, apportion, or allocate gross income or deductions between or among such corporations or banks, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such corporations or banks.

"In the case of a corporation doing business within the meaning of this act, whether under agreement or otherwise, in such manner as directly or indirectly to benefit the members or stockholders of the corporation, or any of them, or any person or persons, directly or indirectly interested in such business, by rendering services of any nature whatsoever, or acquiring or disposing of its products or the goods or commodities in which it deals, at less than a fair price therefor; or where such a corporation, owned and/or controlled either directly or indirectly by another corporation or corporations, render services of any nature whatsoever, or acquires or disposes of the products of the corporations so owning and/or controlling such corporation, in such a manner as to create a loss or improper net income, the commissioner, in order to prevent evasion of taxes or clearly to reflect the income of such a corporation, may require a report consolidated with the owning and/or controlling corporation or corporations, or such other facts as he deems necessary, *and may determine the amount which shall be deemed to be the entire net income allocable to this State of the business of such corporation for the calendar or fiscal year, and compute the tax on such net income.* In determining the entire net income the commissioner shall have regard to the fair profits which, but for any agreement, arrangement or understanding, might be or could have been obtained from dealing in such products, goods or commodities."

Section 4, subdivision 8 of the act as amended in 1935, Stats.1935, p. 1247, declares that: "The provisions of this subdivision, *and of all other amendments to this act enacted during the year 1935, shall apply to taxable years beginning after December 31, 1934.*"

That provision clearly indicates the intention of the legislature to make the amendment of both sections 4 and 14 of the act applicable to all franchise taxes due or payable for the entire calendar year of 1935.

In accordance with the provisions of the act as amended in 1935, the appellant's franchise tax for the calendar year beginning January 1, 1935, was computed according to the revised law without offsetting its profits with the losses of the parent Delaware corporation, and appellant was promptly notified that it was indebted to the State of California in the sum of $10,178.97 for franchise taxes for the calendar year beginning with January 1, 1935. It is conceded the estimated tax last mentioned was correctly computed according to the method designated by the amendment of section 14 in 1935. The taxes were paid under protest in the amount demanded. This suit was then commenced to recover the money alleged to have been improperly levied and unlawfully collected. A demurrer to the complaint was sustained on the ground that it fails to state facts sufficient to constitute a cause of action. A judgment was rendered against plaintiff to the effect that it take nothing by this action. From that judgment this appeal was perfected.

The appellant contends that the additional franchise taxes assessed and levied against it for the year 1935 are void for the reasons:

"First: The said amendments to section 14 of the act were not intended by the Legislature to apply in the computation of taxes for the year 1935 and, under the terms of the act, should not be so applied;

"Second: The said amendments, as applied to the computation of taxes for the year 1935, constitute retroactive legislation; and

"Third: The said amendments, being retroactive in effect, are unconstitutional for the reason that they deprive the appellant of its property without due process of law."

The questions to be determined are, therefore: 1. Did the legislature have authority to amend the Franchise Tax Act so as to increase the taxes for 1935 after the appellant had filed its consolidated report and had paid the nominal tax of $25 for that year? 2. Was the legislature authorized to abolish the right of affiliated corporations to offset the profits of one company with the losses of another as shown by their consolidated report? And, 3. Did the legislature intend that amendment of section 14 to apply to franchise taxes for the year 1935, and if so is that amendment retroactive or unconstitutional in its application to the taxes of that year?

The chief issue is whether the application of the amendment of section 14 to the franchise taxes of 1935 deprives the appellant of vested rights which it acquired by previously paying its taxes for that year according to the provisions of the act as it existed before the amendment became effective, and whether such application of the law resulted in impairing the obligations of a contract.

[1, 2] The legislature is authorized to enact statutes providing for the taxing of franchises of corporations engaged in doing business within the state, based upon their annual net income. Const. of Calif., art. 13, sec. 16, subd. 2(a). Such taxes are ordinarily termed excise taxes, which are paid for the privilege of conducting business within the state. (2 Cooley on Taxation, 4th ed., p. 1711, sec. 845; 26 R.C.L. 236, sec. 209; 61 C.J. 242, secs. 226, 227.) In California both the Constitution and the authorities classify franchises for taxation purposes as property. Const. of Calif., art. 13, sec. 1; 24 Cal.Jur. 85, sec. 69; 12 Cal.Jur. 692, sec. 14. A franchise is described as incorporeal or intangible property. Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 734, 57 P.2d 1022. In Pacific Co., Ltd. v. Johnson, 212 Cal. 148, at page 154, 298 P. 489, at page 492, it is said: "A franchise tax is a tax imposed upon a corporation for the right or privilege of being a corporation *or of doing business in a corporate capacity,* and differs materially from property taxes as levied for state and municipal purposes in the basis prescribed for computing the amount of the tax."

[3] It is apparent the franchise tax authorized by the act in question is levied and paid by corporations as licenses or permits to conduct their businesses for the period of the entire calendar year in the state of California. Regardless of what the tax may be called, it should be treated in its application to the law as a license or excise tax.

[4] The mere fact that the act is deemed to be retrospective with relation to its application to that portion of the year 1935 which had elapsed prior to the adoption of the amendment does not necessarily render it void.

[5, 6] A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. The terms "retrospective" and "retroactive" are interchangeable. City of Los Angeles v. Oliver, 102 Cal.App. 299, 309, 283 P. 298; 5 Cal.Jur. 747, sec. 142; 12 C.J. 1084, sec. 778. Constitutions in some jurisdictions prohibit the enactment of retrospective laws. Neither the Federal Constitution nor the Constitution of California prohibits the enactment of retrospective laws. 5 Cal. Jur. 747, sec. 142. In California a statute is not invalid merely because it is intended to operate retrospectively. It may, however, be invalid if it deprives one of vested rights which are bound to be respected or protected by the state, or if it impairs the obligations of a contract. (5 Cal.Jur. 748, sec. 143.)

[7, 8] It is true that statutes will be construed to operate prospectively rather than retrospectively unless the contrary intention clearly appears. Hopkins v. Anderson, 218 Cal. 62, 21 P.2d 560; Pignaz v. Burnett, 119 Cal. 157, 51 P. 48; 5 Cal.Jur. 561, sec. 12. In the present case the legislature has left no doubt that it intended section 14 of the Bank and Corporation Franchise Tax Act, as amended in 1935, and all other 1935 amendments of that act, to operate retrospectively and apply to the levying of franchise taxes for the calendar year beginning January 1, 1935. The amendment to section 4 of that act specifically declares that: "The provisions of this subdivision, *and of all other amendments to this act enacted during the year 1935, shall apply to taxable years, beginning after December 31, 1934.*" Subdivision 8.

[9-11] We are of the opinion the 1935 amendment to section 14 of the franchise tax act does not unlawfully interfere with the vested right of the appellant to conduct its business in California during the year 1935 merely because that corporation paid a nominal tax of $25 for that privilege before the amendment became effective. This is true for the reason that the tax is in the nature of an excise which is always within the power of the legislative department of government to change or increase during the term for which it is imposed. Alaska Consol. Canneries v. Territory of Alaska, 9 Cir., 16 F.2d 256; Patton v. Brady, 184 U.S. 608, 619, 22 S.Ct. 493, 497, 46 L.Ed. 713; Wisconsin & Michigan R. Co. v. Powers, 191 U.S. 379, 387, 24 S.Ct. 107, 48 L.Ed. 229. The definition of "vested rights", which may not be interfered with by retrospective laws, is given in 5 California Jurisprudence, page 748, section 143, as follows: "The words are generally used as implying interests which it is proper for the state to recognize and protect, and of which the individual cannot be deprived arbitrarily without injustice."

To the same effect the definitions of "vested rights" is also found in the case of City of Los Angeles v. Oliver, supra.

Under circumstances similar to those which exist in the present case it is said in the Alaska Consol. Canneries case, supra [16 F.2d 257]:

"The plaintiff in error contends, first, that the Legislature of the territory lacked constitutional power to increase or change the amounts to be paid for licenses issued prior to the passage of the act of 1923; and, second, that the act of 1923 by its terms is not retroactive.

"The first contention is without merit. 'A license is merely a permit or privilege to do what otherwise would be unlawful, *and is not a contract between the authority,* federal, state or municipal, granting it *and the person to whom it is granted;* neither is it property or a property right. * * * The amount of a license fee or tax ordinarily may be increased or decreased at any time in the discretion of the body imposing it. Where a city has full power to tax an occupation, *it may increase the rate on a particular class of persons engaged therein at any time before the expiration of the period for the enforcement of the tax, even though such increase is made after the tax first levied has been paid.*'"

Explaining the reason for such authorized change or increase of the rate of taxes for the privilege of conducting a business, the preceding opinion also states: "They are, as said in Cooley on Taxation, p. 1: 'The enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs,' and so long as there exists public needs just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the state is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order 'to provide for the common defense' and 'promote the general welfare.'"

[12, 13] Nor does the 1935 amendment of section 14 of the franchise tax act, which, in effect, increases the taxes for that year, and which tax the appellant was compelled to pay for the privilege of conducting its business in California, impair the obligations of a contract. Many authorities hold that the payment of excise taxes for the privilege of doing business does not constitute a contract prohibiting the state from changing the rate or increasing the taxes during the term for which the license or permit is issued. The case last cited determines that very point as also does the Wisconsin & Michigan R. Co. case, supra, the language of which, in that regard, is quoted with approval in the Alaska Consol. Canneries case.

The case of Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 39 P.2d 796, 802, determines the essential issues of this suit. In that case the state treasurer appealed from a judgment which was rendered against him for failure to answer the complaint after his demurrer thereto had been overruled. The Supreme Court reversed the judgment. The Fullerton Oil Company sought to recover franchise taxes paid under protest for the privilege of doing business in California for the calendar year of 1931. The taxes were computed pursuant to section 8 (g) of the Bank and Corporation Franchise Tax Act, as amended February 27, 1931, St.1931, p. 60. It was contended the method of computing franchise taxes, previously specified in that act, which was in full force for about two months of that calendar year before the amendment was adopted, determined the appellant's liability for that year and conferred vested rights upon the oil company in that respect, which the state could not lawfully interfere with by thereafter changing the law so as to increase the taxes. The Fullerton Oil Company asserted that the amendment to section 8 (g) of the act was discriminatory, retroactive and unconstitutional. The Supreme Court held otherwise. It said in that regard:

"The last contention of respondent is equally without merit. Respondent points out that prior to the 1931 amendment to section 8(g) it could compute its depletion allowance on the basis of the 1928 values of its properties, and that since that amendment it is deprived of that privilege. Respondent also points out that under section 2 of the act the tax for any year is computed upon the basis of the net income for the previous year. Section 4 of the act provides that taxes for the current year 'shall accrue on the first day after the close of the "taxable year,"' which taxable year, in respondent's case, corresponds with the calendar year. It therefore follows that respondent's 1931 tax 'accrued' on January 1, 1931, and was computed upon the net income for 1930. The tax, although accruing on January 1, 1931, was not payable until March 15, 1931, under section 23 of the act, and under section 29 the tax became a lien on the first Monday in March, 1931. Under the provisions of section 13 of the act, the taxpayer any time between January 1 and March 15 can file his return. The 1931 amendment to section 8 (g) changing the method of computation became effective February 27, 1931.

"Based on these sections, respondent contends that since its tax for 1931 accrued on January 1, 1931, based on its net income for 1930, at which time 1928 values could be used in computing depletion, the 1931 amendment denying that privilege cannot be used to compute the 1931 tax. To permit the February 27, 1931, amendment to apply in computing the 1931 tax, according to respondent, would be to give that amendment an unlawful retroactive effect. Respondent strenuously contends that its tax liability for 1931 became a determined and accrued liability before the effective date of the amendment. To this contention there is a conclusive answer. The retroactivity alleged is more apparent than real. If the 1931 amendment be applied in computing the 1931 tax, such application is to give the amendment a prospective rather than a retroactive operation. Although under the act the net income earned in 1930 is used as a base for computing the tax due for 1931, the tax collected in 1931 is not for the privilege of doing business in 1930 but is a tax for the privilege of doing business as a corporation in California for 1931. It is a tax for the privilege of exercising a corporate franchise for the entire year 1931—that is the current year when the act here involved became effective. The privilege being taxed is a present and continuing privilege, the amount of the tax being measured by the transactions of a prior year. Although, under the act, the tax accrued on January 1, 1931, and became a lien on the first Monday in March, 1931, the tax imposed for that year was for the entire current year. There is no reasonable or legal basis for contending that a taxpayer is entitled, regardless of legislative action, to have current taxes computed on the same basis as past taxes have been assessed. It is well settled that taxes for the current year may be changed any time during the year, and, in fact, additional taxes may be imposed during the current year on the same subject of taxation. Continental Oil Co. v. Walker [9 Cir.], 285 F. 729; People v. Kelsey, 116 App.Div. 97, 101 N.Y.S. 902, affirmed 188 N.Y. 541, 80 N.E. 1116; American Refrigerator Transit Co. v. Adams, 28 Colo. 119, 63 P. 410; Milliken v. United States, 283 U.S. 15, 51 S.Ct. 324, 75 L.Ed. 809."

[14-16] The case from which we last quoted clearly determines that the legislature has authority to amend the Bank and Corporation Franchise Tax Act to increase taxes or to change the method of computing them so as to become effective for the entire callendar year during which the amendment occurs; that such an amendment to the franchise tax act may lawfully operate retrospectively. That case is in accordance with many decisions which hold that statutes providing for excise taxes for the privilege of conducting business are subject to change or increase at any time during the term for which they are imposed, to provide for necessary financial needs of the state. The clear implication to be drawn from those decisions is that such increase of taxes, after the beginning of the term for which they are imposed, does not interfere with vested rights nor deprive the taxpayer of property without due process of law. All rights and privileges acquired by payment of license taxes are not immune from change. Ordinarily such privileges are subject to change.

[17, 18] The appellant recognizes these principles, but distinguishes between the Fullerton Oil Company case and the present suit by pointing out the fact that it actually paid the franchise taxes for 1935, computed according to the law as it then existed, before the amendment of section 14 of the act occurred. It is also suggested that the obligation to pay the tax became a lien under section 29 of the act before the amendment became effective. We are of the opinion neither of those circumstances alters the power of the legislature to increase the tax or change the method of computing them during the term for which they are imposed. Section 29 of the act vests a lien on March 1 to secure the payment of whatever franchise tax may be lawfully imposed under the statute. The taxpayer acquires no added rights by virtue of the lien. The lien is for the benefit and security of the state to enable it to enforce the payment of the tax. Sec. 2874, Civ. Code. Nor does the mere payment of the taxes prior to the change of the law render the amendment unconstitutional or void with respect to its application to the entire calendar year. Since the legislature has the right to change the rate of taxation during the current year, the amount of franchise tax which was paid by the appellant prior to the amendment was erroneously computed on the basis applicable to the previous year. Neither the payment of taxes nor the vesting of the lien prior to the amendment of the act conferred upon the appellant vested rights which prevented the legislature from increasing the taxes during that current year.

[19] The mere filing of a consolidated report pursuant to the act as it formerly existed did not confer upon the appellant vested rights with respect to the amount of taxes which might be lawfully levied. Like the affidavit which is required to be filed with the tax assessors, that consolidated report is merely received as evidence of the receipts and disbursements of the affiliated corporations for the purpose of computing the franchise taxes. It is not necessarily controlling in that regard. The consolidated report was authorized to be filed incident to the computing and levying of taxes. The vital portion of section 14 of the act which formerly determined the method of computing taxes prior to the amendment of 1935, provided that "The tax imposed under this act *shall be computed as a unit upon the consolidated net income of the group*". St.1933, p. 690. Section 14 was amended in 1935, St.1935, p. 998, to provide that the commissioner "may determine the amount which shall be deemed to be the entire net income allocable to this state of the business of such corporation for the calendar or fiscal year, and compute the tax on such net income". The act provides that the calendar year for which the franchise taxes are computed shall commence with the first day of January of each year.

We are of the opinion the amendment of both section 4 and section 14 of the act in June, 1935, was valid and determinative of the amount of franchise tax which was due from the appellant for the current year of 1935.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

31 Cal.App.2d 631

LIND v. BAKER et al.

Civ. 2186.

District Court of Appeal, Fourth District, California.

March 21, 1939.

Hearing Denied by Supreme Court May 19, 1939.

1. Mines and minerals 🔑29(4)

Where claimant to unpatented quartz mining claims was in open, adverse, continuous, and undisputed possession of mining claims as owner for more than ten years, to knowledge of rival claimant, and boundaries of claims were plainly marked, and rival claimant did not trespass on any of the claims in setting out monuments of claims he located, title to unpatented claims was in claimant in possession, as against contention that claimant's title was defective because of failure to properly describe claims by reference to some natural object or permanent monument that would identify the claims located. Civ.Code, § 1426, subd. 5; 30 U.S.C.A. § 38.

2. Mines and minerals 🔑39

Where claimant who either through his predecessors in interest or personally enters upon unpatented mining land that was open to location, built his monuments, makes discovery of valuable minerals, completes his annual assessment, and continues such possession for a period of five years, right to a patent from the United States, regardless of defects in location notices, is established. 30 U.S.C.A. § 38.

3. Mines and minerals 🔑27(1)

Where claimant had been in open, continuous, adverse, and undisputed possession of quartz mining claims as owner for more than ten years, doing all necessary assessment work, rival claimant could acquire no right by locating claim conflicting with claims of claimant. Civ.Code, § 1426, subd. 5; 30 U.S.C.A. § 38.

4. Appeal and error 🔑996

In suit to determine title to unpatented quartz mining claims, where a reasonable inference could be drawn from the evidence by trial judge that road work was for benefit of the claims involved, trial judge's findings could not be upset on appeal because he might have drawn a contrary inference from the same evidence.

5. Mines and minerals 🔑23(2), 27(3)

Where four or five hundred dollars' worth of work had been done upon road leading to mining claims on unpatented mining land, which road was necessary for ingress and egress to and from claims, and, in addition, work was done on shafts and cuts in actual mining operations on the claims, claimant's right to location was not lost for failure to do required assessment work, and ground was not open to attempted location by rival claimant.

6. Mines and minerals 🔑38(27)

Plaintiff who had no interest in unpatented quartz mining claims could not complain of judgment awarding claims to owners on ground that it was contrary to all the evidence.

7. Appeal and error 🔑886

In action to quiet title to unpatented quartz mining claims, where it was admitted that descriptions in findings of fact and judgment were incorrect, the appellate court was unauthorized to insert the suggested corrections by defendant where it lacked the technical knowledge to determine which were the correct descriptions of the various claims.

8. Appeal and error 🔑1176(4)

In action to quiet title to unpatented quartz mining claims, that descriptions of the claims in the findings of fact and judgment were admittedly incorrect, would not require a general reversal of the judgment, where the general issues of priority of title had been fully tried, but trial court would be directed to amend its findings of fact on evidence before it or after taking new evidence, and enter judgment in favor of the prevailing party.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by H. B. Lind against Annie M. Baker, known also as A. M. Baker, and others, to establish right to certain mining claims. From an adverse judgment, plaintiff appeals.

Reversed with directions.

LeRoy N. French, Chas. L. Nichols, and Gerald F. H. Delamer, all of Los Angeles, and Raymond E. Hodge, of San Bernardino, for appellant.

Z. B. West, of Santa Ana, and Harry H. Parsons, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment denying plaintiff title to six unpatented mining claims in the Vanderbilt mining district in San Bernardino county, and awarding to defendant C. C. Darling, subject to the paramount title of the United States, four unpatented mining claims in that district; to Annie M. Baker, Bayard T. Baker, Verne A. Baker and Elizabeth Henderson Baker (hereinafter referred to as the Baker Group), subject to the paramount title of the United States, four unpatented mining claims in that district. The Baker Group claims were made subject to the contractual rights of Fred Sifford, W. L. March and H. C. Ferris. The judgment also enjoined plaintiff from interfering with the mineral rights of all these defendants. The rights of the other defendants claiming interests in the mineral locations, or the profits therefrom, through the estates of C. A. Bell, deceased, and Sarah J. Bell, deceased, are not involved in this appeal. By stipulation those rights, if any, were reserved for trial and determination after the judgment on the controversy between plaintiff and C. C. Darling, and the Baker Group and those claiming under them, becomes final.

The interests of C. C. Darling and the Baker Group are separate and distinct. As between them, it is believed their mining claims do not overlap. It is probably true that if they do overlap the Darling title is superior and paramount to that of the Baker Group. In the findings of fact the rights of these defendants are treated separately. Except on certain questions, we find it convenient to consider their cases separately.

The C. C. Darling Claims

C. C. Darling owned about seventy mining locations in the Vanderbilt mining district Four are involved here, the New Midnight, Gold Bronze No. 4, Rainbow Side, and Midway. He acquired title to them prior to 1922, either by his own location or from prior locators. He continued in the sole, uninterrupted and exclusive possession of them except for the attempted interference by plaintiff in his locations of the Yucca and (perhaps) the Opportunity Quartz Mining Claims. The Yucca was located by plaintiff on October 10 and the Opportunity on October 7–10, 1930. Plaintiff did not go into actual possession of any portion of either of these claims which overlapped any of the Darling claims, and Darling's actual possession was never disturbed except as it might have been affected by the filing of plaintiff's location notices. Plaintiff contends that his Opportunity location did not overlap any of Darling's claims. This is probably correct and we will so assume.

Darling testified that he had a mill, a dwelling, other structures, and about seven hundred feet of underground workings besides various shafts and cuts on his seventy claims. He testified that he had expended $100,000 in the development of and in mining these claims; that at least $10,000 had been spent on the New Midnight Claim. The three other claims in question here are in a group with the New Midnight Claim. Darling found valuable ore and had mined and removed it.

Plaintiff admits that Darling had done all necessary assessment work on his property. He attacks Darling's ownership of the claims on the sole ground that his location notices were defective because, as he maintains, none of them contained "such a description of the claim by reference to some natural object, or permanent monument, as will identify the claim located". Subdivision 5, § 1426, Civ.Code. We will assume, without holding, that this contention is correct.

Section 38, chapter 2, title 30, U.S.C.A., section 2332, U.S.R.S., provides as follows: "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent."

On this question of possession the trial court found as follows: "That it is not true that the plaintiff, H. B. Lind, was at any time, and especially on July 1st, 1931, a locator or appropriator of said 'Yucca' lode claim, or the area or ground covered thereby or included therein, peaceably and in good faith, but on the contrary the Court does find: (a) that said attempted location of the 'Yucca' claim was initiated by force, menace and fraud, as against the said defendant C. C. Darling, as the possessor in actual possession thereof as claimant thereto, and (b) the Court doth further find that said defendant Darling had been in the open, adverse, continuous, uninterrupted, undisputed and actual possession thereof as owner (save as against the paramount title of the United States Government) for more than ten (10) whole consecutive years immediately prior to July 1st, 1931; and the Court doth further find that the plaintiff H. B. Lind, long prior to and especially at the time of his said attempted location on July 1, 1931, knew that (1) said C. C. Darling was in the actual and undisputed possession of said lands and area and (2) the plaintiff, H. B. Lind, actually knew the monuments, boundaries and exterior limits of said quartz lode claims and mineral lands of C. C. Darling; of the improvements and ground and underground workings thereon, that the said boundaries and exterior limits of said lode claims were so marked upon the ground that they were plainly visible and readily traced and followed, and that said lode claims were not, nor was any part thereof, during the year of 1931, subject and open to relocation or appropriation as public mineral lands, under said mineral land laws, or otherwise, by plaintiff."

In addition to the evidence already outlined, Darling testified that he and his predecessors had been in possession of his four mining claims involved here for more than ten years prior to 1931; that the boundaries of the claims were plainly marked; that plaintiff did not trespass on any of those claims in setting any of the monuments of the claims he located.

In his testimony Darling used a map which was introduced in evidence for the purpose of explaining his testimony. This map shows numerous corner, end, and side line monuments plainly marking the boundaries of the claims in question.

[1] The foregoing evidence brings Darling's claims within the rule announced in section 38, chapter 2 of title 30, U.S.C.A. which we have quoted.

[2] This section has been frequently construed by the courts of the country. Without deviation, it has been interpreted as giving the claimant who, either through his predecessors in interest or personally, entered upon land that was open to location, built his monuments, made discovery of valuable minerals, completed his annual assessments and continued such possession for a period equal to the statute of limitations (five years here) the right to a patent from the United States regardless of defects in his location notices. Cole v. Ralph, 252 U.S. 286, 40 S.Ct. 321, 64 L.Ed. 567; Springer v. Southern Pac. Co., 67 Utah 590, 248 P. 819; Newport Mining Co. v. Bead Lake G. C. M. Co., 110 Wash. 120, 188 P. 27; Law v. Fowler, 45 Idaho 1, 261 P. 667; Oliver v. Burg, 154 Or. 1, 58 P.2d 245.

This rule is recognized and applied in California. See, Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047; Dalton v. Clark, 129 Cal.App. 136, 18 P.2d 752; McLean v. Ladewig, 2 Cal.App.2d 21, 37 P.2d 502, 504. In the last cited case the court said:

"The contention of plaintiff that title by adverse possession has been established is, in our opinion, sustained. The effect of section 2332, U.S.Revised Statutes (30 U.S.C.A. § 38), has been held to be a declaration that possession for the statutory period is the equivalent of a valid location. Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047; 40 Cor.Jur. 779.

"In Humphreys v. Idaho Gold Mines Development Co., 21 Idaho 126, 120 P. 823, 827, 40 L.R.A.(N.S.) at page 826, it is said:

" 'It seems to us that the provisions of section 2332 of the Revised Statutes of the United States (30 U.S.C.A. § 38) are intended to obviate the necessity for proof of posting and recording a notice of location in cases where the claimant to mineral ground has been in the actual, open, and exclusive possession of the ground for a period equal to that required by the local statute of limitations governing adverse possession of real estate.'

"It appears abundantly from the evidence here that the plaintiff and her predecessors in title have held and worked the 'Good Luck Mine' as described in the judgment for many years in excess of five years. The payment of taxes is not required to establish title by adverse possession (Dalton v. Clark, 129 Cal.App. 136, 18 P.2d 752), and the parties stipulated on the trial that all assessment work had been done.

"The evidence seems to us clear that the location in question was established upon a vein or lode of practical value. The witness John E. McLean testified that he had taken several thousand dollars in gold from the mine. The witness Marre described the course of the main vein in the lode. The law does not require that the vein contain ore in paying quantities. It is enough if ore is found and the indications are sufficient to warrant a prudent man in spending his labor and means, with reasonable prospect of success, in developing a valuable mine. Garibaldi v. Grillo, 17 Cal.App. 540, 120 P. 425; see, also, Springer v. Southern Pac. Co., 67 Utah 590, 248 P. 819."

In Belk v. Meagher, 104 U.S. 279, 283, 26 L.Ed. 735, it was said:

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. Forbes v. Gracey, 94 U.S. [762], 767, [24 L.Ed.] 314. * * *

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up."

[3] The trial court found that much, if not all, of the land described in plaintiff's Yucca location conflicted with the mining claims of Darling; that this land was not then open for location and was in the lawful possession of Darling. It follows that as the land was not open for location, and as Darling owned the superior title, plaintiff acquired no rights by his Yucca location.

The Baker Group Claims

A number of years prior to 1929, probably in 1921, or before, C. A. Bell, brother of Annie M. Baker, had located, either in his own name or in the names of himself and Sarah J. Bell, his wife, the four mining claims to which the Baker Group asserts title. On July 10 and 18th, 1929, C. A. Bell, acting for A. M. Baker (Annie M. Baker) located the Paymaster, Gold Bullion, Coyote and Bager (Badger) Quartz Mining Claims. The location notices were signed by A. M. Baker. These were the same claims which had been located by C. A. Bell and Sarah J. Bell. There is no claim that they were not open for location in July, 1929.

After twelve o'clock noon on July 1, 1931, plaintiff located these mining claims in his own name as the Paymaster No. 1, Gold Bullion No. 1, Coyote No. 1, and Badger No. 1. He claims that the required assessment work had not been done by or for Mrs. Baker during the year prior to July 1, 1931. This is the sole ground upon which he attempts to support his claim to these four locations.

The trial judge found that the assessment work on the A. M. Baker (Baker Group) claims for the year ending June 30, 1931, had been done; that plaintiff acted fraudulently and with force in entering on the property on July 1, 1931, and in making his locations; that plaintiff's locations were void.

If there is evidence in the record supporting the finding that the Baker assessment work had been done we need not consider any of the other numerous questions argued by counsel under this phase of the case. If Mrs. Baker, or the Baker Group, was in possession of the four claims under valid locations, with the assessment work done and sufficient discovery made, the property was not open to location on July 1, 1931. As we have observed, plaintiff does not question the validity of the locations. The same is true of the sufficiency of the discovery.

C. A. Bell was burned to death in 1932 in a fire which destroyed the five-room house he had erected on one of the claims. His testimony was not available at the trial.

The evidence of witnesses establishes the following facts: That Bell was lame but was otherwise strong, was fairly active and able to do considerable heavy work; that he lived on the claims and was actually on them a great part of the time during the year ending on June 30, 1931; that the private road leading to these claims had been washed out by a flood during the summer of 1930; that this was a private road necessary for ingress to and egress from these claims; that after this road was washed out Bell worked on it almost every day he was on the property up to June 30, 1931; that he repaired it and made it usable; that the value of his work on this road was not less than $400 or $500; that in addition to this work on the road he worked in shafts and cuts in actual mining operations on the property.

In the case of Ring v. United States Gypsum Co., 62 Cal.App. 87, 216 P. 409, 410, the same claim was made by the plaintiff there as is made by the plaintiff here, that the necessary assessment work had not been done. Defendant there, like the defendants here, proved the assessment work had been done largely by work on roads leading to the claims. The appellate court held that the value of this work was properly considered an assessment work which had been performed where it was done for the benefit of the claims, and said:

"The respondent having shown that it had the right to possession of the property through valid locations, the burden of proof was upon the appellant to show that the respondent's right had been abandoned or forfeited. * * *

"Upon this evidence, as we have said, the trial court found that labor expended by the respondent tended directly to the development and benefit of each and all of said claims, and to facilitate the extraction of mineral therefrom. This finding was plainly on a question of fact, which the trial court was required in the first instance to determine. Big Three Mining & Milling Co. v. Hamilton, 157 Cal. 130, 135, 107 P. 301, 137 Am.St.Rep. 118; Yreka Mining & Milling Co. v. Knight, 133 Cal. 544, 549, 65 P. 1091."

Plaintiff argues that as no witness testified in so many words that the road work was for the benefit of the claims, there was no evidence justifying a finding that such road work benefitted the Baker Group claims.

[4] We cannot agree with this argument. All of the facts were before the trial judge. The reasonable inference that this road work benefitted the mining claims was drawn from those facts. This inference is supported by evidence that this road was used by Bell and others in transporting food and other supplies to the claims and was used as a way in reaching them. When a reasonable inference is drawn from the evidence by the trial judge it cannot be upset on appeal because he might have drawn a contrary inference from the same evidence. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123.

[5] As the Baker Group was in lawful possession of the four mining claims on July 1, 1931, it follows that the ground was not open for location and the attempted locations by plaintiff of this same ground conferred no rights upon him. Belk v. Meagher, supra; Ring v. U. S. Gypsum Co., supra.

[6] Plaintiff argues that as the evidence shows Mrs. Baker was the owner of the four claims, the portion of the judgment awarding an interest in those claims to others of the Baker Group is contrary to all of the evidence. This may be true but plaintiff cannot complain of it. If he has no interest in the four claims it makes no difference to him to whom they are awarded. No member of the Baker Group is complaining of the judgment.

Questions Affecting All Respondents

Plaintiff urges that the evidence shows that his Opportunity Claim does not conflict with either the Darling claims or the Baker Group claims and that the trial court erred in not upholding the validity of his location of Opportunity.

There is no direct finding that the Opportunity Claim conflicts with any of the Darling or Baker Group locations. This is only to be inferred from the findings. Much of the testimony is to the effect that Opportunity does not overlap any other claim. However, if we are correct in concluding that the Opportunity Claim is the same as the old Chippie location it seriously conflicts with one of the Baker Group claims. A map in the record shows that Opportunity (Chippie) overlaps another claim of the Baker Group. However, as the judgment must be reversed with directions on other grounds, this question should be left for determination by the trial court as the evidence is not at all clear on the question of the overlap. Also, the trial court should make a direct finding on the validity, or lack of validity, of that location and of plaintiff's rights, if any, thereunder.

At the close of the case in chief the trial judge, being unable to determine the exact boundaries of the mining claims in controversy, appointed an engineer to make a survey of the claims, map his findings and report back to the court. This was done. The engineer testified at length and produced his map which was introduced in evidence. By affidavits we are informed that an engineer was employed to prepare legal descriptions of the various claims, which he did, and which descriptions were incorporated in the findings of fact.

[7] It is now admitted that these descriptions do not correctly describe several of the mining claims in controversy here. This question was first directly injected into the case in plaintiff's reply brief.

Defendants have prepared what they believe to be correct descriptions of the claims. They ask us to amend the findings of fact and judgment by striking out the admittedly incorrect descriptions and inserting the suggested correct descriptions. Were we engineers we might be able to determine which are the correct descriptions of the various claims. We are not engineers and under the present status of the case have no authority to call in expert engineering assistance. We cannot determine this question here as we have no confidence in our ability to settle it correctly.

[8] This unfortunate situation does not require that the judgment be reversed generally. An almost similar situation was before us in the case of Dennis v. Barnett, Cal.App., 85 P.2d 916, where the description in the findings and judgment of the mining claims in controversy was admittedly incorrect. We there reversed the judgment with directions to the trial court to amend its findings of fact, either on the evidence before it, or after taking new evidence on the question of proper descriptions, if necessary, and enter judgment in favor of the prevailing party.

A similar order would promote the ends of justice here. There could be nothing gained by retrying the general issues of the priorities of titles. The trial judge was most liberal in permitting the introduction of all the evidence on this question in the possession of any of the parties. Those issues were correctly decided. The only error arises from the incorrect descriptions in the findings and judgment and in not directly disposing of plaintiff's Opportunity Claim, if that be error, which question we do not decide.

It is ordered that the judgment be reversed with the following directions to the trial court:

(1) That upon the evidence now before it, if sufficient, or upon new evidence to be taken on that question alone, if such evidence be necessary, the trial court determine the correct legal descriptions of defendant Darling's New Midnight, Gold Bronze No. 4, Rainbow Side, and Midway Mining Claims, and of the Baker Group's Paymaster, Gold Bullion, Coyote, and Bager (Badger) Mining Claims.

(2) That upon such evidence now in the record, or to be taken, if necessary, the trial court determine the correct legal descriptions of plaintiff's attempted locations of Paymaster No. 1, Gold Bullion No. 1, Coyote No. 1, Badger No. 1, Yucca and Opportunity Mining Claims.

(3) That the findings of fact be amended by striking out any incorrect descriptions therein contained and inserting in lieu thereof such correct descriptions, together with any additional correct descriptions of any of the above named claims, or purported claims, not now appearing therein.

(4) That the facts showing title or ownership of plaintiff, if any, to Opportunity Mining Claim be found.

(5) That judgment be entered in favor of C. C. Darling to the four mining claims heretofore mentioned as belonging to him, and, in favor of the several members of the Baker Group to the four mining claims heretofore mentioned as belonging to them, using the corrected descriptions in each instance, and that plaintiff's claim to the Opportunity Quartz Mining Claim be determined by that judgment in accordance with the findings made on that question.

Each of the respective parties will pay his own costs of appeal.

We concur: BARNARD, P. J.; GRIFFIN, J.

PIETRYZK v. DOLLAR S. S. LINES, Inc., Limited.

Civ. 10958.

District Court of Appeal, First District, Division 2, California.

March 21, 1939.

Rehearing Denied April 20, 1939.

Hearing Denied by Supreme Court May 19, 1939.

1. New trial ⚷89, 95, 99

In watchman's action for injuries sustained when slipping on a patch of oil on shipboard, evidence revealing a contract between employer and contractor governing price of cleaning oil tanks at defendant's home office in Shanghai did not entitle plaintiff to new trial on ground of surprise and newly discovered evidence, where record failed to show materiality of contract price, or if it had any materiality, why plaintiff did not ascertain fact before trial, or why facts could not be proved by witnesses present at trial.

2. Seamen ⚷29(5)

In action by watchman on steamship against employer for injuries sustained when he slipped on patch of oil, wherein defendant relied on defense that oil, if any, was deposited by independent contractor, question whether person engaged to clean tanks was independent contractor was properly submitted to jury, where written contract between employer and contractor introduced was not complete, and both parties introduced pertinent oral evidence as to nature of employment.

3. Seamen ⚷29(1, 2)

Operator of steamship could delegate work of cleaning oil tanks to independent contractor, and if employees of contractor negligently deposited oil on stairway on which employee of steamship slipped, operator would not be liable, but if, under his duty to provide safe place for his employees to work in, operator negligently failed to discover and remove oil, he would be liable by reason of negligent failure to provide safe working place. Jones Act § 33, 46 U.S.C.A. § 688; Federal Employers' Liability Act § 5, 45 U.S.C.A. § 55.

4. Seamen ⚷29(1)

In action for injuries sustained by watchman when he slipped on patch of oil, operator of steamship was entitled to interpose defense that negligence was that of independent contractor engaged to clean oil tanks, since such defense was recognized at common law and neither Jones Act nor Federal Employers' Liability Act abolished such defense as to incidental matters such as cleaning tanks. Jones Act § 33, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

5. Trial ⚷260(8)

Where instruction was given that one of tests to determine whether person was acting as servant of another is to ascertain whether he was subject to such person's orders and control and was liable to be discharged for disobedience or misconduct, refusal of instruction "whether or not the employer has the right to exercise control" requested by plaintiff, was not error.

6. Trial ⚷295(4)

In action by watchman on steamship against employer for injuries sustained when he slipped on patch of oil, instruction that if jury found that negligence of defendant, in whole or in part, proximately caused injuries, and that such injuries were not "proximately" caused by plaintiff's own negligence, verdict should be for plaintiff, did not constitute reversible error because of use of word "proximately" rather than "solely" in describing effect of plaintiff's negligence, as plaintiff contended should have been used under Jones Act, where it was obvious from reading instructions as whole that plaintiff was not prejudiced. Jones Act § 33, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

7. Appeal and error ⚷231(9)

Where appellant in objections to instructions given at trial failed to point out particular language that was objectionable or to make any statements or cite any authorities sustaining his objections, Court of Appeal would not consider objections.

8. Seamen ⚷29(5)

In action by watchman on steamship against employer for injuries sustained when he slipped on patch of oil, instruction that to find defendant liable it must appear defendant knew of presence of oil or that it had been there such length of time that in exercise of ordinary care defendant ought to have known of it, was proper, notwithstanding enactment of Jones Act, since such act did not change common law so as to make employer liable for defect of which he had no notice and which lasted such a short time it could not legally be said he should have notice thereof. Jones Act § 33, 46 U.S.C.A. § 688.

9. Master and servant ⚷87
Seamen ⚷29(1)

Liability of employer for injuries to employee under Federal Employers' Liability Act and the Jones Act rests wholly on negligence. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; Jones Act § 33, 46 U.S.C.A. § 688.

10. Seamen ⚷29(5)

In action by watchman on steamship against employer for injuries sustained when he slipped on patch of oil, instruction that plaintiff could not recover if slippery condition resulted as necessary incident of work on ship and against which defendant could not guard in exercise of reasonable care was warranted under evidence. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; Jones Act § 33, 46 U.S.C.A. § 688.

11. Master and servant ⚷250
Seamen ⚷29(5)

In action by employee against employer under either Federal Employers' Liability Act or Jones Act, the common-law rules apply, except as expressly modified by statute. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; Jones Act § 33, 46 U.S.C.A. § 688.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer F. Robinson, Judge.

Action by Myron H. Pietryzk against the Dollar Steamship Lines, Inc., Limited, for injuries sustained by plaintiff while discharging his duties as watchman on board steamship of defendant. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Charles H. Fish, of San Francisco, for appellant.

Irving H. Frank, Nathan H. Frank, and L. Charles Gay, all of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover damages for personal injuries sustained by him the jury returned a verdict in favor of the defendant. The plaintiff made a motion for a new trial, his motion was denied, and he has appealed from the judgment.

On the 27th day of November, 1935, the plaintiff was injured while discharging his duties as watchman on board the President Coolidge en route from Manila to Shanghai. While going down the stairway on the starboard side between decks C and D, he fell and suffered the injuries complained of. He contended that a patch of oil was on one of the steps, that he stepped on it, slipped and fell. It was the theory of the defense that the oil, if any, was deposited by the employees of Ah Jim, an independent contractor who was engaged in cleaning certain tanks. Whereas, the plaintiff contended that Ah Jim was not an independent contractor; and, if he was, it was the duty of the defendant to keep the stairway clear of all defects of which it had notice, or by the exercise of reasonable care, should have had notice. In that connection he introduced evidence that at Hongkong the vessel took on board a quantity of wood oil.

The plaintiff filed his complaint on the 28th of December, 1936. He filed an amended complaint on February 4, 1937. The defendant answered the latter pleading on June 18, 1937. Shortly before the trial it asked permission to add an allegation to its answer. The trial court made an order granting the permission and at about the same time it granted the request of the plaintiff that the defendant should exhibit to the plaintiff certain papers and books. Before said amendment was actually made the plaintiff filed his second amended complaint. The defendant answered the second amended complaint and never made use of the permission granted it to amend the answer theretofore filed. All of the books and papers which the plaintiff asked to inspect, with one exception, were duly turned over to him. That one exception involved a certain contract with Ah Jim, a Chinese contractor, and all facts in that connection will hereinafter be discussed. The plaintiff contends that he was prejudiced by reason of the defendant's failure to comply with the order of inspection. It is sufficient to state that the record shows no such failure.

[1] In the next place the plaintiff complains because his motion for a new trial was denied. He calls attention to the fact that said motion was made on the grounds, "3. Accident or surprise which ordinary prudence could not have guarded against; 4. Newly discovered evidence, material for the plaintiff, which he could not, with reasonable diligence, have discovered and produced at the trial." He then calls attention to the evidence showing that on the

27th day of November, 1935, he was employed by the defendant as watchman on board the President Coolidge, and that while performing his duties he stepped on a patch of oil on a stairway between the C and D decks, fell and was injured. During the presentation of his case he called witnesses who testified in effect that the oil was placed or left in said place by some Chinese who were cleaning tanks. The plaintiff also called officers of the defendant company who testified that said Chinese were working under Ah Jim, another Chinese, who had charge of the work of cleaning said tanks. They further testified that said work was being done under a written contract. That document was produced. The plaintiff offered it in evidence and it was received and marked plaintiff's exhibit 6. It is not before us. However, the record discloses that said document definitely delineated the duties to be performed and that it was signed by Ah Jim and by the defendant. It was executed in 1911. Afterwards it was renewed from time to time. It was renewed for the year 1935 and was in force and effect at the time the plaintiff was injured. On its face it did not state the price for cleaning each tank. Evidence was adduced that if there was any writing on that subject such writing was at Shanghai, the home office of the defendant in the Orient. The fact said contract existed, its terms, and its locus constitute the surprise and newly discovered evidence mentioned above. The record is wholly silent as to how or in what manner the contract price payable to Ah Jim had any materiality to the action on trial; how or why, if it had any materiality, the plaintiff did not ascertain the fact long before the trial and if necessary cause depositions to be taken in Shanghai. Nor does the record show any reason why the same facts could not be proved by other witnesses who were present at the trial. The plaintiff argues that the defendant suppressed the said evidence. The record does not even tend to show any suppression whatsoever.

[2] The trial court gave a number of instructions in which with great care it submitted to the jury the question as to whether or not Ah Jim was an independent contractor. The plaintiff argues earnestly that the written contract should have been construed by the court as a matter of law and that the court should have instructed accordingly. However, it will be noted from what has just been said above that the plaintiff contended with equal earnestness that the said writing was not full and complete. That it was not full and complete the defendant conceded and both parties introduced pertinent oral evidence showing the nature of the employment of Ah Jim. Under such circumstances the court did not err in submitting the question to the jury.

[3] But, the plaintiff argues, the contract was invalid as an attempt to exempt the carrier from liability created by law. 45 U.S.C.A. § 55. The vice in that contention is that the record does not show the contract in question contained any clause in violation of the terms of said statute. In this connection the plaintiff seems to contend that the defendant could not delegate the work which Ah Jim was doing. The defendant replies that it did not attempt to employ an independent contractor to perform or transact its "necessary regular business or functions", but employed him to clean tanks. Continuing it states: "Likewise, if Chinese employees of an independent contractor negligently deposit oil on a stairway, the operator of the vessel is not liable for that act, for they are not his employees. But if, under his duty to provide a safe place for his employees to work in, he negligently fails to discover and remove the oil, he is liable by reason of a negligent failure to provide a safe working place." We think the distinction is well founded. Solovieff v. U. S. S. B. Emergency Fleet Corp., 1925 A. M. C. 1166. The plaintiff does not call our attention to any authority to the effect that the function of cleaning oil tanks is inherently injurious, therefore the duty of performing such work could be delegated. In the absence of express language to the contrary in the Jones Act it did not have the effect of depriving this defendant of the right to rely on the defense that Ah Jim was an independent contractor. 13 Cal.Jur. 1045; American Pacific Whaling Co. v. Kristensen, 9 Cir., 93 F.2d 17, 20.

[4] As stated above the defendant interposed the defense that Ah Jim was an independent contractor. The court admitted evidence on the subject and gave instructions applying that doctrine to the case. The plaintiff complains on several different grounds. (1) He prepared a set of instructions to the effect that since the adoption of the Jones Act said defense is no longer available in actions of this kind.

Prior to instructing the jury, the court and counsel, not in the presence of the jury, met and discussed the requested instructions. As a result plaintiff withdrew several instructions theretofore tendered in which he claimed the defendant, under the facts, was not entitled to have the defense of independent contractor presented to the jury. (2) He assigns as error instructions which the court gave submitting said defense. (3) He claims certain instructions did not correctly state the common law rule. The first two grounds have not, in our opinion, any support. Under the common law, rules were settled which fully covered every phase of such litigation. In 1908 the Federal Employer's Liability Act was enacted by the congress. 45 U.S.C.A. § 51 et seq. It modifies the rules applicable to common carriers in interstate commerce. As to seamen that statute was made applicable by the Jones Act (46 U.S.C.A. § 688). Under neither of said statutes was the defense of independent contractor expressly abolished. Nor do we find any language in either statute which by implication has that effect as to incidental matters such as cleaning of oil tanks. Under the first two divisions of the attacks of the plaintiff we find no error.

[5] As to the third division the attack is as follows: Instructions 21, 22, 23 and 24 were given at the request of the defendant. The plaintiff makes the objection to them which we have discussed above. That objection need not be again discussed. However, the plaintiff makes the additional objection that said instructions were not correct statements. For instance he complains because the trial court in one instruction stated to the jury, "* * * one of the tests by which you may determine whether a person was acting as the servant of another is to ascertain whether he was subject to such person's orders and control and was liable to be discharged for disobedience or misconduct", whereas, he claims the correct statement should have been "whether or not the employer has the right to exercise control". We think that is a distinction without a difference. The two statements are essentially the same. Reading all of said instructions together we find no error therein.

[6] One of the instructions requested by the plaintiff was modified by the trial court by inserting the parenthetical expressions and then given as follows: "If you shall find from a consideration of all the evidence in this case that the negligence of the defendant, its officers, agents or employees or any of them, in whole or in part, proximately caused the injuries, if any, to the plaintiff as alleged in his complaint and (if) proved by a preponderance of the evidence, (and if you find that the injuries to plaintiff, if any, were not proximately caused by his own negligence), you will find your verdict for the plaintiff and against the defendant." The plaintiff contends that the use of the word "proximately" was error because under the Jones Act the word "solely" should have been used. Grand Trunk Western R. Co. v. Lindsay, 233 U.S. 42, 34 S.Ct. 581, 58 L.Ed. 838, Ann.Cas.1914C, 168. The defendant does not directly dispute the plaintiff's contention. However, it argues that when instructions 14, 15, 16, 17, 19, 20, 27 and 28 are read together it is obvious that the word "proximately" could not have been prejudicial to the plaintiff. The argument is convincing. The jury was told repeatedly that if the plaintiff's injuries were caused in whole or in part by the negligence of defendant's agents or employees the plaintiff could recover. Furthermore the instruction which was modified contains the same expression.

The same comments are applicable to the changes made by the trial court in instruction number 20.

[7] Complaint is made of instructions 26, 27, 28 and 29, given at the request of the defendant. The plaintiff does not point out the particular language that is objectionable, nor does he make any statements or cite any authorities sustaining his objections. This court is not called upon to perform that function for him.

[8, 9] Instruction number 33, given at the request of the defendant, was as follows: "If you shall find that the plaintiff was caused to fall by reason of oil being on the step or tread of the staircase on the starboard side of the steamship President Coolidge, between C and D decks, that fact would not of itself warrant you in finding that the defendant was negligent. To justify such a conclusion it must appear that the defendant knew of its presence and had unreasonably failed to remove it, or that it had been there such a length of time that in the exercise of ordinary care it ought to have known of it and removed it, for the defendant is not liable for a mere transitory danger of such character." The plaintiff objects to the last sentence. He

claims the substance thereof was formerly the law but it is not the law since the enactment of the Jones Act. He cites no language in the Jones Act to the effect that an employer is liable for a defect of which he had no notice and which had lasted such a short time it could not legally be said he should have notice thereof. The Jones Act by reference adopted the Federal Employers' Liability Act. The latter statute rests wholly on negligence. The instruction attacked was not erroneous. Seaboard Air Line v. Horton, 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062, L.R.A. 1915C, 1, Ann.Cas.1915B, 475.

[10] Acting upon the request of the defendant the trial court gave instruction number 34. It was as follows: "If you shall find that the plaintiff sustained injuries from slipping or falling and that the fall was caused by a slippery condition of the stairway on which the plaintiff claims to have fallen, which was slippery *as a necessary incident of the work on the ship*, and against which the defendant could not guard in the exercise of reasonable care, then I instruct you that the defendant cannot be held liable for injuries sustained by the plaintiff from such condition, for the plaintiff assumes the risk of injury from such causes." (Italics ours.) The plaintiff contends there was no evidence that the stairway was made "slippery as a necessary incident of the work of the ship". That statement is hardly correct. The plaintiff had introduced evidence not only that the crew employed by Ah Jim was cleaning tanks but also that the vessel had taken on board a quantity of wood oil. The instruction was addressed to all of the evidence and not to merely a part thereof. Taking into consideration the loading of the wood oil, it may not be said the instruction was prejudicially erroneous.

[11] The plaintiff also complains of instructions 35, 37 and 39, all of which were given at the request of the defendant. We have examined each one and we find no error. Each purported to deal with a certain rule of the common law pertinent to such actions. In chapter 2, title 45 U.S.C., §§ 51–59, 45 U.S.C.A. §§ 51–59, the congress made certain alterations and modifications in the common law rules concerning the rights and remedies in the trial of such actions between the employee and the employer engaged in operating as a common carrier. In section 688 of title 46 U.S.C., 46 U.S.C.A. § 688, the former statute was made applicable to actions commenced by a seaman. It is settled law that except as modified by the said statute the common law rules apply. The Richelieu, D.C., 27 F.2d 960. The plaintiff does not call our attention to any misstatement in any one of said instructions of any one of the rules said instructions purport to state.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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31 Cal.App.2d 655

PEOPLE v. AHERN.

Cr. 2049.

District Court of Appeal, First District, Division 2, California.

March 22, 1939.

Rehearing Denied April 6, 1939.

Hearing Denied by Supreme Court April 21, 1939.

1. Embezzlement ⊂=44(4)

In prosecution for grand theft claimed to have been committed by embezzling property received by defendant to be held in trust where defendant claimed property was given to him upon agreement, evidence sustained conviction and finding that a trust relationship existed. Pen.Code, § 952.

2. Embezzlement ⊂=40

In prosecution for grand theft claimed to have been committed by embezzling property transferred to defendant, testimony as to defendant's conversations with various parties after transfer had been made was admissible to show defendant acquired property upon agreement to hold it in trust rather than as a gift. Pen.Code, § 952.

3. Embezzlement ⊂=10

In prosecution for grand theft under indictment alleging that defendant embezzled property transferred to him to be held in trust after he had made representations concerning intentions of alleged victim's sisters, evidence that alleged representations were false was not necessary to sustain conviction. Pen.Code, § 952.

4. Embezzlement ⚷11(1)

In prosecution for grand theft claimed to have been committed by embezzling property transferred to defendant, evidence that a demand had been made upon defendant for the property claimed to have been embezzled was not necessary to sustain conviction in view of other evidence. Pen.Code, § 952.

5. Embezzlement ⚷10

In prosecution for grand theft claimed to have been committed by embezzling property transferred to defendant in trust, a defense based upon theory that property was obtained free of trust because evidence showed only an oral agreement to hold property in trust could not be sustained since such oral agreements will be enforced in order to prevent statute of frauds from being used as a shield for fraud. Pen.Code, § 952; Civ. Code, §§ 2221, 2222, 2253.

6. Embezzlement ⚷10

In prosecution for grand theft claimed to have been committed by embezzling property transferred to defendant in trust, a defense based upon theory that property was obtained free of any trust because there was not a sufficiently definite statement of purpose of trust could not be sustained, since an agreement providing transferee will hold property in trust for transferor contains a sufficiently definite statement of purpose of trust. Pen.Code, § 952; Civ.Code, §§ 2221, 2222, 2253.

◆

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

William J. Ahern was convicted of grand theft, and he appeals.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

John D. Harloe, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was tried by the court, sitting without a jury, upon an indictment containing two counts charging grand theft. He was found guilty on both counts. His motion for a new trial was denied and he appeals from the judgment of conviction and from the order denying his motion for a new trial.

The original indictment charged in the first count that defendant unlawfully took certain real property of Catherine Malone Ahern of the value of $3,400; and in the second count, that he unlawfully took certain personal property of said Catherine Malone Ahern consisting of money in the sum of $8,225.22. An amended indictment was thereafter filed in which the first count was amended but the second count remained the same. The first count of the amended indictment was quite lengthy but it may be briefly summarized. It was alleged that defendant made certain representations to Mrs. Ahern regarding the intentions of her sisters to have her committed to the state hospital and to obtain for themselves control of her property; that he further "stated and represented to said Catherine Malone Ahern that if she would deed the said real property to him, he would hold it for her use and benefit and as her trustee"; that "in reliance upon said statement and representation", Mrs. Ahern executed and delivered a deed to defendant; that thereafter and on August 17, 1936, defendant "contrary to and not in due or lawful execution of said trust" sold said real property for the sum of $3,500 and "wilfully, unlawfully, feloniously and fraudulently embezzled, converted and appropriated" said sum to his own use.

Upon the trial, it was the theory of the prosecution that defendant had received both the real property described in the first count and the money described in the second count upon his agreement to hold the same in trust for the use and benefit of Mrs. Ahern and that he had thereafter embezzled the proceeds of the sale of said real property and also the money described in the second count. It was the theory of the defense that no trust was created and that Mrs. Ahern had given defendant both the real property and the money as his own upon the agreement that he would take care of her for the rest of her life.

There is no conflict as to any material fact except the understanding upon which the real property and money were transferred to defendant. Mrs. Ahern was defendant's aunt by marriage and was 70 years of age. Defendant was 45 years of age. She transferred the real property and money to him in April 1936 and she died on August 27, 1936. The deed was dated April 8, 1936 and was recorded on the same day. The deposit of the $8,225.22 in defendant's name was made on

April 16, 1936. He sold the real property on August 17, 1936 for $3,500. It is conceded that all of the proceeds of the sale and practically all of the money deposited in the bank was used by defendant for his own purposes.

[1] There are no headings in defendant's brief but it is apparent that his contention is that the evidence was insufficient to sustain his conviction on either count. We find no merit in this contention. While defendant testified in line with his theory as above stated, there was ample evidence to the contrary showing that the real property and money were transferred to him upon his agreement that he would hold said real property and said money in trust for Mrs. Ahern. The testimony of Mr. Lynch and of Mr. Riley showed that Mrs. Ahern became apprehensive about the transfers shortly after making the same and that she consulted Mr. Riley, an attorney at law. Both Mr. Lynch and Mr. Riley testified that they talked with defendant at that time and that he then stated that he was merely holding the real property and money in trust for Mrs. Ahern and that he was willing to execute a declaration of trust, if desired, stating that he held it in trust and did not claim as his own. Defendant further told Mr. Riley that Mrs. Ahern had deeded the property over to him to sell it for her; that he was holding out for a price of $4,000 but that the best offer he had been able to get was $3,500. There was also evidence of the bank teller to show that when Mrs. Ahern transferred the money to defendant, said defendant already had an account of his own in that bank; that the teller suggested to defendant, in the presence of Mrs. Ahern, that defendant would want to keep the new account separate from the old and that pursuant to said suggestion, the new account was opened in the name of "William J. Ahern, Trustee". Said evidence was ample to show that a trust relationship was established and the trial court was justified in so concluding.

[2] Defendant claims that his conversations had with various parties after the transfers had been made were insufficient to impose a trust upon the property. He cites authorities to the effect that a gift of property may not be changed into a trust by oral declarations subsequently made. Defendant's claim is based upon a misconception of the purpose of said testimony. Said testimony was introduced to show that defendant had originally acquired said property, not as a gift, but upon his agreement, made at the time of the transfer, to hold it in trust for Mrs. Ahern. Said evidence was sufficient for that purpose. Taylor v. Morris, 163 Cal. 717, 127 P. 66.

[3] Defendant further claims that there is no evidence that any false representations were made to Mrs. Ahern by defendant. The answer to this claim is that no evidence of false representations was required. The gist of the first count of the amended indictment was that Mrs. Ahern had deeded the real property to defendant upon his agreement to hold it in trust for her and that he thereafter sold the property and embezzled the proceeds. The second count of the amended indictment pleaded the unlawful taking of the money in bank in the short form permitted by law. Penal Code, § 952. As above indicated, the prosecution introduced evidence which was sufficient to prove that the real property and money were transferred to defendant upon his agreement to hold in trust for Mrs. Ahern and that he thereafter embezzled the proceeds of the sale of the real property and the money in bank. As we view the record, any allegations in the first count concerning representations made by defendant as to the intentions of Mrs. Ahern's sisters, were mere surplusage, and such allegations required no proof.

[4] Defendant apparently further claims that the evidence was insufficient because there was no evidence of any demand upon him. We are of the opinion however that in view of the evidence of the existence of the trust and of the conversion by defendant to his own use of the proceeds of the sale and of the money in the bank, no evidence of demand was necessary. People v. Hatch, 163 Cal. 368, 125 P. 907.

[5, 6] Finally defendant cites and relies upon several code sections (Civ.Code §§ 2221, 2222 and 2253) and the case of Logan v. Ryan, 68 Cal.App. 448, 229 P. 993. Defendant does not make entirely clear his purpose in citing these authorities. We assume that he may be claiming that he obtained the property free of any trust as (1) the evidence showed only an oral agreement to hold the property in trust for Mrs. Ahern and (2) there was no sufficiently definite statement of the purpose of the trust. We do not believe defendant's claim is tenable in either particular. Such oral agreements have frequently been given effect in order to prevent the statute of frauds

from being used as a shield for fraud (Taylor v. Morris, 163 Cal. 717, 127 P. 66; Butler v. Hyland, 89 Cal. 575, 26 P. 1108; Adams v. Lambard, 80 Cal. 426, 22 P. 180; Marsh v. Smith, 46 Cal.App. 692, 189 P. 1037; 25 Cal.Jur. 172, sec. 41; 25 Cal. Jur. 125, sec. 2a), and we believe that an agreement which provides that the transferee will hold the property in trust for the transferor contains a sufficiently definite statement of the purpose of the trust.

The judgment and order denying the motion for new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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31 Cal.App.2d 666

FRANKINI v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 5951.

District Court of Appeal, Third District, California.

March 23, 1939.

As Modified April 19, 1939.

Hearing Denied by Supreme Court May 22, 1939.

1. Appeal and error 🔑1097(1)

The decision of District Court of Appeal on former appeal, in case wherein evidence was practically identical with that on subsequent appeal, was "law of the case" on second appeal.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Banks and banking 🔑154(9)

Evidence of discrepancies between bank depositor's signature on card filed with bank and signatures of his name as maker of forged checks was sufficient to raise jury question as to bank's negligence in cashing forged checks.

3. Banks and banking 🔑148(1)

Bank teller was under duty to acquaint himself with depositor's signature where depositor had maintained account with bank and had signature card on file for many years, notwithstanding ordinary commercial practice might not permit comparison between signatures on signature card and checks drawn on depositor's account.

4. Banks and banking 🔑154(9)

Whether bank is negligent in paying forged checks is usually for jury.

5. Banks and banking 🔑154(9)

Whether bank depositor exercised due care in promptly examining his passbook, paid checks, or statement of his account is jury question in a depositor's action against bank for amount of forged checks paid thereby.

6. Banks and banking 🔑154(9)

Withdrawal of case from jury in depositor's action against bank for amount of forged checks paid by bank is error if there is any substantial evidence to support bank's liability therefor.

7. Banks and banking 🔑148(1)

Generally, bank is warranted in paying out depositor's money only in accordance with depositor's genuine order and no degree of care will excuse bank from liability for amount of forged checks paid by bank in absence of circumstances creating equitable estoppel as against depositor or depositor's prior negligence contributing to payment of checks.

8. Banks and banking 🔑148(3)

A customer is bound to use diligence in examining his account after it is received from bank, but is excused from performing such duty if bank has failed to use ordinary care in detecting forged signatures.

9. Banks and banking 🔑154(9)

A defense of account stated, predicated on bank depositor's acquiescence in statement of account sent him by bank, by failure to object thereto within reasonable time, is not such absolute defense to depositor's action against bank for amount of forged checks paid by bank as to preclude jury from passing on question of bank's negligence in failing to detect forged signatures.

10. Banks and banking 🔑154(9)

In depositor's action against bank for amount of forged checks paid by bank, whether depositor examined statement of his account sent him by bank, within reasonable time, and reported errors therein, were questions for jury.

11. Limitation of actions 🔑14

Parties to contract may stipulate therein for limitation period shorter than that fixed by statute, and such stipulation violates no public policy if period fixed be not so unreasonable as to show imposition or undue advantage, "imposition" being an excessive, unwarranted or uncalled for requirement or burden.

[Ed. Note.—For other definitions of "Imposition," see Words & Phrases.]

12. Banks and banking ⚿148(4)

A contract whereby depositor authorized bank to mail statements of his account and cancelled checks to depositor and promised to notify bank of any error and claim credit or refund within 10 days after expiration of time covered by statements was so unreasonable as to render contract void, especially in view of caption in bold type as an "Authorization to Mail Statement and Vouchers."

13. Limitation of actions ⚿14

Courts should scrutinize carefully agreements between depositor and bank whereby shorter limitation period than that fixed by statute is fixed, in which depositor may claim credit or refund for error in statement of depositor's account.

14. Banks and banking ⚿3

The courts' power carefully to scrutinize transactions between bank and depositor is derived through state's right to exercise police power over banking institutions and from inherent nature of business conducted.

15. Banks and banking ⚿3

Banks, although organized and financed by private individuals for personal gain, are in a sense "public institutions," subject to legislative regulation, examination and control.

[Ed. Note.—For other definitions of "Public Institution," see Words & Phrases.]

16. Banks and banking ⚿154(9)

In depositor's action against bank for amount of forged checks paid by bank, evidence raised jury question whether bank was negligent in paying forged checks.

17. Appeal and error ⚿979(2, 4)

The granting or denial of a new trial on ground that evidence was insufficient to justify jury's verdict rests so fully in trial court's discretion, where there is a substantial conflict in evidence, that its ruling is conclusive unless abuse of discretion appears.

18. New trial ⚿70

In depositor's action against bank for amount of forged checks paid by bank, trial court had right to grant depositor new trial in exercise of sound discretion, if not satisfied with sufficiency of evidence to sustain jury's verdict for bank, and did not abuse such discretion where there was evidence justifying finding of bank's negligence which was not conclusively negatived by defenses set up.

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Appeal from Superior Court, Sacramento County; J. G. Bruton, Judge.

Action by Louis Frankini against the Bank of America National Trust & Savings Association to recover the amount of forged checks charged to plaintiff's account by defendant. From a judgment on a directed verdict for defendant as to part of the checks, plaintiff appeals, and from an order granting plaintiff's motion for a new trial as to a jury's verdict for defendant with respect to other checks, defendant appeals.

Judgment on directed verdict reversed and order granting motion for new trial affirmed.

Prior opinion, 86 P.2d 686.

Frank L. Murphy and Ralph Thomas Lui, both of Sacramento, for plaintiff.

Devlin & Devlin & Diepenbrock, of Sacramento, and S. J. Tosi, of San Francisco, for defendant.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought to recover from the defendant bank the aggregate amount of a number of forged checks which were charged to the account of plaintiff. The trial court directed the jury to bring in a verdict in favor of the bank on those checks cashed during the months of November and December, 1931, and January of 1932, and such a verdict was rendered.

On checks cashed during the month of February, 1932, the issues were submitted to the jury, and a verdict found for defendant. The judgment was that plaintiff take nothing by reason of the action. Thereafter the court granted a motion for new trial as to the verdict found by the jury with respect to the February checks, on the ground of insufficiency of the evidence. Plaintiff now appeals from the judgment resulting from the directed verdict, and defendant appeals from the order granting the motion for new trial.

There is little dispute as to the material facts of the case. The plaintiff, Louis Frankini, was a depositor in defendant bank, and had been such for many years prior to the commencement of the action. In the year 1928, at the request of the bank, plaintiff signed and delivered to the bank the following agreement:

"Authorization to Mail
Statement and
Vouchers.

"Louis Frankini, name of account. To Bank of Italy National Trust and Savings Association.

"You are hereby requested and authorized to send by mail not registered the statement of the deposit account of the undersigned, together with all canceled checks pertaining to it, unless otherwise directed herein, to the undersigned at the following address: In consideration of your compliance with this request, the undersigned promises *to notify you of any error, and to make any claim for credit or refund within ten days after the expiration of the time covered by the statement.* This request and authorization is to remain in force and effect until revoked in writing. Signed: Louis Frankini, 5208 Folsom Boulevard. (Italics ours.)"

Pursuant to said contract defendant mailed to plaintiff monthly written statements of his account, together with canceled checks paid during the months of November and December, 1931, and January of 1932. Plaintiff admitted the receipt of each of the three monthly statements in due course of mail, and further admitted that he placed said statements, unopened, in his desk drawer, where they remained until his bookkeeper called for them in the early part of February, 1932. His testimony was to the effect that if he had examined the statements he would have discovered the forgeries.

During the months of November and December, 1931, and January and the first ten days of February, 1932, the defendant bank accepted a number of checks drawn upon it, on which the name of plaintiff was forged as maker. These checks were all made out by William Rose, a former employee of plaintiff, to employees and former employees of plaintiff, and said William Rose forged the names of these employees on the endorsements. The defendant debited the plaintiff's commercial account with the amount of the forged checks in the sum of $1,345, and plaintiff seeks to recover that amount. These forged checks were forty-nine in number. Five of them totalling $130 were cashed during the month of November, 1931. Ten, amounting to $290, were cashed during the month of December, 1931. Twenty-one, amounting to $560, were cashed during the month of January, 1932. Thirteen, amounting to $365, were cashed during the month of February, 1932. On February 10, 1932, plaintiff first discovered the errors arising out of the forgeries, which appeared in these statements, and on that date he notified the bank of such discovery.

This case, upon practically the same facts, was before this court on appeal, the decision being filed March 6, 1936, and reported in 12 Cal.App.2d 298, 55 P.2d 232. We there held that the trial court erred in directing a verdict for defendant with respect to the forged checks for the months of January and February, 1932. We expressly refrained from passing upon the legality of the contract mentioned above.

[1-3] It is admitted that the evidence in this case is identical with that in the former case, with one exception, which is pointed out by respondent, who states that the record now shows that the statement of plaintiff's account for the month of January, 1932, was for the period ending, January 29th instead of January 31st—the date which we assume to be correct on the former appeal. This statement of the evidence appears to be correct. The decision in the former case holds that there was sufficient evidence of negligence on the part of the bank in cashing the forged checks to make out a case for the jury, and that plaintiff was not, as a matter of law, himself negligent. We now take that to be the law of the case before us. In that connection, however, we deem it proper to point out a few of the facts in the record which would support a finding of negligence on the part of the bank. During the four month period involved, the bank cashed forty-nine forged checks drawn on the account of the plaintiff. Each of these contained *two* forged signatures, the signature of plaintiff as maker, and the endorsed signature of the payee. It appears that plaintiff had maintained an account in the bank for many years prior to these transactions, and his signature card had been on file with the bank during that time.

This original card is before us in the record, together with the forged checks. Having carefully examined these exhibits, we are satisfied that the jury would have been justified in finding that if the bank had compared the genuine signatures with the forged signatures of plaintiff at any time, they would have rejected the forged checks. For illustration: in making the final "s" on his given name, plaintiff used the conventional method of completing that letter with a short line to the right leading from the bottom of the letter. In none of the forty-nine forged checks do we find that line. It is entirely omitted. We do not purport to detail all the facts which would support a finding of negligence, but merely refer to this one, which is so apparent and obvious. While, ordinarily, commercial practice may not permit the teller of a bank to constantly make such comparisons, it is certainly the duty of the employee to acquaint himself with the signature of the customer; otherwise, the latter would have no protection whatever against forgeries.

[4-8] Taking up, first, the appeal of plaintiff, it is contended that the court erred in directing a verdict for the defendant. Respondent seeks to uphold the directed verdict covering the checks cashed during the months of November and December, 1931, and January, 1932, upon two grounds: First: That the failure of the plaintiff to notify the bank within a reasonable time, of any error or forgeries, gave rise to an account stated between the parties; and, Second: That plaintiff was bound by the terms of the contract to give such notice within ten days "after the expiration of the time covered by this statement", and having failed to give such notice, he had no recourse whatever against the bank. Conceding that there is sufficient evidence of negligence on the part of the bank, it is nevertheless contended by the respondent that the two defenses mentioned above are so conclusively proven that the jury had no alternative but to sustain them, and that as a matter of law no other verdict was reasonably possible. If this contention is correct, the action of the trial court in directing a verdict should be sustained. "The question as to whether a bank is guilty of negligence in paying a forged check drawn upon the account of a depositor therein is equally one for the determination of the jury after the actual payment of a forged check has been established. So, also, the question as to whether a depositor has exercised due care in promptly examining his passbook, paid checks, or a statement of his account is for the decision of the jury. Leather Mfg. Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811. It is error to withdraw the case from the jury if there is any substantial evidence to support the liability of the bank therefor. The well-established rule with respect to the liability of a bank for the payment of a forged check from the account of a depositor therein is expressed in the case of Union Tool Co. v. Farmers' & Mechanics' Nat. Bank of Los Angeles, 192 Cal. 40, at page 46, 218 P. 424, 426, 28 A.L.R. 1417, as follows: 'It is a well-settled general rule that as between a bank and its depositor the bank is only warranted in paying out the money of the depositor on his genuine order and in accordance therewith. If payments be made on a forged check, with no attendant circumstances sufficient to create an equitable estoppel as against the depositor, or there has been no prior negligence by the depositor contributory to the payment of the check, no degree of care on the part of the bank will excuse it from liability.' We may not say as a matter of law that the plaintiff was guilty of negligence which contributed to a justifiable payment of the forged checks by the bank merely because he left his blank checks, green ink, and protectograph on his desk in his private office in his home. He may not be deemed to have reasonably anticipated that some thief and forger would procure a skeleton key and unlawfully enter his home in his absence to obtain these means of forging the checks. At least that question of negligence was for the determination of the jury. The authorities appear to hold that when the bank is guilty of negligence in the payment of a forged check, in the absence of an agreement to the contrary, it may be liable for the payment of a forged check even though the depositor has neglected to promptly examine his passbook or statement of account so as to discover the error. It is said in that regard in the case of Glassell Dev. Co. v. Citizens' Nat. Bank of Los Angeles, 191 Cal. 375, at page 380, 216 P. 1012, 1014, 28 A.L.R. 1427: 'The weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his

duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks. * * * This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when, by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts.'" Frankini v. Bank of America etc., 12 Cal. App.2d 298, 55 P.2d 232, 234. "If it (the bank) was negligent; if its officers are found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the subsequent negligence of the depositor, his failure to perform his duty in examining his pass-book and vouchers with reasonable care, and to report to the bank, in a reasonable time, any errors or mistakes, *would constitute no defense.*" 7 Am.Jur., p. 371, par. 516, citing numerous authorities. Summarizing briefly the rule as it pertains to the contentions here, it appears that though one is bound under the law to use diligence in examining his account after it is received from the bank, he is nevertheless excused from performing such duty if in fact the bank has failed to use ordinary care in detecting the forged signatures.

[9, 10] Taking up the defense of "account stated," there are in reality three accounts involved in the directed verdict. It is undisputed that the bank was notified of the forgeries when they were first discovered by plaintiff, on February 11, 1932. The first statement was mailed and received by plaintiff on or about November 30th; the second, on December 31st, and the third on January 29th. Each statement contained some canceled forged checks. There are therefore three varying periods of time to be considered. It appears without question that such defense is here predicated upon the silence and acquiescence of the customer, under the rule that if the account is sent to the debtor and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated. 1 Cal. Jur. 197. But as we have seen, mere acquiescence is no defense where there is evidence of actual negligence on the part of the bank. This rule, if logically applied, would seem to be broad enough to cover any conduct of the customer in respect to failure to examine accounts, which conduct amounts to mere acquiescence, and hence would apply to the defense of accounts stated under the facts here. The basis of such defense is the mere passive conduct on the part of the customer, and we see no reason why the rule laid down in the Glassell case, above cited, should not, with equal force and logic, be applied to the defense of mere acquiescence, no matter what form it may take. If we have a given state of facts which, under the rule laid down by the courts of this and most jurisdictions, constitute no defense in an action of this character, can this rule be nullified in its application by merely designating that defense as an "account stated"? Unless there is some magical implication in the words last quoted, the answer must be in the negative. Furthermore, we are not prepared to hold, as a matter of law, that each of the varying periods of time was unreasonable in length. Those issues should be submitted to the jury under appropriate instructions, and the jury should not be deprived of the right to pass upon them.

It follows that a defense based upon the theory of accounts stated, where acquiescence alone is relied upon, is not in itself such an absolute defense to this action as to preclude the jury from passing upon the question of the negligence of the defendant. A very similar case is that of Wussow v. Badger State Bank, 204 Wis. 467, 234 N.W. 720, 721, 236 N.W. 687. There, a recovery against the bank upon forged checks was affirmed. The pertinent facts are as follows: "The plaintiff made no examination of his returned checks at all. He received paid checks and accompanying statements from the bank at intervals, *signing at each time a receipt reciting that he agreed to 'examine same carefully and report all differences, or missing vouchers, if any, within ten days, otherwise the account will be considered correct.'* Each bank statement contained the following: 'Please examine at once. If no error is reported in ten days the account will be considered correct,' and 'all items are credited subject to final payment.'"

The court disposed of the defense of account stated, based upon the signed writing, in the following language: "The defendant also contends that the court should have awarded judgment in its favor because the statements received by the plaintiff constituted an account stated. It is urged that the recitals printed on the signature card and on the statements themselves mentioned in the statement of facts support this contention. The recitals, except as to the ten day provision, do no more than state the implied legal obligation of the depositor. A bank can hardly limit the depositor's time to make examination or fix the effect of omission to do so by 'setting a trap for the unwary' in this way. Only by affirmatively showing that the depositor expressly so agreed, by having his attention called directly to it, could such a statement have the force of a contract. Los Angeles Inv. Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193. The testimony of the plaintiff that the statement was never called to his attention or noticed by him precludes giving to the statement the dignity and effect of a contract, either to constitute the statements accounts stated or relieve the bank from its liability for payment of forged checks."

[11] We will take up next the defense that the "Authorization to Mail Statement and Vouchers" constituted a contract, and that the failure to notify the bank within ten days after receipt of the statement absolutely precluded a recovery. The undisputed evidence shows that plaintiff signed this writing without reading the same, and that the provisions of the writing were never called to his attention by the bank. It will be noted that the writing purports to obligate the depositor in requiring him to give notice of errors, but no corresponding or reciprocal promise is made on behalf of the bank; *in fact the bank does not agree or promise to perform any act whatever.* It may, or may not, at its option, mail a statement of the account. Furthermore, the time from which the ten day period begins to run is fluctuating, vague and indefinite. This time is fixed in the following language: "Within ten days after the expiration of the time covered by the statement." An examination of the statement admitted as exhibits here fails to show any designation of the "time covered by this statement". We are in full accord with the rule invoked by respondent bank in its opening brief, as laid down in the case of Beeson v. Schloss, 183 Cal. 618, 192 P. 292, 294, where it is said: "It is a well-settled proposition of law that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, *and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way.* [Citing many cases.]"

[12] Respondent further states that the provision of the contract for the giving of notice within ten days is binding upon the parties, *unless it can be said that such period is so unreasonable as to show imposition or undue advantage.* We are of the opinion, however, that the contract here is unreasonable for the reason that it *does* show imposition and undue advantage. An imposition is defined as "An excessive, unwarranted or uncalled for requirement or burden." Webster's New International Dictionary, 2d Ed. We believe that the terms of this contract, relating to the time when the ten day period commences to run, as explained above, stamp this so-called contract as an imposition upon the customer, and that the placing, in large type at the top of the printed card, of words which referred to comparatively inconsequential matter, instead of emphasizing a clause, the ignoring of which might mean financial ruin to the depositor, would appear to be so misleading as to come under the category of an undue advantage. This is the plain implication of the reference by the Supreme Court to a writing identical in *form,* though not in language. It was there characterized as a "trap for the unwary". See Home Savings Bank case, following. This is also the inference which may be drawn from the following reference to this identical writing when it was before this court in the former appeal, though its validity was not adjudicated. Speaking through Mr. Justice Thompson we said: "But the instrument was presented to him as a mere written request for monthly statements. This instrument was retained by the bank. Section 340, subdivision 3, of the Code of Civil Procedure allows one year in which to commence an action against a bank for the payment of a forged check, and yet this written document limits the time for challenging the wrongful payment to ten days 'after the expiration of the time covered by the statement.' It will be observed the depositor is not even allowed ten days from the time of receiving the statement from the bank. Under a strict construction of that language, the transmission of the statement might be delayed by the bank until the de-

positor would have no time or opportunity to challenge its accuracy." [55 P.2d 232, 234.]

[13-15] No case has been called to our attention where such a contract as now under consideration has been upheld. In the case of Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193, the writing involved required the depositor to report any errors in the statement "within ten days after *receipt* thereof". Nevertheless, the court there characterized the writing as a "trap for the unwary", and refused to give any contractual effect to it, for the reason that it was unsigned and attention of the depositor was not specifically called to the provision in question. As noted, however, *that* contract was not subject to the infirmity inherent in the one here considered. Zollman, in his late work on "Banks and Banking", referring to "Special Contract by Depositor", and concluding the section upon that subject, adds: "Nor will the courts indulge in a liberal construction of their terms in favor of the bank." Vol. 5, page 377, § 3404. We therefore conclude that the writing in question, if it can be said to have the form of a binding agreement, is unreasonable and void. In reaching this conclusion we believe that the power of the courts to carefully scrutinize transactions of this character is derived through the right of the State to exercise police power over banking institutions, and from the inherent nature of the business conducted. "Though banks are organized and financed by private individuals for personal gain, they are in a sense public institutions, subject to legislative regulation, examination and control. It is therefore well established that the State, under its police power, may regulate the banks within its borders". Zollman on Banks and Banking, vol. 9, pages 10 and 11, § 5722. "In the progress made in the industrial and economic world within comparatively recent years, the business of banking has ceased to be, if indeed it ever was, a purely private enterprise. Such business affects so intimately the commercial welfare and business interests of the people as to render it a proper subject of regulation by the state in the exercise of the police power. People v. Bank of San Luis Obispo, 154 Cal. 194, 97 P. 306. The public patronage which the banker invites and receives is of such a character that *he becomes, in a just sense, the trustee of the fiscal affairs of the people of the state.* State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A. 1915E, 675." Bank of Italy v. Johnson, 200 Cal. 1-12, 251 P. 784, 788.

Throughout its presentation of this phase of the appeal, respondent adheres to the view that a contract between a bank and customer should be viewed in the same light as contracts in general, irrespective of the quasi public nature of the business in which one of the parties is engaged. The error of this view is plainly set forth in the case of Meadowcroft v. People, 163 Ill. 56, 45 N.E. 991, 992, 35 L.R.A. 176, 54 Am.St.Rep. 447, where it is said: "The contention is that every person living under the protection of our state government has the right to be engaged in the prosecution of any one of the ordinary and common callings or business pursuits that is innocent in itself, and has been followed from time immemorial, on the same terms that govern those engaged in other ordinary and common callings or business pursuits of life, and, as incident thereto, has the right to make the same contracts relative thereto as those engaged in such other ordinary and common callings or business pursuits are allowed to make; * * *. The fundamental error in the contention thus formulated is the assumption that the business of banking stands upon exactly the same footing that the ordinary industrial pursuits of farming, merchandising, manufacturing, and mining, and the many other common occupations of life, stand upon. The business of a banker is not juris privati only, but, like that of an innkeeper or common carrier, is affected with a public interest, and therefore subject to public regulation."

[16] Summarizing the entire matter with reference to the appeal of plaintiff, it appears that there is in the record sufficient evidence of negligence on the part of the bank in cashing the forged checks to justify a finding by the jury to that effect; that neither of the two defenses, based on the account stated and the contract between the parties, was established to the extent that they, or either of them, absolutely precluded the jury from considering the negligence of the defendant, and therefore the court was not, by reason of the proof of such defenses, justified in instructing the jury to find for the defendant.

[17] Taking up the appeal by defendant from the order granting the motion for new trial, it appears that such motion was granted upon the ground that the evidence was insufficient to sustain the verdict. "The rule is well established that the granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the *discretion of the trial court* that its action is conclusive upon this court, unless it appears that there has been an abuse of discretion." (Italics ours.) Springer v. Pacific Fruit Exchange, 92 Cal. App. 732–734, 268 P. 951, 952.

[18] What we have said upon the appeal by plaintiff is equally applicable on *this* appeal. There was evidence which would justify a finding by the jury to the effect that defendant was guilty of negligence. The defenses set up did not conclusively negative such negligence. It was still a question for the jury. If the trial court was not satisfied with the sufficiency of the evidence to sustain a verdict, it had the right to grant a new trial, in the exercise of sound discretion. We cannot say that such discretion was here abused.

That portion of the judgment resulting from the directed verdict is reversed. The order granting a motion for new trial on the other issues is affirmed. Plaintiff to recover costs on appeal.

I concur: THOMPSON, J.

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31 Cal.App.2d 705

ABOS v. MARTYN.

Civ. 11649.

District Court of Appeal, Second District, Division 1, California.

March 27, 1939.

Hearing Denied by Supreme Court May 25, 1939.

1. Negligence 🔑108(2)

Negligence may be charged in general terms by saying that something was negligently done without stating the particular omission which rendered the act negligent, if it appears from the facts averred that the negligence caused or contributed to injury.

2. Pleading 🔑205(2)

A complaint alleging that designated chiropractic treatments were negligently administered sufficiently alleged negligence as against general demurrer and in absence of special demurrer.

3. Pleading 🔑406(7)

A chiropractor sued for alleged negligent treatment resulting in death of patient waived any right to greater certainty in pleading of negligence by his failure to interpose special demurrer.

4. Pleading 🔑428(1)

An objection to introduction of any evidence has effect of general demurrer.

5. Physicians and surgeons 🔑18(8)

Evidence warranted recovery for death of patient on ground that chiropractor's treatment was not of that degree of care, diligence, and skill possessed and used by prudent, skillful, and careful practitioners of medicine practicing in the same vicinity.

6. Physicians and surgeons 🔑14(3)

A physician does not guarantee to effect a cure of patient in absence of special contract, and does not guarantee against unusual consequences or results during treatment.

7. Physicians and surgeons 🔑14(4)

A medical practitioner is required by law to use same degree of care, diligence, and skill in treatment of his patient as is possessed and used by prudent, skillful, and careful practitioners of the same school practicing in the same vicinity.

8. Evidence 🔑538

In action for death of patient whom chiropractor was alleged to have negligently treated, testimony of physicians of allopathic, as distinguished from chiropractic, school, was admissible.

9. Appeal and error 🔑1002

The District Court of Appeal is not concerned with a conflict in the evidence where there is competent evidence to support the judgment.

10. Trial 🔑109

In action for death of patient whom chiropractor was alleged to have negligently treated, refusal to grant motion for nonsuit on ground that opening statement by plaintiff's attorney did not state cause of action was not error where attorney merely undertook to epitomize the facts from which he expected the jury to be warranted in finding that chiropractor did not use the degree of care used by prudent practitioners of his school practicing in the same vicinity.

11. Death ⚷99(3)

$10,000 to mother for wrongful death of 6-year-old son was not excessive.

12. Appeal and error ⚷1004(1)

An award of damages will not be set aside on appeal if amount thereof is not so outrageously excessive as to suggest at first blush passion, prejudice, or corruption.

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Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Lucia Abos against Clyde A. Martyn, a licensed doctor of chiropractic, for damages for alleged negligent treatment resulting in the death of the plaintiff's son. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

H. J. Gwartney, of Los Angeles, George G. Rinier, of Indianapolis, Ind., and Thomas Morris, of Los Angeles, for appellant.

De Forrest Home and Eugene Kelly, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by defendant, a licensed doctor of chiropractic, from a judgment against him for $10,000, entered upon the verdict of a jury, as well as from an order denying defendant's motion for judgment notwithstanding such verdict.

By her second amended complaint plaintiff alleged, in substance, that defendant held himself out to be a duly licensed and competent doctor of chiropractic in the city of Los Angeles and undertook for compensation the diagnosis and treatment of an illness of plaintiff's minor child, the nature of which illness was unknown to plaintiff, and "in his capacity as a doctor of chiropractic" for a period of five months continuously treated the child; that, according to plaintiff's information and belief, at the time of the diagnosis and during the treatments the defendant did not possess or employ the knowledge, skill and learning commonly possessed and employed by chiropractors in the same locality; that defendant so carelessly and negligently diagnosed and treated said child that as a proximate result thereof the child's malady grew worse until, on or about April 23, 1933, the child died; that had defendant used or possessed that degree of skill and learning commonly possessed by practitioners of the same profession in the same locality, or had he diagnosed or treated the plaintiff's child with reasonable care and skill, the child's illness would have been cured; and that the death of said child was directly and proximately caused by defendant's lack of, and failure to exercise, that degree of knowledge and skill commonly possessed by members of the defendant's profession practicing in the same locality and by the negligence and carelessness of the defendant in diagnosing and treating the illness of plaintiff's child.

It was stipulated, in lieu of an answer, that all material allegations of the second amended complaint should be deemed denied.

[1] Appellant urges that the court erred in overruling his objection to the introduction of any evidence by plaintiff on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that it sets forth no facts showing any negligent act or omission nor any facts showing a causal connection between any act or omission of defendant and the death of the patient. The general rule, as stated in Smith v. Buttner, 90 Cal. 95, 27 P. 29, is that "negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury".

[2-4] It sufficiently appears from this complaint that what was done by this defendant was the administration of chiropractic treatments, which treatments, it was alleged, were negligently administered. Having alleged what was done and that the same was negligently done, the complaint was sufficient in the absence of a demurrer. While the defendant might have insisted upon greater certainty and particularity, he waived such defects by failure to interpose a special demurrer. As against a general demurrer, which is what an objection to the introduction of any evidence amounts to, the complaint is sufficient.

Plaintiff testified that she was the mother of the deceased child, Leopold Abos; that about three weeks before December 1, 1932, she noticed that he was "stooping a bit"; that the boy said it was painful for him to stand erect since a boy bumped him at school; that about December 1 he developed a weakness in the legs, and on the same date she and her husband took the boy to the office of Dr. Martyn, who took two X-rays and told them that the second X-ray showed the third vertebra to be misplaced and that it should be adjusted; that Dr. Martyn said, "Don't treat him like a sick person, because he is not sick." That Dr. Martyn gave the boy an adjustment at that time; another two days later, and again on the fifth and seventh of December; that after four or five adjustments the child developed fever, his temperature running around 100, and after that Dr. Martyn came to the boy's home to give adjustments; that he advised the parents that the boy should be kept in bed and on a liquid diet because of the fever and the adjustments should be continued; that Dr. Martyn continued to call and give an adjustment about every three days until about a week before the boy's death, which took place on April 23, 1933; that plaintiff had several conversations with Dr. Martyn with reference to the child's condition; that she asked him whether another doctor should be called in, to which he replied that "no doctor could do more than what he was doing"; that "the only thing the boy had was a certain pressure on the spinal cord, on account of the misplaced vertebra, and he was doing the best thing, and nothing more could be done for the child".

The child's mother further testified that throughout the period of treatment the child's condition "changed progressively every day. He was losing vitality and paralysis was coming from the legs to the arms, and he was completely paralyzed;" that he lost weight and color, and complained of pain when the adjustments were being given.

On cross-examination plaintiff testified that she knew defendant was a chiropractor; that she saw his advertisement in a newspaper; that he did not give the boy any medicine, and the only treatments he rendered were spinal adjustments; that after she dismissed the defendant she secured the services of another chiropractor.

Raymond D. Abos, brother of the deceased, testified to substantially the same effect as plaintiff, and also to a conversation between plaintiff and defendant, in which plaintiff asked defendant if he thought they were doing the proper thing for the child, to which defendant replied, "Yes, I have had these cases before, and I know that nothing I am doing can be done for the child by anyone else, and that the treatments that he is receiving are about all that he can get. *His illness is nothing but a matter of pressure upon the spine, and the only way that it can be adjusted, or, rather, that the child can be brought back to normal, is through adjustments.* And that, also, he will get worse—there is no doubt about that—and when he is cured, he will practically have to learn to walk all over again." The brother also testified to a conversation two or three weeks before the child's death in which Dr. Martyn expressed the opinion that the vertebra were practically in place and the child's illness would soon be over.

The defendant, called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, testified that he took two X-rays of the spine and found *"a subluxation of the second cervical vertebra, impinging the nerves, and causing a congestion in the cord"*, as well as a *"rotation of the second, third and fourth cervical"*; that *"subluxation is a misalignment of one vertebra with the one above or the one below, or both, causing pressure upon a nerve"*; that he made an examination of the spine with his hands; that he made no laboratory tests, urinalysis, blood count, or other test, except the X-ray and the examination of the spine; that he found no abnormality, swelling, tumor, contusion or abrasion, other than the condition of the second cervical vertebra. He then testified, in part:

"Q. Did you make any diagnosis of his condition at that time? A. In chiropractic, we don't use the term 'diagnosis'. I take it that you want to know if I placed a name on his condition?

"Q. Yes. I want to know if you came to a conclusion? A. Yes, I came to a conclusion, but in chiropractic, we term it 'analysis', instead of 'diagnosis'. * * * My analysis was that he had a subluxation of the second cervical vertebra, causing an impingement of the nerves at that point. * * *

"Q. Well, was that an impingement of the nerves or of the cord? A. Well, it might have been from both. It was apparent from his condition that there was inflammation of the cord. The inflammation might have been from pressure on the spinal nerves, or upon the cord, itself.

* * *

"Q. So, it was your finding and your conclusion that at all times, from the time of your first treatment to the last, there was some inflammation and congestion of the spinal cord at the region of the cervical vertebrae? A. Yes."

Frank R. Webb, physician and surgeon, associated with the office of the county coroner, testified that he performed an autopsy on the body of deceased, which examination "showed the body thin, the lungs congested, the left lung being pneumonic, and both lungs studded with small tubercular tubercles. The heart, liver and stomach were normal. * * * *There was no evidence of spinal or other injury.* * * * I had been informed that there was some spinal condition existing, and I therefore examined the spine to see if I could find any abnormality, which I did not find."

"Q. Assuming, Doctor, that this boy, upon whom you made this autopsy, had been treated for approximately four months and twenty days, before the date of the autopsy, by chiropractic adjustments of the second cervical vertebra; that at the time of the first adjustment, the boy was suffering from the beginnings of slight paralysis or limitation of motion of the lower extremities,—that is the two legs; that at that time his lungs were clear,—there was no evidence of tuberculosis in the lungs; that after the adjustments commenced he ran a constant, low temperature,—by that I mean a temperature of from 100 to 101 most of the time during the latter part,—I think the testimony was that it was occasionally as high as 103; that X-rays of the spine showed merely a slight subluxation of the second cervical vertebra; taken together with the findings which you made at the autopsy, are you able to state, or do you have an opinion as to what the boy was suffering from five months before,—at the beginning of the chiropractic adjustments?"

Over objection, the witness answered: "My opinion of the condition or diagnosis of the state of health of the boy at the early stage of this treatment would be a tuberculosis of the meninges of the brain, or coverings of the brain. At that time, he showed paralysis, which is a typical symptom of early meningitis. Tuberculosis may begin in any part of the body. The fact that the lungs were clear does not dispel the idea of tuberculosis. It could have started in some of the lymph glands of the body, or it could have started in the brain coverings, themselves. Subsequently, this tuberculosis became more general, and extended into the lung tissue. At the time of the autopsy, it showed a diffuse pulmonary tuberculosis.

* * *

"Q. What is the medical effect of a chiropractic adjustment upon the cervical vertebrae,—particularly the second cervical vertebra, when tuberculosis of the spine exists? * * * A. *It would be detrimental, as rest and quiet would be absolutely indicated in those cases, and that would not pertain to rest and quiet.*

"Q. Would it accelerate or increase, in your opinion, the inflammation existing? * * * A. It would."

This witness also testified that an examination of the X-rays which were taken by defendant, disclosed to him *no indication of dislocation, maladjustment or malposition of the vertebrae, no pathological condition, and no indication of any tubercular condition.* He further testified that in his opinion, from the history of the case, his examination of the deceased and the X-rays had the condition been properly diagnosed and treated by rest and quiet, his chances of recovery would have been a great deal better; that by means of various tests the existence of tuberculosis in the human body can be positively determined.

Dr. Gustave F. Boehme, M. D., a diagnostician, testified that the X-rays indicated no dislocation or pathologic change, nor evidence of tuberculosis in the lungs; and in response to a hypothetical question containing the history of the case, stated that in his opinion the boy was suffering from "some form of meningetic irritation, probably tubercular in character", at the time he was first taken to Dr. Martyn; and that manipulation or adjustment of the spine would aggravate any condition present and accelerate the progress of the disorder; but that with rest, immobilization and proper diet the chances for recovery would be comparatively great; also that there can be an acceleration of pulmonary tuberculosis by such manipulation, and that in his opinion the adjustments in this case probably did accelerate the process.

John W. Koer, a chiropractor, testified that if the bony vertebrae were diseased "an adjustment probably was not the thing to do, so far as the meninges were concerned,—tubercular meningitis, yes,—an adjustment could be given and relief expected; * * * with tuberculosis of the spine,—the bony spine, it is not good practice". He further testified that the X-ray disclosed no evidence of tuberculosis of the spine, and that, according to the standards of skill and care required by chiropractors usually in this locality, it would be perfectly safe, he thought, to adjust the spine pictured in the X-ray, but if the spine were tubercular, adjustment would be contra-indicated; that the Los Angeles College of Chiropractic taught "general diagnosis" and the use of the blood count, urinalysis and sputum tests; but that he did not know whether the use of these tests was approved by the school of which defendant was a graduate. He further testified:

"Q. Assuming that a patient was given chiropractic adjustments of the second cervical vertebra over a period of four and one-half months, and that during that period the patient got progressively worse and progressively more paralysis, and a progressively higher fever, and was progressively weaker, in your opinion, would it be good chiropractic practice to continue the adjustments? * * * Over a period of four and one-half months, would it indicate to you, as a doctor, that some other method of treatment should be followed? A. Other treatment might be tried."

Dr. Vincent Askey, M. D., testified that in his opinion, from the history given, the patient was suffering from a secondary tuberculosis of the spinal column, of the spinal cord, an infection which had come from a primary source, probably the lungs; that the fact that the X-ray showed the lungs clear did not mean there could not already be tuberculosis of the lungs, which is sometimes shown only by repeated fine X-rays; that sometimes a secondary infection is found before tuberculosis is found in the lungs; that chiropractic adjustments or any motion of that type would be contrary to the well-known treatment of tuberculosis, which is absolute bed rest, and includes, if there be spinal involvement, an absolute cast fixation; that an early case, with very little, if any, evidence, if given proper treatment at the onset, in his opinion the child would have recovered. "I would say that the child died because of lack of *proper medical attention,* sanitary care, and proper fixation."

[5-7] Appellant's contention that the evidence is insufficient to justify the verdict cannot be sustained. There is very substantial evidence in the record from which the jury could infer that the course of treatment persisted in by the defendant was not of that degree of care, diligence and skill possessed and used by prudent, skillful and careful practitioners of medicine practicing in the same vicinity. While it is true that a physician in treating a patient, in the absence of a special contract so to do, does not guarantee to effect a cure (Perkins v. Trueblood, 180 Cal. 437, 181 P. 642), and that he does not guarantee against unusual consequences happening during the course of such treatment nor unusual results therefrom; nevertheless, a practitioner is required by law to use the same degree of care, diligence and skill in the treatment of his patient as is possessed and used by prudent, skillful and careful practitioners of the same school practicing in the same vicinity. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Hopkins v. Heller, 59 Cal.App. 447, 210 P. 975.

[8, 9] Appellant's claim that the testimony of the physicians called by respondent should have been excluded because they were of the allopathic and not the chiropractic school, is without merit. Ellinwood v. McCoy, 8 Cal.App.2d 590, 594, 47 P.2d 796. Determinative of this point is the language of the Supreme Court in Hutter v. Hommel, 213 Cal. 677, 681, 3 P. 2d 554, 556, as follows: "We might add that we are cited to no rule obtaining in this jurisdiction and know of none which would preclude a physician trained in one medical school from testifying in a proper case as to the treatment rendered by a physician or surgeon trained in a different school. Such a rule might be promulgated where charges of negligence in a malpractice case are directed toward some special course of treatment to be tested by the general doctrine of a particular school, but it is not applicable to a case of this character where the alleged malpractice is based upon general charges of negligence relating largely to matters of almost common observation within the experience of every physician and surgeon." The evidence of allopathic physicians being com-

petent, the same provided testimony of sufficient substantiality, if believed by the jury, to warrant the latter in finding, as by their verdict they did, that the defendant did not exercise that degree of skill and care commonly exercised by persons practicing the medical profession in the same locality. Rankin v. Mills, 207 Cal. 438, 278 P. 1044; Johnson v. Clarke, 98 Cal.App. 358, 276 P. 1052. The fact that other medical witnesses testified to the contrary merely established a conflict, with which this court cannot be concerned where there is competent evidence to support the judgment. The testimony of appellant's witnesses, who were chiropractic doctors, merely contradicted respondent's evidence, and of itself furnishes no grounds upon which to reverse the judgment.

[10] Appellant's contention that the court erred in refusing to grant a motion for a nonsuit upon the ground that the opening statement to the jury made by respondent's counsel did not state a cause of action, is without merit. In his opening statement to the jury, respondent's counsel undertook merely to epitomize the facts from which he expected the jury to be warranted in finding that appellant did not use the same degree of care, diligence and skill in this case as is possessed and used by prudent and skillful and careful practitioners of his school practicing in the same vicinity. A reading by us of the opening statement made by respondent's counsel to the jury convinces us of the correctness of the court's ruling. Neither do we find any error in the rulings of the trial court upon hypothetical questions asked of expert witnesses during the trial.

[11, 12] Appellant next complains that an award of damages in the sum of $10,000 for the wrongful death of plaintiff's six-year-old son is excessive. Reviewing the decisions of the appellate courts of this state in similar cases, we cannot hold as a matter of law that the sum of $10,000 in damages is excessive. As was said in Clark v. Tulare Lake Dredging Co., 14 Cal.App. 414, 434, 112 P. 564, 572, "the jury were authorized, as the court properly instructed them, to consider and take into account, as an element affecting the pecuniary value of the service of deceased to the plaintiff, the fact that plaintiff has, by his death, been deprived of the comfort, society and protection of her son. * * * And, obviously, this element of loss of society, comfort and protection of the son to be reckoned in determining the pecuniary value of the service of the deceased to his mother is difficult to measure in mere dollars and cents, and manifestly must, with the whole question of damages, be left to the good sense and sound discretion of the jury to be exercised in the light of all the circumstances of the case." See, also, Hill v. Peres, 136 Cal.App. 144, 28 P. 2d 944, and Frazzini v. Cable, 114 Cal.App. 444, 300 P. 121. The facts and circumstances in the instant case do not warrant us in saying that the amount of damages awarded is so outrageously excessive as to suggest at first blush passion, prejudice or corruption, and therefore it cannot be set aside on appeal. Connor v. Henderson, 108 Cal.App. 237, 242, 291 P. 641.

It would unduly prolong this opinion to here set forth the instructions, the giving and refusing of which appellant urges as being erroneous. Suffice it to say that we have read the questioned instructions, and from a reading of all the instructions given we are convinced that the jury was fairly and correctly advised as to the law applicable to the facts of the case. Nowhere do we find error that prejudiced in any wise appellant's rights to a fair and impartial trial.

For the foregoing reasons the judgment and the order denying the motion for a judgment notwithstanding the verdict are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

13 Cal.2d 236

KENNEDY v. STATE BAR OF CALIFORNIA.

S. F. 16061.

Supreme Court of California.

March 30, 1939.

Rehearing Denied April 27, 1939.

1. **Attorney and client** ⚷54

In disciplinary proceeding against an attorney, the proper investigating committee may review any past conduct of attorney, whether or not previously involved in investigation proceedings, to determine whether attorney is imbued with the essential qualities of integrity and honesty, or for any bearing it may have upon his motive, or otherwise on question of the measure of discipline to be applied.

2. **Attorney and client** ⚷53(2)

Evidence regarding attorney's delay in accounting for moneys collected for clients justified disbarment from practice of law.

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In Bank.

Proceeding by Karl F. Kennedy against the State Bar of California to review a recommendation that Karl F. Kennedy be disbarred from the practice of law.

Petitioner disbarred from the practice of law.

Frank Curran, of Fresno, Andrew J. Copp, Jr., of Los Angeles, and Karl F. Kennedy, of Coalinga, in pro. per., for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

On January 12, 1938, the petitioner was served with a notice to show cause why he should not be disciplined for professional misconduct. The local administrative committee of The State Bar, for Fresno county, heard the charges, made its findings of fact, and recommended disbarment. Subsequently the board of governors adopted the findings of the committee and recommended to this court that the petitioner be disbarred from the practice of the law. The petitioner does not dispute the truth of the facts disclosed by the record, but he contends that under all the circumstances a reprimand is a sufficient disciplinary measure to accomplish the end and object of the proceedings before The State Bar.

The petitioner was born in San Jose, California, and is now 59 years of age. It is represented that his family and his family's associates have been prominent in the political and economic history of the state. The petitioner was admitted to practice law in this state in May, 1905, after completing his law studies at Stanford University. The record indicates that the petitioner practiced law in San Jose after his graduation until he enlisted in the World War. From 1918 to 1929 he was not engaged in the practice of the law. In 1928 he suffered personal injuries, including injuries to his head and brain, in an automobile accident. When he was deemed sufficiently recovered, he settled in Coalinga, California, with the intention of starting a law practice there.

In 1932 the petitioner received from Pacific Credit Association of San Francisco for collection the claim of Houbigant, Inc., against Flentge Drug Co. He collected $10 on the account and sent $5 thereof directly to Houbigant, Inc., instead of to the forwarder, retaining the same amount as his "minimum fee", although it was questionable whether he was entitled to more than $3.72.

In the same year Credit Clearing House Adjustment Corporation of New Orleans, La., forwarded to the petitioner a small claim for collection. Within the year he collected $30.91 from the debtor, but failed to remit any amount to the corporation. Upon complaint being made to The State Bar soon thereafter he contended that he had "misplaced" his file; but thereupon he sent his check for $20.61 as the forwarder's proportion of the collection. That check was dishonored but the petitioner later made good the amount.

In 1933 G. O. Berry sent to the petitioner for collection a claim on a promissory note signed by Mrs. Gentry of Coalinga. The petitioner collected $10 on this claim, but failed to report or remit until 1934 and after complaint to The State Bar, whereupon he remitted $7.50 of the collection through the check of one of the members of the committee.

As to the above three matters the acting local administrative committee at that time (1933) determined that further proceedings were not then justified and declined to issue a notice to show cause.

In December, 1936, the board of governors at a meeting held in San Francisco decided that the proceedings in the above three matters should be reopened for further investigation. After the subsequent hearing on the old and the new charges against the petitioner, the local administrative committee for Fresno county determined that the foregoing three charges, because of the lapse of time intervening since the prior investigation, should be dismissed, but that each should be considered only "in the light of its value as evidence of a course of conduct pursued by petitioner".

The following new charges, upon which the notice to show cause was based, were investigated by the committee:

In 1932 the petitioner was employed by Mrs. Arletta J. Enterline to collect money due her from an estate then in course of administration. In April, 1932, he collected $200 for the account of Mrs. Enterline in the form of a check drawn to her order. He sent the check to her requesting her to endorse the same and return it to him, representing that he would remit immediately the proportion due to her. He received the endorsed check and deposited it in his personal account in the bank at Coalinga, and at the same time sent to Mrs. Enterline his check for $157.50. At that time there were outstanding against his account checks aggregating a sum greater than the amount on deposit, so that when his check drawn to Mrs. Enterline was presented for payment it was dishonored. The petitioner, after some correspondence with Mrs. Enterline and in August, 1932, commenced to make small payments to her on account of his indebtedness, and between the latter date and February, 1937, succeeded in repaying to her $75 of the total amount due.

In 1931 the petitioner obtained a judgment for $62.50 against one Burleson on behalf of his client, G. G. Covington. In the same year the justice of the peace before whom the action was tried received the amount of the judgment and remitted the same by check to the petitioner. The petitioner cashed the check and apparently applied the proceeds to his own personal use. He made no report of this collection to Covington until 1936 after the latter learned from the justice of the peace that the judgment had been paid. In the meantime the petitioner had claimed that he did not recall the collection of the amount, and had attempted again in 1933 to locate the debtor and realize on the judgment. When confronted finally with the statement that he had endorsed the check, he contended that it must have been a forgery, as he had no recollection of receiving or endorsing it. Finally in January, 1938, the petitioner paid $36 on the account, claiming 50 per cent of the collection as his fee.

By his own admission to the committee, the petitioner had never read the rules of professional conduct, and had not known that it was improper for him to mingle clients' funds with his own.

[1] The petitioner contends that the committee and the board acted beyond their proper jurisdiction in reconsidering the early charges against him, as to which he claims to have been exonerated. It is not erroneous for the proper investigating committee or board to review any past conduct of an attorney, whether or not previously involved in investigation proceedings. The board is entitled to consider the past conduct as well as that which is directly under investigation, for whatever weight it may have in determining the question whether the attorney is imbued with the essential qualities of integrity and honesty, or for any bearing it may have upon his motive or otherwise upon the question of the measure of discipline to be applied. Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403; McCue v. State Bar, 4 Cal.2d 79, 47 P.2d 268. The record before us contains sufficient evidence that experience alone apparently will not teach the petitioner the rudiments of proper professional conduct. Whatever might be the cause of the failings of the petitioner, whether due to lapses because of prior serious injury, or ignorance of the rules of conduct, or otherwise, such failings may not be condoned. Protection to the public requires that the rules of professional conduct be adhered to. Citation of prior decisions of this court is not necessary to support the conclusion, based on the facts here presented, that the petitioner must be subjected to some period of suspension within which to rehabilitate himself from his past sufferings and conduct. However, inasmuch as it also appears that before reinstatement of the petitioner in the practice of the law a reexamination into the progress made during such period of rehabilitation will become necessary, it is the opinion of the court that the present recommendation of the board of governors should be adopted.

[2] In view of the foregoing we conclude that the petitioner has not shown that the decision and recommendation of the board is erroneous or unlawful. Other matters presented by the petitioner are ex-

traneous to any showing sufficient to meet the burden devolving upon him in this proceeding, and we do not deem it necessary to discuss such matters specifically.

It is ordered that the petitioner be disbarred from the practice of the law in this state and that his name be stricken from the roll of attorneys.

13 Cal.2d 229

GLOVER v. STATE BAR OF CALIFORNIA.

L. A. 16972.

Supreme Court of California.

March 24, 1939.

1. Attorney and client 🔑57

Refusal of Board of Governors to grant a continuance in proceedings charging attorney with professional misconduct was not ground for complaint by attorney, where he apparently failed to attend hearings before local administrative committee in person, or take advantage of opportunity to offer any defense to charges.

2. Attorney and client 🔑57

In proceedings charging an attorney with professional misconduct, attorney must present any available favorable evidence to local administrative committee and the Board of Governors, and cannot withhold his activities in that respect and then demand in petition for review by Supreme Court either that such evidence may be considered by Supreme Court, or that he is entitled to another hearing in order to have it considered by appropriate body.

3. Attorney and client 🔑44(2)

Conduct of attorney apparently consisting of misappropriating money intrusted to him by clients and, when called upon to account, executing checks upon an account in which there were insufficient funds, warranted disbarment.

In Bank.

Proceeding by George A. Glover against the State Bar of California to review the action of the Board of Governors of the State Bar recommending that petitioner be disbarred.

Petitioner ordered disbarred.

George A. Glover, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

WASTE, Chief Justice.

Three charges of professional misconduct involving moral turpitude were filed with the respondent State Bar against the petitioner, an attorney at law. At the conclusion of its hearings, only one of which petitioner attended in person, the local administrative committee filed its report with the board of governors wherein it recommended that petitioner be disbarred from the practice of the law. The board, in turn, held a hearing and has similarly recommended disbarment of the petitioner.

In his petition to review such recommendation, the petitioner merely complains of the refusal of the board of governors to grant a continuance when the matter was before that body. When this was pointed out in the brief of The State Bar and reference made to the fact that "petitioner does not question the sufficiency of the evidence to sustain the findings of fact adopted by the board", petitioner in his reply brief stated that he "does earnestly and seriously question the sufficiency of the alleged evidence * * *". However, he has since made no effort to point out any deficiency in the evidence or findings, satisfying himself with the statement that he "does not desire to occupy the time of this * * * court in discussing the alleged evidence, until such time as the record is sufficient and complete and all material facts bearing on the charges are before this court". The refusal to grant the requested continuance before the board of governors underlies this statement.

[1, 2] An examination of the entire record convinces us that petitioner had ample opportunity to develop "all material facts bearing on the charges". Three hearings were held before the local administrative committee at which the several charges against petitioner were fully developed. Though personally served, petitioner failed to file an answer to the charges against him and he found it convenient to attend but one of the three hearings in person. At the

first and third hearing he was represented by an office associate who, by reason of petitioner's attitude in the matter was not entirely clear as to his authority or status in the proceeding. At the conclusion of the second hearing, which petitioner attended in person, he stated that he had no further evidence which he desired to produce in the so-called "Rust matter". His office associate appeared at the third and final hearing and stated that petitioner declared it to be immaterial to him whether the hearing was held or continued. It was held on May 3, 1938, and at the conclusion thereof, petitioner's representative was informed that the committee would hold the whole matter open for a week "with the understanding that [petitioner] may have an opportunity to come in and offer any evidence he may have". One week later, or on May 10th, the matter was submitted after petitioner's associate had indicated that petitioner did not desire to offer any further evidence and would not again appear without subpoena. Under date of July 22, 1938, petitioner was informed by letter of the report of the committee, a copy of which was enclosed. He was also informed of his right to file a statement in opposition to such report and of his right to appear before the board for further hearing on August 19, 1938. On July 28th, petitioner sought by telegram to procure a continuance of the hearing before the board "on account of involved nature of cases and number of persons concerned and summer vacations seem impossible to properly prepare for hearing". Petitioner was immediately informed that his request for a continuance would have to be presented to the board at its scheduled meeting and that he should be prepared to proceed in the event the request was denied. Other telegrams and letters were exchanged on the subject. When the board met on August 19th as noticed, petitioner failed to appear and likewise failed to offer or file any statement in opposition to the report of the committee. A continuance was denied and the board heard and determined the proceeding in petitioner's absence. This chronological statement of the case speaks for itself. It points irrefutably to the conclusion that petitioner at all times was afforded full opportunity to offer any defense he might have to the several charges pending against him. He did not seriously avail himself of this opportunity but, on the contrary, appears to be procrastinating. His contention that he was improperly denied a continuance and an opportunity to be heard lacks merit. As stated in Shaeffer v. State Bar, 220 Cal. 681, 32 P.2d 140, 142, "the practice * * * requires that the attorney present evidence available to him which he deems favorable to himself, to the local committee and the board, where such evidence may appropriately be received, and he may not neglect or withhold his activities in that respect and then successfully demand in his petition for review either that such evidence may properly be considered by this court or that he is entitled to another hearing in order to have it considered by the appropriate body." See, also, Tapley v. State Bar, 8 Cal.2d 167, 170, 171, 64 P.2d 404.

[3] Inasmuch as petitioner fails to point out any deficiencies in the evidence or findings, we do not intend to here narrate in detail the charges against him. Examination of the record definitely indicates that the charges were fully established by the evidence and that the punishment recommended therefor is proper. In the so-called "Rust Matter" it appears that on October 25, 1937, petitioner received on behalf of his client a cashier's check in the sum of $1,995, by way of settlement of a claim. From that time until February 21, 1938, a period of 117 days, petitioner failed to notify his client of the receipt of such money. On the latter date, he informed his client thereof and requested the client to call at his office. When the client called, some one in the office delivered to him a check in the amount of $1,950, drawn on "Trust Account #7" and signed by petitioner. The check was dishonored when presented for payment for at none of the pertinent times did petitioner have sufficient funds in the account to cover the check. In fact, a copy of the bank statement introduced in evidence discloses that between February 1 and February 21, 1938, the account varied from $3.50 to a high of $62.50 and to a low on the latter date of ten cents. Complaint was thereupon made by the client to The State Bar as a result of which $200 was paid to the client and petitioner agreed to pay $100 a month until the obligation was discharged. During the committee hearings petitioner made one payment of $100, leaving a balance still owing of $1,650.

In the "Abraham Matter" petitioner unsuccessfully represented a client on a counterfeiting charge. He was paid a stipulated fee. Thereafter it was agreed between the parties that petitioner should be paid an additional amount of $500 to cover proceedings intended to establish the client's insanity or, failing in this, for an effort on his part to secure a reduction of the client's sentence from 12 years to 3 years, or less. It was also agreed that $400 of this sum was to be returned by petitioner should he be unsuccessful. The record fails to disclose any effort by petitioner to accomplish the desired result. Upon demand, he promised to repay the $400 as originally agreed. Several days after a complaint was lodged with The State Bar petitioner, through his office associate, repaid $100 of this sum.

The "Bautovich Matter" presents a situation where on November 20, 1937, petitioner received $400 from his client which he was to pay over to her estranged husband under a property settlement agreement, said sum to be paid in discharge of her note held by the husband. Counsel for the husband delivered all papers upon which payment of the money was conditioned. However, repeated requests to and demands upon petitioner for the payment of the money proved unavailing. Complaint was made to The State Bar and on March 29, 1938, the date set for hearing of such complaint, petitioner delivered to adversary counsel his check on "Trust Account #7" in the sum of $377.50, an acceptable deduction having been made from the original amount due. Upon presentment, the check was dishonored for insufficient funds. Subsequently, the husband sued petitioner's client on her note and on April 16, 1938, the client paid $413 in discharge of the note and costs, petitioner on the same day having repaid her.

The record thus discloses that on three distinct occasions petitioner misappropriated money entrusted to him by clients, and in two instances when called on to account, executed and delivered two checks on an account in which there were insufficient funds. His acts and conduct show moral turpitude and a disregard of the duties and obligations owed by an attorney to his client. Such conduct merits the punishment recommended. Maggart v. State Bar, 7 Cal. 2d 495, 61 P.2d 451; Mills v. State Bar, 6 Cal.2d 565, 567, 58 P.2d 1273.

It is therefore ordered that petitioner, George A. Glover, be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys, effective thirty days after the filing hereof.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.; EDMONDS, J.; HOUSER, J.; LANGDON, J.

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13 Cal.2d 241

ASSOCIATED CONSTRUCTORS, Inc., v. PAONESSA et al.

L. A. 16926.

Supreme Court of California.

March 30, 1939.

Rehearing Denied April 27, 1939.

1. Principal and surety ⟹192

Sureties on successive bonds for the same obligation are "cosureties" if the bonds remain in force and are merely cumulative, but if the latter bond supersedes the former, the liability of the surety on the first bond terminates as to the future when the second is given.

[Ed. Note.—For other definitions of "Cosurety," see Words & Phrases.]

2. Appeal and error ⟹464, 474, 1227

Under statute, an appellant who desires to stay execution of judgment pending an appeal must either in the first instance provide sureties who can "justify" or, upon their failure in that regard, offer other sureties for the purpose of qualifying on an undertaking, and hence on failure of first sureties to justify, subsequent sureties who succeed in qualifying are deemed to have been intended to supersede the first sureties. Code Civ.Proc. § 948.

3. Appeal and error ⟹1227

Where individual sureties on undertaking to stay execution of judgment failed to justify, and subsequent undertaking by surety company which qualified was accepted and approved, undertaking of individual sureties was superseded by that of the company, and individual sureties could not be held liable on their undertaking as "cosureties" because company became insolvent, and was not adequate security for payment of the judgment, especially where insolvency of company was brought to attention of respondents who failed to pursue statutory remedy available. Code Civ.Proc. §§ 948, 954.

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In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Associated Constructors, Inc., against Alfred E. Paonessa and others. The defendants recovered judgment against the plaintiff on a cross-complaint, and the plaintiff appealed. Harold and Laura Fisch offered themselves as sureties upon an undertaking to stay execution pending the outcome of the appeal. The judgment was affirmed. Summary judgment was entered against Harold and Laura Fisch as sureties. From an order denying their motion to vacate the summary judgment, filed pursuant to section 473 of the Code of Civil Procedure, Harold and Laura Fisch appeal.

Reversed, with directions.

Prior opinion, 81 P.2d 461.

Edward Flam, of Los Angeles, for appellants.

Ralph D. Paonessa and Hal Hughes, both of Los Angeles (G. Vernon Brumbaugh, of Los Angeles, of counsel), for respondents.

PER CURIAM.

On September 11, 1933, a judgment in the sum of $2,520 was entered in favor of the defendants upon their cross-complaint in the above-entitled action against the plaintiff, Associated Constructors, Inc., a corporation. Thereupon the plaintiff and cross-defendant appealed from the judgment and, at the instance of the appellant, Harold Fisch and Laura Fisch offered themselves as sureties upon an undertaking to stay execution of the judgment pending the appeal. On November 8, 1933, the respondents filed a notice of exception to the form of the undertaking on appeal, as well as to the sufficiency of the sureties therein, and on November 15, 1933, the objections to the sufficiency of the sureties and to the form of the undertaking were sustained. On the same date, the above-named sureties filed another undertaking, in proper form, which also was excepted to by the respondents, and hearing thereon was had on November 22, 1933. Upon failure of the sureties again to qualify, a new undertaking to stay execution was filed by the appellant therein, in which the Coast Surety Company, a corporation, then qualified to execute surety bonds, was named as surety. The surety in the last-mentioned undertaking was justified, accepted by respondents and the said undertaking filed, staying execution pending the appeal.

More than two years later, to-wit, on December 16, 1935, under the provisions of section 954, Code of Civil Procedure, on the ground that said surety company had become insolvent, the respondents filed an affidavit and notice of motion for an order requiring a new undertaking to be given in the place and stead of that executed by the Coast Surety Corporation. No reference was made to the proposed undertakings theretofore offered by Harold and Laura Fisch, either in the motion or the affidavit with regard to the giving of a new bond following the asserted insolvency of the Coast Surety Company; and it appears that neither of them was made a party to those proceedings. However, the motion was allowed to go "off calendar", and no further steps were taken by respondents looking to the acquisition of additional security pending the appeal. In due course, the judgment in favor of the respondents and cross-complainants was affirmed. A summary judgment against Harold and Laura Fisch, as well as against the surety company, was thereafter entered.

The instant appeal is presented by said Harold and Laura Fisch, and is from the denial of a motion filed on their behalf, under section 473, Code of Civil Procedure, to have the said summary judgment set aside as far as the said appellants Fisch were affected thereby.

The question presented is whether the undertaking of the surety company should be considered "cumulative", that is, as additional security to that offered by the appellants Fisch, in which event the latter would become co-sureties with the said surety company,—or whether the undertaking that was furnished by the surety company must be deemed to have superseded that which was offered by the said appellants and rejected by the respondents and the trial court.

[1] In 50 Corpus Juris, page 281, it is said: "Sureties on successive bonds for the same obligation are cosureties if the bonds *remain in force* and are merely cumulative, but not where the latter bond supersedes the former, and the liability of the surety on the first bond terminates as to the future when the second is given. * * *" (Italics added.)

The appellants contend that under the provisions of section 948, Code of Civil Procedure, having failed to justify, they were superseded as sureties by the second undertaking, which they assert is deemed to relate to the time of the filing of the first undertaking and thus renders the first bond of no further avail to the respondents. On the other hand, the respondents contend that the rule is that sureties who fail to justify are not relieved from liability,—relying in particular upon the case entitled McColgan v. Scoble, 2 Cal.2d 285, 40 P.2d 483, 485. In that case, the plaintiff in an ejectment action recovered judgment for possession of the property and for money damages. The defendants appealed and gave an undertaking staying execution on the judgment. The plaintiff excepted to the sufficiency of the sureties and a day was noticed for their justification. The time thus noticed was continued by stipulation of the attorneys on several occasions, the last continuance carrying the time beyond the statutory period of twenty days within which sureties might justify under the provisions of section 948, Code of Civil Procedure. No further attempt was made to have the sureties justify, and no undertaking was given in the place of that executed by said sureties. Thereafter, at the request of the defendants, the appeal was dismissed and, upon the going down of the remittitur, the plaintiff moved that judgment be entered in his favor against the appellant sureties for the amount specified in the undertaking. It was contended that where the respondent on appeal had excepted to the sufficiency of the sureties on an undertaking to stay execution, and the sureties had failed to justify within twenty days after the appellant had been served with notice of such exception, the sureties were no longer bound; and that judgment entered against them on the undertaking was erroneous. It was there held, however, that the failure of the sureties to justify within the time allowed after notice of the respondent's exception to the sufficiency of the sureties did not release the sureties from their undertaking, but merely operated to "vacate the stay" of execution and that thereafter the respondent was entitled to proceed against the sureties on the undertaking, or to enforce the judgment by execution. The particular language in that decision relied on by respondents here is the statement that "Under the authority of Fried v. Rivkin [96 Misc. 697, 161 N.Y.S. 94], * * *, we are of the opinion that the appellants as sureties on the undertaking which was the subject of this action were not released by their failure to justify after the respondent had excepted to their sufficiency, and that they are bound by the judgment herein, which was entered against them for the amount specified in said undertaking." However, no question was presented in that case with regard to a substitution of "other" sureties, under section 948, Code of Civil Procedure, in the place of those who theretofore had offered themselves and who had failed to justify within the time prescribed by that section, as is the situation in the instant case. What was said by the court in that case necessarily was applicable only to the facts there presented. It will be noted that in making the statement relied on here, in part the court said: "* * * we are of the opinion that the appellants as sureties *on the undertaking which was the subject of this action* were not released, * * *." (Italics added.) By its use of the italicized words it is clear that in that case the court intended to limit the ruling to the facts there involved.

Counsel for respondents point to no decisions either in this jurisdiction or elsewhere which hold sureties liable where, pursuant to statutory provision therefor, they have filed an undertaking on appeal which, in effect, has been rejected by the court and the respondent for failure of the sureties to justify thereon, and which original undertaking, for that reason and in compliance with the statutory provisions, has been supplanted by another undertaking with different sureties, on which undertaking the sureties have succeeded in qualifying, and by reason whereof the execution of the judgment has been effectually stayed. Neither have the appellants cited any case which directly sustains their position. However, they rely upon the following statement found in the case entitled Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 22 P. 594, 596, 15 Am.St.Rep. 50, which they contend places the proper interpretation upon the provisions of section 948, Code of Civil Procedure:

"If the sureties are insufficient, pecuniarily, the opposite party has his remedy under section 948 [Code Civ.Proc.]. He may, as provided in that section, except to the sureties at any time within 30 days after the filing of the undertaking; and, unless they, *or other* sureties, justify, as therein provided, within 20 days after the appellant has been served with notice of such exceptions, 'execution of the judgment, order, or decree appealed from *is no longer stayed*.' That is, the proceedings are stayed until the necessary exceptions are made, and time given for the sureties to justify, and no longer. It necessarily follows that if the same or other sureties do justify within the time allowed, the stay *continues*, and the liability of the new sureties relates back to the time of the first stay. * * *"

Appellants also direct attention to a statement of the law found in 4 Corpus Juris, page 1289, wherein it is said that where the second bond "is not intended as additional security, but is given, in accordance with statutory requirement, to supersede the first, it discharges the first".

The pertinent language of section 948, Code of Civil Procedure, is that upon exception to the proposed sureties "* * * unless they *or other sureties,* within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, * * * execution * * * is no longer stayed". (Italics added.)

[2] The apparent effect of the provisions of that section is that it is incumbent upon an appellant who may desire to stay execution of a judgment pending an appeal either, in the first instance, to provide sureties who can "justify", or, upon their failure in that regard, to offer "other", or different, sureties for the purpose of qualifying on an undertaking. Consequently, on failure of the first sureties to justify, the proposed sureties who are next offered and who may succeed in qualifying, must be deemed to have been intended to take the place of, or to have thereupon superseded, the former proposed sureties. It will be observed that on failure of the first sureties to justify, the statute does not provide for the justification of "further" or of "additional" sureties; it provides that "unless they or *other* sureties" justify, execution will not be stayed. (Italics added.) This language must mean that, upon failure of the first proposed sureties to qualify, an entirely new undertaking must be given in lieu of the original undertaking. Furthermore, if the first sureties have been found not to be financially responsible for the purposes of the bond, it would seem not only inconsistent, but also unjust, for the respondent, nevertheless, to seek to impose liability upon them as co-sureties at a time subsequent to that on which they had been superseded by other sureties whose financial qualifications *had been accepted* by the respondent. We think that it was not intended by the legislature that the section here in question was to have the meaning contended for by respondents herein.

[3] Another reason suggests itself why sureties who may fail to qualify on a first undertaking were not intended to be held liable under the circumstances here presented, in that, under section 954, Code of Civil Procedure, the legislature has made provision for adequate protection of a respondent who, pending appeal, may have reason to believe that sureties on an undertaking which has been accepted as an appeal bond have become insufficient for that purpose. Under that section, it is provided that: "When it is made to appear to the satisfaction of the court or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, * * * the last-named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the maintenance of the appeal. * * *"

As hereinbefore has been stated, pending the appeal, at a time when knowledge of the insolvency of the surety company was brought to their attention, the respondents availed themselves of the provisions of section 954, Code of Civil Procedure, by filing the motion relating thereto which was subsequently ordered "off calendar". The fact that thereafter respondents failed to pursue their remedy in that regard cannot operate to impose liability upon the appellants, whose undertaking lost its force and effect at the time it was superseded by that of the surety company.

From that which has been said hereinbefore, it follows that the order appealed from should be, and is, reversed; and directions are hereby given to the trial court to enter an order in conformity with the views herein set forth.

31 Cal.App.2d 717

E. M. LEWIS & CO. v. DAUGHERTY, Commissioner of Corporations.

Civ. 10692.

District Court of Appeal, First District,
Division 1, California.
March 28, 1939.

1. Appeal and error 🔑790(3)

An appeal from minute order, sustaining demurrer to complaint and dissolving restraining order granted in action for injunction, should be dismissed, where all questions presented thereby were fully determined by decision of Court of Appeal in granting writ of prohibition forbidding further proceedings by trial court in such action.

2. Appeal and error ⚷102, 870(5)

A minute order, sustaining demurrer to complaint without leave to amend, is not appealable, but reviewable only on appeal from final judgment entered pursuant thereto, and appeal from such order must be dismissed, where no such judgment was entered.

3. Appeal and error ⚷100(2)

A minute order, dissolving restraining order granted in action for injunction, was not appealable, though construed as order dissolving injunction, after trial court entered order reviving and reinstating restraining order.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by E. M. Lewis & Co., a corporation, against Edwin M. Daugherty, Commissioner of Corporations, to enjoin defendant from proceeding with a hearing to determine whether cause existed for revocation or suspension of a broker's certificate issued to plaintiff. From an order sustaining defendant's demurrer to the complaint and dismissing a restraining order, plaintiff appeals.

Appeal dismissed.

Ellis & Steindorf and Richard M. Lyman, Jr., all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph C. Marron, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

Plaintiff brought this action to enjoin the defendant as commissioner of corporations of the state of California from proceeding with a hearing to determine whether cause existed for the revocation or suspension of a broker's certificate theretofore issued to plaintiff; and upon the filing of the complaint an order was granted restraining defendant from holding said hearing and directing him to show cause why an injunction pendente lite should not issue. Defendant demurred to the complaint and on October 8, 1937, a minute order was entered sustaining the demurrer without leave to amend and dissolving the restraining order. Thereafter, and on October 13, 1937, an order was made and filed reviving and reinstating the restraining order for the purpose of maintaining the status quo pending plaintiff's intended appeal; and on the following day plaintiff filed its notice of appeal from the order made on October 8, 1937. The transcript on appeal was filed herein on November 5, 1937, and appellant's opening brief was filed some twenty days later. In the meantime, to-wit, on November 9, 1937, the defendant in said action instituted in this court an original proceeding in prohibition to prohibit the superior court from taking any further action in the cause pending therein; and after a hearing on the merits a peremptory writ of prohibition was issued as prayed. Daugherty v. Superior Court, 23 Cal.App.2d 739, 74 P.2d 549. Subsequently the appeal came on for hearing; there was no respondent's brief on file, and neither side appeared at the hearing; whereupon the cause was ordered submitted.

[1-3] The appeal should be dismissed for the following reasons: First, all questions presented thereby have been fully determined by the decision rendered in Daugherty v. Superior Court, supra; secondly, the order of October 8, 1937, from which the appeal was taken, was not appealable. It was merely a minute order sustaining the demurrer without leave to amend. No judgment was ever entered pursuant thereto; and it is well settled that no appeal lies from such an order; that the only method provided for review is by way of appeal from a final judgment entered pursuant to the order; and that where, as here, no such judgment is entered, any attempted appeal from the order itself will be dismissed. Doran v. Sherman, 18 Cal.App.2d 479, 64 P.2d 442; Curran v. Giometti, 20 Cal.App.2d 405, 66 P.2d 1260. Nor construing the latter portion of said minute order as one dissolving an injunction, was it appealable because the effect thereof was completely nullified by the trial court the day before the appeal was taken by its order of October 13, 1937, directing that the restraining order be revived and reinstated.

Upon the grounds and for the reasons stated the appeal is dismissed.

We concur: TYLER, P. J.; WARD, J.

31 Cal.App.2d 697

MASON v. DRUG, Inc., et al.

Civ. 10798.

District Court of Appeal, First District,
Division 2, California.
March 27, 1939.
Hearing Denied by Supreme Court
May 25, 1939.

1. Judgment 🔑704

In action instituted by stockholder in representative capacity on behalf of preferred stockholders, judgment was not res judicata as to stockholder when judgment was presented as defense to suit against stockholder and others by assignee of preferred stockholders' claims, since the parties were not adverse in the prior action.

2. Corporations 🔑204

In representative action to recover damages alleged to have been sustained by corporation, where plaintiff was successful, trial court's award of $30,000 to plaintiff, his costs including counsel fees, was authorized and award did not constitute a payment of secret profits by defendants on which allegations of duplicity in subsequent action by assignee of preferred stockholders could be based.

3. Corporations 🔑211(6)

In action by assignee of claims of preferred stockholders for damages arising out of activities of corporate common stockholder and affiliates in seeking to take over business and properties of corporation, complaint was insufficient to support charge of fraudulent representations and concealment by stockholder by whom representative action had previously been maintained in absence of allegation that any contract relations existed between stockholder and assignors, or of facts constituting fraud or deceit as defined by statute. Civ.Code, § 1710.

4. Judgment 🔑511

Charges of intrinsic fraud in representative action to recover damages allegedly sustained by corporation because of wrongful acts of other defendants was not subject to review in action by assignee of preferred stockholders for damages arising out of activities of common stockholder and affiliates in seeking to take over business and properties of corporation, as basis for charges of concealment and of false representations as to one of affiliates.

5. Corporations 🔑211(6)

In action against corporate owner of common stock and others by assignee of preferred stockholders' claims for damages arising out of activities of common stockholder and affiliates in seeking to take over business and properties of corporation, assignee was required to state the names of the agents and servants through whom corporation acted, what they said and did material to the cause of action, when it had happened, and such facts as assignee relied on as proof of fraud and deceit constituting his cause of action.

6. Fraud 🔑50

Fraud is never presumed.

7. Corporations 🔑211(6)

In action against corporate owner of common stock in corporation and others by assignee of preferred stockholders' claims for damages arising out of activities of common stockholder and affiliates, in seeking to take over business and properties of corporation, complaint was insufficient to charge defendants with making fraudulent representations in absence of allegations as to name of person who spoke, his authority to speak, to whom he spoke, what he said or wrote, and when it was said or written.

8. Corporations 🔑211(6)

In action by assignee of preferred stockholders' claims for damages as for fraud, allegation that named individual issued certain "communications" was insufficient to support charge of fraud of corporate defendants, as against special demurrers in absence of showing whether the communications were written, whether they were received by assignee or assignor, etc.

9. Assignments 🔑24(3)

A claim for damages as for fraud is not assignable except when assigned in connection with property that was obtained by fraud and deceit.

10. Assignments 🔑24(3)

Action for damages arising out of fraudulent conspiracy to induce, by means of fraudulent representations and concealment, owners of preferred stock to exchange their stock for stock in corporate owner of common stock, could not be maintained by assignee of claims of preferred stockholders where assignee did not claim to be stockholder in his own right, or as assignee, and property assigned was merely amount of claim without any assignment of property obtained by the alleged fraud.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by A. R. Mason against Drug, Incorporated, and others for damages as for fraud. From a judgment sustaining demurrers of two of the defendants without leave to amend, plaintiff appeals.

Affirmed.

J. Maxwell Peyser and Penaat & Penaat, all of San Francisco, for appellant.

John Francis Neylan and Chickering & Gregory, all of San Francisco, for respondents.

STURTEVANT, Justice.

The trial court sustained the demurrers of two of the defendants without leave to amend. From the judgment entered the plaintiff has appealed.

Including fictitious parties, the plaintiff named a large number of defendants, several corporations, and many individuals. No person appeared as being one of the fictitious defendants excepting W. W. Hindman. All of the other individuals are directors of the corporate defendants. Except Owl Drug Preferred Stockholders Association, all of the corporations named are alleged to be the affiliates and agents of Drug, Inc., a corporation. The record is silent as to what persons, natural or artificial, have been served with process. Only two defendants, United Drug Company, a corporation, and W. W. Hindman appeared and demurred. The plaintiff complains because their demurrers were sustained. The demurrers were both general and special. Before taking up a consideration of the attacks made by said demurrers, the substance of the plaintiff's amended complaint should be stated. Among other things, it alleged the following facts:

Prior to February 9, 1932, Owl Drug Company was a corporation organized under the laws of the state of Nevada and had issued and there were outstanding 40,000 shares of common stock and 60,000 shares of preferred stock. Each share was of the par value of $100 but the preferred stock had no voting power. Prior to the transactions complained of the preferred stock was owned and held by many different stockholders. The common stock of the Owl Drug Company was owned by Drug, Inc. The latter and its affiliates were desirous of taking over the business and properties of the former. To protect their interests some of the preferred stockholders formed a corporation, Owl Drug Preferred Stockholders Association, and caused that action to be brought entitled Hindman v. Owl Drug Company, 4 Cal.2d 451, 50 P.2d 438. That decision was filed October 16, 1935. Feeling that all of their rights had not been adjusted, three hundred sixty or more preferred stockholders, one of whom was a member of said association, assigned their claims to this plaintiff, who claims to represent 9384 shares of said preferred stock. The plaintiff does not allege that he is or ever was the owner of any of the preferred stock of the Owl Drug Company. He sues solely as assignee.

He alleges that the defendants fraudulently conspired to cause said assignors to exchange their preferred stock in the Owl Drug Company for stock of Drug, Inc., and pursuant to that plan Drug, Inc., purchased all of the common stock of the Owl Drug Company; that the latter had an established business in the middle west and on the Pacific coast which was reasonably worth $10,000,000; that the defendants represented (1) that the Owl Drug Company was indebted to United Drug Company (one of the affiliates of Drug, Inc., a corporation) in the sum of $2,000,000; (2) that the financial condition of Owl Drug Company was not as favorable as plaintiff's assignors had believed it to be; (3) that defendants represented to plaintiff's assignors that W. W. Hindman and Owl Drug Preferred Stockholders Association were acting in behalf of plaintiff's assignors; that plaintiff's assignors believed said representations, and acted thereon, and thereafter exchanged their stock on October 15, 1932, to their damage, etc.

Commingled with said charge of fraudulent misrepresentations there is a charge of fraudulent concealment. That charge includes the allegation that W. W. Hindman and Owl Drug Preferred Stockholders Association deliberately withheld from plaintiff's assignors and from holders of Owl Drug Company preferred stock any detailed information as to the assets or net worth of said company or the fact that a large part of its liabilities were owing to Drug, Inc., and it was further alleged that the same defendants withheld from plaintiff's assignors and from Owl Drug

Company preferred stockholders the fact that W. W. Hindman was being paid $35,000 by defendants.

The amended complaint is wholly silent regarding any claim that any one of plaintiff's assignors rescinded or attempted to rescind the exchange of shares of stock. The pleading is solely a claim for damages as for fraud.

In support of the ruling of the trial court the defendants contend the plaintiff's cause of action is barred by the judgment in Hindman v. Owl Drug Company, supra. They call to our attention parts of the transcript which show: that in the original complaint the plaintiff set forth all of the allegations contained in the amended complaint and in addition he pleaded by reference the said judgment; that the defendants demurred thereto; that the trial court sustained said demurrers on the ground said judgment was res judicata; that the plaintiff struck out of said pleading all allegations regarding said judgment and then filed the deleted pleading as the amended complaint now before us. Thereafter the defendants, appearing, each presented (1) a motion to strike and (2) a demurrer. The trial court never ruled on the motions to strike. It sustained the demurrers without leave to amend. The defendants argue that in doing so the trial court had the power to take, and that it did take into consideration the allegations contained in the original complaint pleading the Hindman judgment, and also those contained in the amended complaint. The court was of course bound to, and it did, examine the allegations set forth in the amended complaint to which the defendants had demurred. But it had the right at all times to take judicial notice of its own records in the case. Code Civ. Proc., sec. 1875, subd. 3. In some cases the courts have exercised the power of taking judicial notice and have held that facts alleged in the complaint demurred to were nonexistent. Ohm v. San Francisco, 92 Cal. 437, 449, 28 P. 580; Mullan v. State, 114 Cal. 578, 581, 46 P. 670, 34 L.R.A. 262; French v. Senate, 146 Cal. 604, 607, 80 P. 1031, 69 L.R.A. 556, 2 Ann. Cas. 756. In another case the trial court sustained a demurrer of a defendant to a supplemental complaint and ordered judgment in favor of the defendant, that is, it wholly failed to take judicial notice of its own records which showed the original complaint had been answered, that the issues so framed had not been determined, and nevertheless the court ignored such matters and ordered a final judgment. On appeal that judgment was reversed because the trial court did not take notice of its own records. Craiglow v. Williams, 45 Cal.App. 514, 188 P. 76; see, also, People v. Clinton, 78 Cal.App. 451, 248 P. 929; People v. Rhodes, 137 Cal.App. 385, 30 P. 2d 1026; Schomer v. R. L. Craig Co., 137 Cal.App. 620, 31 P.2d 396; 15 R.C.L. 1113.

If the trial court had granted the motion of United Drug Company to strike and had failed and refused to pass on its demurrer, a more simple question would have been presented. On the hearing of the motion the trial court would have been entitled to act on the evidence and that evidence, of course would have included judicial notice of all the records in the action.

[1] Not waiving his contention that the Hindman judgment was not res judicata, the plaintiff contends that the parties in the instant case were not adverse in the Hindman case. As to United Drug Company and its affiliates on the one hand, and the plaintiff's assignors on the other hand, it is clear said contention is not well founded. However, as to the defendant Hindman the point is sound. As to him the judgment in Hindman v. Owl Drug Company, supra, was not res judicata.

[2] In the amended complaint it is alleged that Owl Drug Preferred Stockholders Association undertook to represent all of preferred stockholders in the action entitled Hindman v. Owl Drug Company, supra, and that Hindman was in charge of that litigation for said stockholders. Then there is a hint that Hindman took secret compensation from his adversaries. If he did so of course it would have been serious fraud. But the pleading does not allege such fraud. It is stated "that said W. W. Hindman and said Owl Drug Preferred Stockholders Association deliberately withheld from plaintiff's assignors and other Owl Drug Company preferred stockholders the fact that W. W. Hindman was being paid by said defendants named herein $35,000 cash in addition to the stock exchange offered all stockholders as compensation for obtaining the consent of the Owl Drug Company preferred stockholders to said stock exchange; * * *" That is the sole allegation of duplicity. But, looking at other portions of the record

it is clear said action was a representative action maintained by W. W. Hindman, that it was successful, and that the trial court awarded him $30,000, his costs including counsel fees. That award was clearly authorized by law. 14 C.J. 948; Fox v. Hale & Norcross S. M. Co., 108 Cal. 475, 477, 41 P. 328. In no proper sense was it a payment of secret profits.

[3] The purported charge of concealment was wholly insufficient against the defendant W. W. Hindman. It is not alleged that any contract relations ever existed between Hindman and the plaintiff's assignors. No facts are alleged showing that the case falls within the provisions of section 1710 of the Civil Code. Hence it is controlled by the doctrine stated in Camm & Hedges Co. v. Bank of Covelo, 208 Cal. 246, 250, 280 P. 962, and said charges were insufficient as against W. W. Hindman.

[4] As to the defendant United Drug Company, the charges of concealment and of false representations are both merely charges of intrinsic fraud in Hindman v. Owl Drug Company, supra, and are not subject to review in this proceeding. Pico v. Cohn, 91 Cal. 129, 135, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159.

[5-8] The corporations could speak and act only through their agents and servants. Therefore it was material to state the names of such agents and servants, what they said and did material to the cause of action which the pleader was attempting to set forth, when the event happened, and such facts and circumstances as the pleader relied upon as proof of the fraud and deceit constituting his cause of action. Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 682, 67 P.2d 1039. At an early date Mr. Justice Field, in Green v. Palmer, 15 Cal. 411, at page 415, 76 Am.Dec. 492 quoted with approval, "Those facts, and those only, must be stated which constitute the cause of action, the defense, or the reply. Therefore, first, each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged." Fraud is never presumed. So in the instant case, if the plaintiff would charge the defendant corporation with making fraudulent misrepresentations it was necessary for him to allege the name of the person who spoke, his authority to speak, to whom he spoke, what he said or wrote, and when it was said or written. But the amended complaint is wholly wanting in such allegations. Therefore it did not state facts sufficient to charge the corporate defendants. The plaintiff alleged that the defendant Hindman issued certain "communications". Conceding that expression was more nearly correct, it was not sufficient in the face of the special demurrer which attacked the allegation from several different angles. Among others, the said demurrers alleged it could not be ascertained whether said communications were written or oral, whether they were received by plaintiff or plaintiff's assignors, what form of communication and what communications were made to each of plaintiff's assignors and whether or not W. W. Hindman and the Owl Drug Preferred Stockholders Association had any information as to the assets or net worth of Owl Drug Company or of its liabilities.

[9, 10] If it be conceded that the amended complaint would have stated a cause of action either for false representations or for concealment if it had been filed by one of plaintiff's assignors, it is patent that the pleading is insufficient when considered as one filed by an assignee. As stated above, this plaintiff does not claim to be a stockholder in his own right nor as assignee. The extent of his claim is stated in his pleading as follows: "That prior to the commencement of this action each of the assignors of plaintiff * * * sold, transferred and assigned to plaintiff all of their right, claim, and demand of said assignor herein sued upon." The property assigned by his assignments was the amount of the "right, claim and demand of said assignor herein sued upon", the damages of his assignors—no more, no less. But such a claim is not assignable, except when assigned in connection with the property that was obtained by fraud and deceit. Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 463, 274 P. 959; Sanborn v. Doe, 92 Cal. 152, 28 P. 105, 27 Am.St.Rep. 101; Archer v. Freeman, 124 Cal. 528, 57 P. 474; Smith v. Pacific Bank, 137 Cal. 363, 70 P. 184; Greenlee v. Los Angeles Trust etc. Bank, 171 Cal. 371, 153 P. 383; Emmons v. Barton, 109 Cal. 662, 666, 42 P. 303. It follows that the amended complaint did not state a cause of action in favor of the plaintiff.

The trial court did not err in sustaining the demurrers of the defendants. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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31 Cal.App.2d 719

GOLDENZWIG et al. v. SHADDOCK et al.

Civ. 12160.

District Court of Appeal, Second District, Division 2, California.

March 28, 1939.

Hearing Denied by Supreme Court May 26, 1939.

1. Usury 🔑77

A contract not requiring usurious payments in its inception is not usurious, though obligor subsequently pays obligee as bonuses sums which with interest paid amount to more than legal rate of interest.

2. Usury 🔑117

The burden is on one charging exaction of usurious interest to prove such charge by preponderance of evidence.

3. Usury 🔑77

A contract unaffected by usury in its inception can never be invalidated by subsequent usurious transaction.

4. Judgment 🔑199(1)

It is trial judge's duty in proper case to render on his own motion or that of party aggrieved by jury's verdict, a judgment for such party notwithstanding verdict. Code Civ.Proc. § 629.

5. Judgment 🔑199(3)

The trial judge, having found on substantial evidence that plaintiffs in action to have certain payments to defendants declared usurious, paid bonuses to defendants voluntarily, not in consideration of loan or forbearance from collection thereof, without prior agreement between parties for such payments, correctly concluded that no usurious interest was exacted or received by defendants and properly entered judgment for them notwithstanding jury's verdict for plaintiffs. Code Civ.Proc. § 629.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Douglas L. Edmonds and W. Turney Fox, Judges.

Action by Eley Goldenzwig and another against Yetta Shaddock, also known as Yetta Medoff, and another, to restrain a sale of realty under a trust deed and have a loan and payments made thereon declared usurious. From a judgment for defendants notwithstanding a jury's verdict for plaintiffs, the latter appeal.

Affirmed.

Henry K. Elder, of Los Angeles, for appellants.

Feinfeld & Feinfeld and Stick & Moerdyke, all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants predicated upon the granting of defendants' motion for a judgment notwithstanding the verdict of the jury (sec. 629, Code Civ.Proc.) in favor of plaintiffs in an action to have certain payments of money to defendants by plaintiffs declared to be usurious.

The material facts are:

August 15, 1928, plaintiffs borrowed from defendant Yetta Shaddock and her husband, Benjamin Medoff (now deceased), $16,500 and gave as security therefor two notes secured by a mortgage on real property. One note dated August 15, 1928, for $12,500 was due three years after date. The second note was for $4,000, dated August 22, 1928, and due nine months after date. Both notes bore interest at the rate of 7½ per cent per annum. Thereafter five quarterly interest payments, each in the sum of $309.38, were made to defendants. About November 15, 1929, plaintiffs paid $2,500 to defendants on the principal of the $4,000 note. Subsequently seven quarterly interest payments in the sum of $262.50 each were made by plaintiffs.

November 15, 1932, by written agreement the indebtedness was extended and the interest rate increased to 8 per cent per annum on the unpaid balance of $14,000. Thereafter six quarterly interest payments, each in the sum of $280, were made by plaintiffs, and on September 7, 1932, plaintiffs paid on account of the unpaid principal the sum of $100.

February 15, 1933, the principal indebtedness of $13,900 was renewed by plaintiffs to defendants, to become due February 15, 1936, with interest at the rate of 7½ per cent per annum, the indebtedness being secured by a trust deed wherein defendant Union Bank and Trust Company of Los Angeles was named as trustee. On May 15 and August 15, 1933, quarterly interest payments each in the sum of $262.50 were made by plaintiffs, and on November 15, 1933, plaintiffs made a payment of $150 on account of interest.

July 17, 1934, the trustee declared a default under the terms of the deed of trust and declared the sum of $13,900 with interest from November 15, 1933, at 7½ per cent per annum, less $150 which had been paid as interest, due and payable.

The present action was brought to restrain the sale of the property described in the trust deed, and for a declaration that the loan was usurious and that said payments made thereon were usurious.

In addition to the payments above-mentioned the jury found in answer to special interrogatories submitted to it that plaintiffs paid defendant Yetta Shaddock and her husband, Benjamin Medoff, as bonuses on the above-mentioned loans, and not as payments of principal or interest, the following amounts at or about the date set opposite each sum:

November 15, 1929	$2,500.00
July 24, 1929	50.00
November 16, 1931	29.50
February 14, 1930	50.00
May 23, 1932	205.57
June 28, 1932	100.00
Total	$2,935.07

The trial court made the following finding, which was supported by substantial evidence: "That it is not true that the said amounts, or either of them, found by the jury to have been paid as a bonus were paid in consideration of said loan of $16,500 or in forbearance of said loan, or any portion thereof. That there was no prior agreement between the plaintiffs and B. Medoff or the defendant Yetta Shaddock, also known as Yetta Medoff, to pay any of said amounts, and said payments were made voluntarily."

[1, 2] This is the sole question necessary to be determined:

Is a contract usurious which does not in its inception require payments which are usurious, even though sums are subsequently paid by the obligor to the obligee as bonuses, which coupled with interest paid amount to a sum in excess of the legal rate of interest?

This question must be answered in the negative and is governed by the following established principles of law:

(1) The burden is upon one, who charges the exaction of usurious interest, to prove such charge by a preponderance of evidence. Ewalt v. Mortgage Securities, Inc., 129 Cal.App. 559, 564, 19 P.2d 60.

[3] (2) A contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction. Sharp v. Mortgage Security Corp., 215 Cal. 287, 290, 9 P.2d 819; O. A. Graybeal Co. v. Cook, 111 Cal.App. 518, 528, 295 P. 1088.

[4] (3) It is the duty of the trial judge in a proper case to render, either on his own motion or on motion of the aggrieved party, a judgment in favor of the aggrieved party notwithstanding the verdict of the jury. (Sec. 629, Code Civ. Proc.)

[5] Applying the foregoing rules of law to the facts of the instant case, it is apparent that, since the trial court found, based upon substantial evidence, that the bonuses paid by plaintiffs were not paid in consideration of the loan made to them or in forbearance for the collection of said loan or any portion thereof, and that there was no prior agreement between plaintiffs and defendant Yetta Shaddock and Benjamin Medoff to pay any of said sums but that said payments were voluntarily made by plaintiffs, the conclusion of law reached by the trial judge that no usurious interest had been exacted or received from plaintiffs by defendant Yetta Shaddock and her husband was correct, and judgment was properly entered in favor of defendants.

For the foregoing reasons the judgment is affirmed.

I concur:

CRAIL, P. J.

WOOD, Justice (concurring).

I concur in the judgment. In an action such as this, to restrain a sale and for declaratory relief, the trial judge had the right to make findings independent of and in addition to the verdict of the jury. The evidence is not before us and it must be presumed that it is sufficient to support the findings, which in turn are sufficient to support the judgment.

32 Cal.App.2d 58

MILES v. TREZEVANT et al.

Civ. 11011.

District Court of Appeal, First District, Division 2, California.

April 1, 1939.

Hearing Denied by Supreme Court May 29, 1939.

1. Mortgages 🔑319(3)

In action to quiet title and enjoin sale of realty under trust deed securing note, evidence *held* sufficient to sustain trial court's findings that defendant payee delivered note and trust deed to codefendant maker as payee's agent, with instructions to deliver them to third defendant in payment for legal services, that maker delivered instruments to such third defendant for valid consideration, and that note was valid and obligation thereof not extinguished or satisfied by such transaction.

2. Appeal and error 🔑1010(1)

Where trial court's findings are sustained by substantial evidence, appellate court may not interfere.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Bernice Peck Miles against R. M. Trezevant and others to quiet title to realty and enjoin sale thereof under a trust deed. Judgment for defendants, and plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Edward L. Conroy and R. M. Trezevant, in pro. per., both of Hollywood, for respondents.

SPENCE, Justice.

Plaintiff, the former wife of defendant Charles Kenneth Miles, brought this action to quiet title to certain real property and for an injunction. Plaintiff appeals from a judgment in favor of defendants.

In 1932, defendant Charles Kenneth Miles executed a promissory note in favor of defendant C. S. Miles, his father, for the sum of $7,000, together with a deed of trust to secure said note covering the real property in question. Said deed of trust was subordinate to a first mortgage on said real property. In 1932, said C. S. Miles, at the request of his said son, indorsed said note "without recourse" and delivered it, together with the deed of trust, to his son, who in turn delivered said instruments to defendant R. M. Trezevant in payment of legal services performed and to be performed by the latter for defendant Charles Kenneth Miles. Plaintiff and defendant Charles Kenneth Miles had been divorced and the legal title to said real property had become vested in plaintiff pursuant to a sale thereof on execution to satisfy the obligation of said defendant for support as provided in the divorce decree.

This action was brought against the defendant R. M. Trezevant, as holder of said note and deed of trust, and also against other defendants. The first count was in the ordinary form of an action to quiet title. The second count set forth the facts as alleged by plaintiff, who claimed that by reason of said facts, the obligation of defendant Charles Kenneth Miles upon said note had become wholly released and discharged. Plaintiff therefore sought to enjoin the sale under said deed of trust. Defendant R. M. Trezevant and defendant Charles Kenneth Miles answered, denying all the material allegations of the complaint and alleging certain facts regarding the transaction by which said note and deed of trust had been delivered to the latter by his father and in turn delivered to defendant R. M. Trezevant. The answer of the defendant bank, which was the trustee under the deed of trust, was in the form of a general denial. Defendants C. S. Miles and his wife filed a disclaimer.

[1] The trial court found in effect that the note and deed of trust had been delivered by defendant C. S. Miles to defendant Charles Kenneth Miles, as the agent of defendant C. S. Miles, with instructions to deliver the same to defendant R. M. Trezevant in payment for the above-mentioned legal services and that defendant Charles Kenneth Miles did so deliver said instruments to said defendant R. M. Trezevant as agent for defendant C. S. Miles; that

said instruments were delivered to defendant Charles Kenneth Miles solely for the purpose last mentioned; that said delivery to defendant Charles Kenneth Miles was without consideration from said defendant Charles Kenneth Miles but that the delivery to defendant R. M. Trezevant was for a valid consideration; that said note was valid and that said obligation had not been extinguished or satisfied by reason of the transaction above mentioned or otherwise. The trial court further found that plaintiff was the owner of said real property, subject, however, to said deed of trust. Judgment was entered accordingly decreeing that the note, secured by said deed of trust, was a valid and subsisting obligation and denying to plaintiff the relief asked.

Appellant contends that the evidence was insufficient to sustain the findings and judgment, but we find no merit in this contention. The testimony of respondent Charles Kenneth Miles is ample to sustain the challenged findings. He testified that defendant R. M. Trezevant had represented him as his attorney for a period of years but had told him that he could not afford to represent him further without receiving a substantial payment; that said Charles Kenneth Miles had no money, but he asked his father, C. S. Miles, to assign the note and deed of trust to said R. M. Trezevant for said services; that said C. S. Miles consented to do so and gave him the note and deed of trust with explicit instructions to turn them over to said R. M. Trezevant; that he left his father's house and delivered said note and deed of trust to said R. M. Trezevant within a half hour thereafter. The testimony of defendant R. M. Trezevant corroborated said testimony in many particulars as did also at least a portion of the testimony of defendant C. S. Miles. Appellant strongly relies, however, upon one portion of the testimony of the last-mentioned witness.

Said defendant C. S. Miles was called by plaintiff under the provisions of section 2055 of the Code of Civil Procedure. He was then a man eighty-two years of age who admittedly could not hear or understand the questions well and who admittedly had a memory which had become faulty. He was questioned in one portion of his testimony as to a subsequent conversation regarding the transaction in question. He testified as follows:

"Q. And you did tell her that you had turned it back to your son, did you not? A. For a specified purpose—

"Q. I don't care, did you or not—

"The Court: Conclude your answer. A. What are you trying to get at anyway? I said it was given to him for a purpose.

"The Court: Mr. Miles, you started to give an answer, and you were interrupted; you didn't finish it. You said for a specific purpose. Will you conclude that answer? A. It was to help him out.

"The Court: Well, I want the rest of that answer, for the specific purpose of what; for what specific purpose?

"The Witness: For attorney's fees."

In another portion of the testimony of said witness, he was questioned concerning the transaction and he testified as follows:

"Q. And you just gave it back to him? A. I gave it back to him, yes, turned it over to him.

"Q. And told him to keep it? A. I didn't tell him anything of the kind. I turned it over to him.

"Q. With the intention that he own it? A. That he should own it and do as he pleased with it."

[2] Giving this last portion of the testimony all of the force to which appellant claims it is entitled, the most that can be said is that it created a conflict which the trial court was called upon to determine. The trial court having made the findings above set forth with substantial evidence to sustain them, this court may not interfere.

Appellant cites and relies upon Bailes v. Keck, 200 Cal. 697, 254 P. 573, and Gordon v. Wansey, 21 Cal. 77, but these cases are clearly distinguished on their facts. The facts found here showed that there was no assignment by the payee to the maker for a valuable consideration.

Some reference is made in appellant's brief to the value of the note and deed of trust in comparison with the value of the legal services performed. This question does not appear to have been raised in the trial court and the finding that the note and deed of trust were assigned to defendant R. M. Trezevant for a valid consideration is not assailed. It appears appropriate, however, to state that the only testimony in the record relating to the value of the security, consisting of the second incumbrance on the property, is to the effect that said security was of doubtful value.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

PEOPLE v. TENNANT.

Cr. 1624.

District Court of Appeal, Third District, California.

March 29, 1939.

Rehearing Denied April 13, 1939.
Hearing Denied by Supreme Court April 27, 1939.

1. Embezzlement 🔑44(1)

Evidence *held* sufficient to sustain conviction of secretary of irrigation district for fraudulent appropriation of property by a public officer, and for grand theft. Pen. Code, § 504.

2. Embezzlement 🔑21

Failure of secretary of irrigation district to deliver to the district building materials received from purchaser of district's land apparently as part of the purchase price, under circumstances, constituted a "fraudulent appropriation" under statute concerning embezzlement by officers of the state or any association. Pen.Code, § 504.

[Ed. Note.—For other definitions of "Fraudulent Appropriation," see Words & Phrases.]

3. Embezzlement 🔑21

Conduct of irrigation district's secretary in appropriating to his own use a part of the purchase price received for sale of land belonging to district was a "fraudulent appropriation" under statute concerning embezzlement by officers of state or any association. Pen.Code, § 504.

4. Embezzlement 🔑22

Where an assignment of an interest in land was made to defendant and his wife and son as joint tenants, in prosecution for grand theft by appropriating assignor's interest, defendant could not escape liability on ground that the only value of the interest which he had taken was one-third of assignor's interest.

5. Embezzlement 🔑44(3)

In prosecution under indictment charging grand theft, evidence supported implied finding that value of property in question exceeded $200.

6. Criminal law 🔑768(1)

In a criminal case, an outline of duties of jurors given by trial judge to members of panel before trial of case, although unusual, was within inherent power of trial court in controlling its proceedings.

7. Criminal law 🔑768(1)

In a criminal case, statements of trial judge, in outlining general duties of jurors, that jurors should disregard remarks or statements unless made under oath, that jury should pay strict attention to and adopt comments of trial court in so far as possible, and that jury should not be unduly influenced by presumption of innocence, were proper, especially where a jury satisfactory to defendant was thereafter selected from the venire.

8. Jury 🔑68

In a criminal case, amending the sheriff's return mistakenly showing a personal service of the veniremen to show service by registered mail was proper, where done by permission of trial court.

9. Jury 🔑68

The filing of a venire summons and sheriff's return thereon in the clerk's office was a "return to the court," and hence that the summons and return were filed in clerk's office was not a ground for objection to selection of jury.

10. Jury 🔑63

The provision of Code of Civil Procedure that names of jury lists shall be selected from different wards or townships of counties in proportion to number of inhabitants as nearly as can be estimated is directory only. Code Civ.Proc. § 206.

11. Jury 🔑82(1)

That jury list from which venire was drawn might not have been properly selected due to some disproportionate allotments of names to various precincts was not ground for complaint by defendant, where abuse of discretion of board of supervisors in selecting lists was not shown and a jury satisfactory to both parties was chosen from the particular venire. Code Civ.Proc. § 206.

12. Criminal law 🔑853

In a criminal case, it was not error for trial court to excuse jurors from courtroom while trying challenge to panel, since matter was addressed to trial court only, and jury's presence was unnecessary.

13. Indictment and information 🔑137(1)

Motion to set aside indictment on ground that grand jury had not been properly listed and drawn because there appeared to be no proper order on record listing the names of prospective grand jurors for year in which indictment was apparently returned was properly denied, where trial court was apparently convinced grand jury had been properly listed and drawn. Code Civ.Proc. § 204.

14. Grand jury 🔑40
Indictment and information 🔑28

Neither the indictment nor record of grand jury need affirmatively show that biased members of grand jury were asked to retire or that at least 12 members voted for indictment.

15. Indictment and information 🔑11(1)

The presenting of the indictment, indorsed as a true bill by its foreman to the trial court by the grand jury in its own presence, indicates the regularity of all prior proceedings of grand jury in the matter.

16. Embezzlement 🔑34

Counts in an indictment charging a secretary of an irrigation district, as a public officer, with fraudulently appropriating building materials claimed to belong to district, with grand theft by stealing an interest in real property of the value of $300, and apparently charging secretary with appropriating a part of purchase price of land sold by district, were sufficient to charge public offenses. Pen.Code, § 504.

17. Embezzlement 🔑49

That verdicts of jury finding secretary of irrigation district guilty of fraudulent appropriation of property as a public officer and of grand theft omitted a showing of amount of money allegedly stolen or appropriated was not error. Pen.Code, § 504.

18. Embezzlement 🔑48(1)

In prosecution of irrigation district secretary for fraudulent appropriation of property as a public officer and for grand theft, an instruction concerning illegality of directors or officers being interested in contracts of district was proper for jury's consideration, where jury was warned, in following instruction, that secretary was not being tried or charged under such law. Pen.Code, § 504.

19. False pretenses 🔑52

In cases of grand theft involving the elements of obtaining money or property by false pretenses, the jury must be instructed as to statute requiring corroboration of testimony. Pen.Code, § 1110.

20. Embezzlement 🔑48(1)

In prosecution of irrigation district's secretary for grand theft by appropriating an interest in land, refusing defendant's instruction embodying language of statute requiring corroboration of testimony in cases of grand theft involving elements of obtaining money or property by false pretenses was not error, where defendant did not obtain interest in land by false pretense, but apparently unlawfully appropriated interest after it had been assigned to him. Pen. Code, §§ 504, 1110.

◆

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

H. M. Tennant was convicted for fraudulent appropriation of property by a public officer and for grand theft, and he appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

E. H. Zion, of Modesto, and Harold L. Hjelm, of Turlock, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

ROSS, Justice pro tem., delivered the opinion of the court.

Appellant was convicted on three counts of an indictment, the first and third being for fraudulent appropriation of property by a public officer, and the second, for grand theft. This appeal is taken from the judgment of conviction and order denying a new trial.

Appellant was assessor and secretary of Oakdale Irrigation District. As such secretary, he did much of the actual work of carrying on the business of the district, the directors relying on him and ratifying his acts, deals and negotiations.

About June 15, 1936, appellant had a deal with one Clyde Boothe for the purchase by the latter of a piece of land belonging to the district. The directors had stated to appellant that they wanted at least $30 per acre for this land, and there had also been some discussion about reserving and selling separately a barn on the premises. Appellant asked Boothe a price of $35 per acre, and Boothe accepted. Then appellant told Boothe that the barn was to be reserved, and to avoid losing it, Boothe agreed to furnish materials sufficient to build a similar barn elsewhere. The deal was reported by appellant to the directors of the district, and a contract was made by them to sell the land to Boothe for $35 per acre, but nothing was told the directors about the materials to be furnished, and nothing was put in the contract about said matter. Later, at appellant's direction, lumber and corrugated iron was furnished on Boothe's order by certain dealers, and hauled to appellant's own ranch, and used in the construction of a barn thereon. There is some dispute as to whether Boothe knew, at the time of the deal, that the materials to be furnished by him were to be delivered to appellant personally or not.

Over a year later appellant called on Boothe and stated that some argument or "mud-slinging" had occurred about the deal, and wanted a written statement from Boothe showing the deal to have been regular. Boothe refused this, and learned for the first time, he testified, that appellant had not paid the district for the materials for the barn. Boothe got in touch with the directors, and appeared at a public meeting of the board to make a statement about the deal. As he started to do so, appellant had a heart attack, but was revived, and Boothe made his statement.

The first count of the indictment charges appellant, as a public officer, with fraudulently appropriating the $921 worth of materials furnished by Boothe, a violation of section 504, Penal Code.

In June, 1935, appellant had had some correspondence with one E. K. Allison, who had a contract of purchase on 105 acres of land adjoining appellant's own ranch. Allison had paid $515 down on his land in August, 1934, and there were instalments due each August thereafter until the purchase price should be paid in full. Apparently Allison was willing to assign his interest for $300, and appellant wrote to him at Allison's home in Bellflower, California, stating that appellant would buy it if he could get a government loan to develop the land, and enclosing an assignment with directions to execute it and return it to an Oakdale bank for delivery to appellant on payment of $300. Allison executed the assignment and directed his wife to send it directly to appellant instead of to the bank, which was done. Apparently the assignment was made to appellant, his wife and son, as joint tenants, and was attached to the Allison contract by appellant.

According to Allison he heard nothing more about the $300 and in August, 1935, he stopped at Oakdale while on the way home from a vacation trip, and inquired of appellant about the deal, and was told by appellant that he, appellant, had been unable to get a government loan because the title to the property was not clear, and that the deal had therefore not been consummated. Allison called to get his papers from the Oakdale bank and found they were not there, but gave up the matter and went home. He testified: "I figured I was beat out of my $515.00, or ranch, whatever you may call it. Told them they could take it."

This deal with Allison is the basis of count two of the indictment for grand theft, the stealing of an interest in real property of the value of $300. Later, in October, 1936, one Andy Wells desired to purchase 73 acres out of the 105 Allison acres, and appellant secured a price of $45 per acre from him, telling Wells that this was his individual piece of land. In collecting the purchase price appellant had Wells make two checks, one to the Oakdale Irrigation District for $1,500.21, and one to the First National Bank of Oakdale for $1,293.23. These checks made up the purchase price, less 5 per cent reduction for cash and a reduction for taxes. The check to the Oakdale Bank was credited to appellant's account therein, except a portion which was applied on a note owned by him. The district received the other check, and the directors in due time, by resolution duly passed, conveyed the 73 acres to Wells. No payments of the instalments on Allison's contract had been made by anyone in either August, 1935, or August, 1936, and this payment of $1,500.21 was the unpaid amount due on Allison's contract for the 73.11 acres covered. The appropriation by appellant of the $1,293.23 paid by Wells is the basis for count three of the indictment, also under section 504, Penal Code.

[1] Appellant contends that the evidence does not justify a conviction on any of the three counts. We hold that it is sufficient on each.

[2, 3] As to count one, appellant did receive the materials for a barn, as a public officer. The district was entitled to the whole consideration paid by Boothe for his parcel of land, either money or materials, and, although appellant had neither the right nor power to receive the materials, he did so, and was obligated by his trust to the district to deliver them to said district. His failure to do so was a

fraudulent appropriation under section 504 of the Penal Code. Likewise, as to count three, the district was entitled to the whole consideration paid by Wells for his land, and when appellant received the benefit of the check for $1,293.23 he was obligated under his trust as an official of the district to turn it in. Instead, he fraudulently appropriated it. The land belonged to the district; not to him. In spite of the assignment from Allison, the instalment payments had not been made, and he had no right to sell to Wells.

[4, 5] As to count two, it is apparent that appellant appropriated to his own use the interest in the 105 acres which Allison had. He got possession of the assignment, and secretly appropriated it, later deceiving Allison into believing that he had not done so, that the latter might be discouraged and throw up the whole deal, as he actually did. There is no merit in the contention that because the assignment was to appellant, and to his wife and son, as joint tenants, the only value of the interest taken would be one-third of Allison's interest. The whole of Allison's interest was taken by appellant, and his sharing it with his wife and son does not make it less. The jury were fully instructed as to the limit necessary for a charge of grand theft, and impliedly found the value here to be more than $200, which is amply supported by the proof.

[6] The day the trial of this action started a new jury panel was to be used, and the trial judge had directed its members to be present in court a half hour before the usual court time, at which time the trial was noticed to commence. The trial judge then gave the assembled veniremen a short summary of the general duties of jurors. The appellant was not present, although one of his counsel happened to be in the courtroom. This outline of duties by the trial judge, although unusual, is apparently within the inherent power of the court in controlling its proceedings. The court said: "This is not intended, nor shall it be considered by you as being an instruction in any case, but merely an outline of your duties for the purpose of assisting you in the discharge of your present office."

[7] Included in the court's statement are the following passages, to which appellant objects:

"You will disregard all remarks or statements made by attorneys, or any other person unless made under oath, relative to the truth or falsity of any fact presented during the trial."

* * * * * *

"I therefore, suggest that you pay strict attention to any such comments as may be made by the court, and adopt them insofar as possible to your views on the matters commented upon."

* * * * * *

Referring to the presumption of innocence, the court said it was "in the nature of a cloak of protection for persons charged with crime, and should abide with you throughout the trial of a criminal case. You should not, however, be unduly influenced thereby".

All of these statements were proper as parts of a general outline of jury duty. In the instant case a jury satisfactory to appellant was thereafter selected from this venire after exhaustive voir dire examination, and proper instructions on the law applicable to this action were given to that jury at the conclusion of the trial. No comment on the evidence was made by the trial judge herein.

[8, 9] Appellant made three objections to the selection of the jury. First, it appeared that the sheriff's return had mistakenly shown a personal service of the veniremen, and this was amended, by leave of court, to show service by registered mail. This was perfectly legal and proper. It was also proper to file the venire summons and sheriff's return thereon in the clerk's office. This was a return to the court.

[10, 11] Appellant complains also that the jury list from which this venire was drawn was not properly selected in that there were some disproportionate allotments of names to various precincts to the number of registered voters therein. As said in People v. Crossan, 87 Cal.App. 5, 261 P. 531, the provision of section 206, Code of Civil Procedure that names of jury lists shall be selected from different wards or townships of counties in proportion to the number of inhabitants, as nearly as can be estimated, is directory only. In the instant case there is certainly no abuse of discretion shown on the part of the board of supervisors in selecting the lists, and appellant has no just cause of complaint, especially where a jury satis-

factory to both parties was chosen from the particular venire.

[12] It was not error for the court to excuse the jurors from the courtroom while trying the challenge to the panel. This matter was addressed to the court only and the jury's presence was not necessary.

[13-15] As to the grand jury which presented the indictment in the instant case, appellant complains that there appears to be no proper order on record listing the names of prospective grand jurors for 1937, and that therefore this grand jury lacked authority to act in any matter. Appellant states that the record shows only a sheet of paper in the clerk's office reciting that such an order was made, and listing the names of those on the grand jury list for the year, but that it is not signed by either the court or clerk. There should be a court order under section 204, Code of Civil Procedure, in January of each year, designating the number of trial and grand jurors to be required, and listing the names of prospective grand jurors. Apparently, such order was made here, and if the minutes fail to show it, they could be corrected. The court had judicial knowledge of its own proceedings, and, apparently being convinced that the grand jury had been properly listed and drawn, properly denied the motion to set aside the indictment, as far as that ground was concerned. Likewise, neither the indictment nor record of the grand jury need affirmatively show that biased members of the grand jury were asked to retire, or that at least twelve members voted for the indictment. The presenting of the indictment, endorsed as a true bill by its foreman to the court by the grand jury in its own presence, indicates the regularity of all the prior proceedings of that body in the matter.

[16] The demurrer to the indictment was properly overruled. The facts stated in each count properly allege a public offense.

[17] The verdicts of the jury show a finding that the appellant is guilty of each of the three offenses as alleged in the indictment. The fact that they omit a showing of the amount of money allegedly stolen or appropriated is not error.

[18] The instructions given, which are complained of by appellant, were all proper. Several of them are general statements of the law concerning irrigation district affairs. That concerning the illegality of directors or officers being interested in contracts of the district was a proper statement for the jury's consideration, as the jury was warned in the following instruction that appellant was not being tried or charged under this law, and that they must not consider him as so charged. Some of the instructions may have been superfluous, but they were in no way prejudicial.

[19, 20] Appellant complains of the refusal to give a requested instruction embodying the language of section 1110, Penal Code, as applicable to count two of the indictment. The cases of People v. Carter, 131 Cal.App. 177, 21 P.2d 129, and People v. Curran, 24 Cal.App.2d 673, 75 P.2d 1090, are authority for the proposition that in cases of grand theft involving the elements of obtaining money or property by false pretenses, the jury must be instructed as to section 1110, Penal Code, requiring corroboration of testimony. However, false pretenses are not an element herein. The appellant, by accepting the assignment by Allison, which he had no legal right to accept, took the interest in the real property, and his only false pretense was in later deceiving Allison into thinking that he had not taken the assignment, but that Allison still had an equity in land to which the title was not good, and on which he must keep up his instalment payments to protect it. In other words, this was not a case of obtaining the interest in the land by any false pretense, but of unlawfully appropriating said interest to his own use, secretly, and section 1110, Pen. Code, does not apply.

The interests of appellant were zealously guarded throughout the trial of this case, and there appear to be no prejudicial errors. From a consideration of the whole case the court finds the convictions on each count of the indictment amply justified.

The judgment and order are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

31 Cal.App.2d 723

PEOPLE v. TAYLOR.

Cr. 521.

District Court of Appeal, Fourth District, California.

March 28, 1939.

Hearing Denied by Supreme Court April 27, 1939.

1. Criminal law 🔑1186(4)

In sodomy prosecution, exclusion of evidence given at preliminary hearing, intended to impeach testimony of 7 year old victim, as to kind of clothing worn by person who molested victim, although error, was not reversible, where other evidence of identity was so strong that admission of excluded evidence could not have changed result. Pen.Code, §§ 286, 288, 288a; Const. art. 6, § 4½.

2. Criminal law 🔑823(1)

An instruction that if jury believed accused had made false statements as to facts on which charges were based, knowing them to be false, such could be considered as bearing on question of guilt, was not error in view of other instructions, as against contention that instruction singled out accused and placed greater emphasis upon possibility of his testimony being false.

3. Criminal law 🔑1186(4)

The refusal of instruction that jurors were not bound to decide in conformity with any number of witnesses which did not produce conviction in their minds as against a less number of witnesses or against a presumption or other evidence, although error, was not prejudicial in view of given instructions. Code Civ.Proc. § 2061, subd. 2; Const. art. 6, § 4½.

4. Criminal law 🔑46

The statute, excepting from those capable of committing crimes, "persons who committed the act charged without being conscious thereof," was not intended to include insanity, which is covered by other statutes, or temporary interference with functioning of the mental faculties which results from voluntary intoxication. Pen.Code, §§ 22, 26, subd. 5.

5. Infants 🔑20

The statutory crime of committing a lewd or lascivious act upon or with the body of a child under the age of 14 years involves a specific intent. Pen.Code, § 288.

6. Criminal law 🔑1158(1)

The Court of Appeal does not consider weight of evidence.

7. Sodomy 🔑6

Evidence sustained conviction for crime against nature. Pen.Code, §§ 286, 288, 288a.

Appeal from Superior Court, Kern County; H. E. Schmidt, Judge.

Leroy Taylor was convicted of violating sections 286, 288, and 288a of the Penal Code, and he appeals.

Affirmed.

Earle M. Daniels, W. Eugene Craven, and Ward Sullivan, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Thomas Scott, Dist. Atty., and Norman F. Main, Deputy Dist. Atty., both of Bakersfield, for the People.

BARNARD, Presiding Justice.

The defendant was charged, in separate counts, with violations of sections 286, 288 and 288a of the Penal Code. A jury found him guilty on each count and he has appealed from the judgment and an order denying a new trial.

On August 16, 1938, the appellant registered at a hotel in Bakersfield and was given room 97. A swimming pool was operated in connection with the hotel and some new cottages were under construction on a portion of the hotel grounds. A man named Best and a man named Cuevas joined the appellant that afternoon and the appellant and Best spent most of the afternoon in the swimming pool, going frequently to the appellant's room where the two consumed four-fifths of a quart of whiskey. The appellant testified that he drank more than Best did but Cuevas testified that the two shared it equally. A number of other people were using the pool and the appellant made himself conspicuous to the extent that the life guard cautioned him twice and later asked him to take Best away. The life guard testified that Best was under the influence of liquor but that the appellant was not, and that they left the pool about 4 o'clock. Shortly before 5 the appellant took his friends home in his automobile, first going to Best's home and then to Cuevas' home. Cuevas testified that they arrived at his home about 5 o'clock; that the appellant told him that he was going to return to the hotel to change his clothes; that when he left him he walked all right, drove the car all right, and his talk was normal and rational; and that when he left he said: "So long, see you later."

The appellant testified that when they reached Cuevas' home he stayed and talked to Cuevas for about five minutes but did not enter the house because he "wasn't feeling too good". He testified that the next thing he remembered was walking into a restaurant at 12 minutes to 7; that he ordered some coffee, ordered his dinner and made a telephone call at 7 o'clock; that he did not know where he had been from the time he left Cuevas until 12 minutes to 7; that after eating his dinner he went outside and started to look for his car; that at that time he did not know where his car was; that he later saw his car a block east and three-fourths of a block south of the restaurant; and that he then drove to Cuevas' house and remained with him until about 10:30, when he returned to his room at the hotel.

The proprietor of the hotel lived across the street from it. His son, David, who was then 7 years and 2 months old, had spent the afternoon in and around the swimming pool. An employee of the hotel testified that on three different occasions that afternoon he had seen the appellant pick up David and make believe he was going to throw him into the pool. The life guard testified that David left the pool at exactly 10 minutes after 5. David testified that when he left the swimming pool he went over to where the new cottages were under construction; that when he got there another boy, "Toddy", who was 9 years old, came across the street to play with him; that he and Toddy were climbing up on a platform and jumping into some sand; that while they were doing this the appellant came over and talked to them; that the first thing he remembered the appellant saying was "Let's see who has the best sunburn," that he and the appellant walked over toward the new cottages; that Toddy would not go, so he went back to the platform; that after a little while Toddy's mother called him and he went home; that the appellant then "tried to coax me over again, so I went over to" about the same place where the appellant had gone before; that the appellant said, "This room looked like a good one" and went in about three steps; that he did not go in and the appellant came out; and that as he was walking along the porch the appellant "came and picked me up and took me into this last room". He then described certain acts which there occurred, and upon which these charges are based. With one exception, hereafter noted, no contention is made that the evidence is not sufficient to sustain the verdict and judgment.

Toddy testified that he was playing with David on the platform in front of the new cottages toward the end of this afternoon; that he saw the appellant there; that the appellant said: "Who has the best sunburn?"; that the defendant then said: "Let's go look in one of these cottages," that he did not go; that David went and then came back; that he said: "Im not going, David," that David replied, "Then I'm not either," that the appellant went over to the cottages and then came back to where he was standing; that his mother called him and he went home; that at that time David was jumping from the platform and the appellant was near by; that after he had eaten his supper he came back to the platform; that he was gone about 30 or 40 minutes and then came back; that when he saw David was not at the platform he went over toward the cottages; that from where he stood he could see the door of the last cottage; that David came out from the last cottage and was crying; that David went home; that after David came out of the door he saw the appellant come out of it; and that when David came out of the door he said: "Keep away from there, there is a man in there."

The father and mother of David testified that they were eating dinner and that about a quarter after 6 David came in crying hysterically. He told his mother what had occurred and she examined his body and called his father, who also examined him. He was taken to a doctor, who testified as to what he found. Officers who were called were given a description of the appellant by David, Toddy and the life guard. They searched room 97 and, among other things, found an empty whiskey bottle, a white polo shirt, a pair of white linen trousers and a pair of white shoes with brown saddles.

When the appellant returned to his room shortly before 11 o'clock the officers took him across the street to the home of David's father. Both David and Toddy were brought in to look at the appellant and then taken out where they had a conversation with the officers. What was said is not in the record, but shortly thereafter the appellant was arrested and was, in effect, told that it was for these offenses. An officer testified that the appellant told him that he did not know whether he had done such a thing; that he could not remember anything from the time he left the hotel shortly before 5 o'clock to take two acquaintances home until 7 o'clock when he came to himself in a restaurant; that he said he was so drunk he could not remember where he left his automobile and had to look for it around the streets and finally found it; that the appellant said, "he had no recollection of having molested the boy, but that if the boy said he did and the evidence pointed to him, he guessed he must have done it", and that at the time they arrested him the appellant was perfectly sober. A maid employed at the hotel testified that she saw the appellant between 5 and 6 o'clock on that afternoon near his room, at which time he asked her for a bath towel.

[1] The first assignment of error is that the court erred in refusing to permit the appellant to attempt to impeach the testimony of David with respect to the kind of clothing worn by the person he said had molested him, by reading to the jury inconsistent statements made by David in his testimony at the preliminary hearing. At the trial, in December, 1938, David testified that on August 16, when the events in question transpired, the appellant did not wear glasses, that he had on a pair of shoes and a white polo shirt. By way of impeachment the appellant sought to introduce the record of David's testimony at the preliminary hearing held on September 15, 1938, during the course of which he had answered questions as to whether at that time the appellant wore glasses, whether he had on a pair of shoes or a pair of slippers, and whether he had on a white shirt or a gray shirt, by saying "I forget." The proffered evidence was excluded, the court sustaining an objection on the ground "There is no inconsistency." The clothing found in appellant's room was introduced in evidence and corresponded to the description given by David at the trial. The fact that he could then describe it but could not at the time of the preliminary hearing, several months before, constituted an inconsistency in his testimony, at least in the absence of an explanation. It appears to us beyond question that the evidence was admissible and that its exclusion was error. Perhaps that error would be sufficient, in spite of the provisions of section 4½ of article 6 of the Constitution, to justify a reversal in a close case, as to the identity of the one who committed a crime, where the question of identity rested largely upon a description of the clothing worn by the party. People v. Turner, 118 Cal. 324, 50 P. 537.

The clothing here in question was only a part of the means of identification available to David. David positively identified the appellant and Toddy, who saw them both emerge from the room, also identified him. The maid saw him there between 5 and 6 o'clock and the life guard identified him as being there in the afternoon. All of these witnesses had had a rather unusual opportunity to observe him and two of them had seen him over a period of two hours when all he had on was swimming trunks. Two of these witnesses, aside from David, had seen him in the hotel grounds between 5 and 6 o'clock, after he had left Cuevas, to whom he said he was returning to the hotel to change his clothes. The appellant himself did not deny that he was there at the time the crime was committed but claimed he was unable to remember anything that occurred from the time he left Cuevas' home until he entered the restaurant. He had told Cuevas he was going to return to the hotel and when he left Cuevas he was able to walk and drive all right and his talk was rational. He seems to have been able to drive his car a considerable distance and to park it in downtown Bakersfield. While he says he could not remember where he left his car he seems to have had little trouble in finding it a couple of blocks from the restaurant. Regardless of the plain inconsistency in David's testimony on these two occasions, with respect to a description of the clothes, there is such strong evidence of the identity of the appellant that it cannot be conceived that the admission of the rejected testimony would have changed the result. We are far from convinced that a miscarriage of justice has occurred in this respect, and we therefore hold that this error is not sufficiently prejudicial to justify a reversal. People v. Hale, 64 Cal.App. 523, 222 P. 148.

[2] Complaint is next made of an instruction given by the court to the effect that false statements made by a defendant are admitted in evidence as tending to show consciousness of guilt and that if the jury believed beyond a reasonable doubt that this defendant had made false state-

ments as to the facts on which the charges in this case were based, knowing them to be false, the same, although not conclusive as to his guilt, might be taken as strengthening the inferences of guilt, if any, arising from other portions of the evidence. It is argued that this instruction singled out the appellant from other witnesses and placed greater emphasis upon the possibility of his testimony being false, and that it failed to inform the jury that any such false statement must relate to some material matter connected with the offenses of which he was charged. The instruction related to evidence which was before the jury, the jury was not told that a different rule applied to the appellant than that governing other witnesses, the jury was elsewhere instructed that any witness wilfully false in one part of his testimony was to be distrusted in others, and the instruction particularly pointed out that any such false statements must relate to the facts on which the charges were based.

[3] It is next contended that the court erred in refusing to give an instruction requested by the appellant to the effect that the jurors were not bound to decide in conformity with any number of witnesses which did not produce conviction in their minds as against a less number of witnesses or against a presumption, or against other evidence satisfying their minds. This was refused and marked "Covered elsewhere". It does not appear that the contents of this instruction were in terms given in any other instruction, although subdivision 2 of section 2061 of the Code of Civil Procedure provides that a jury is to be so instructed on all proper occasions. It does appear that the court gave all of the usual instructions on presumption of innocence, giving the defendant the benefit of that presumption, the burden of proof, and that the members of the jury are the sole judges of the evidence, having the duty of weighing the evidence and determining the credibility of the witnesses. The court also instructed the jury as follows:

"You are instructed that you are the sole judge of the credit to be given to the testimony of the different witnesses. You are not bound to believe anything to be a fact merely because a witness states it to be so, provided you believe from the evidence that such witness is mistaken, or has knowingly testified falsely.

"You are further instructed that you are the exclusive judges of the credibility of the witnesses who have testified, and that you have the right to determine, from their character and conduct, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor, fairness and intelligence, their relation to the parties, their apparent bias or impartiality, the strength or weakness of their recollection, and from all other circumstances in the case appearing on the trial, which witnesses are worthy of credit, and to give credit accordingly."

In People v. Maughs, 8 Cal.App. 107, 96 P. 407, 414, in discussing an ambiguous instruction along the line of the one here requested and refused, the court said: "The instruction is based on subdivision 2 of section 2061 of the Code of Civil Procedure, and when given in the exact language of the section, as it should be given if at all, involves a mere commonplace. It ought not to be necessary to tell a jury composed of men of average intelligence that they need not accept the testimony of any number of witnesses if such testimony does not convince them of the truth of the fact to which it relates, and this is in effect all that the language of the subdivision of the section from which the instruction was taken declares. We cannot perceive how the appellant could have been prejudiced by the instruction as given."

This instruction should have been given. However, the jurors were instructed that they were to determine which witnesses were worthy of credit, and that they were not bound to accept anything as a fact merely because a witness stated it to be so. The jury must have understood that if they were not bound by the testimony of any witness they were not bound by the testimony of any number of witnesses. Under the circumstances here appearing, it is not reasonable to believe that any prejudice resulted to the appellant from the failure to give this instruction, and a reading of the entire transcript confirms this impression.

[4] The appellant next assigns as error the refusal to give two instructions requested by him. The first of these was to the effect that the defendant was not capable of committing the crime charged and must be found not guilty, in the event the jury found that at the time of the

commission of the alleged crime or immediately prior thereto he "had been drinking intoxicating liquor and if you further find that by reason of said intoxication the defendant was not conscious of his acts at the time that he is alleged to have committed the crime of 288 P.C.". The second instruction is to the effect that no person may be convicted of a crime which was committed while such person was in an unconscious condition, and that if the jury believed from the evidence that a crime had been committed by the defendant but reasonable doubt existed in their minds as to whether or not the defendant was conscious of his acts in relation to the commission of the offense, he must be found not guilty. It is contended that the appellant was entitled to these instructions under subdivision 5 of section 26 of the Penal Code, which includes "persons who committed the act charged without being conscious thereof" among those persons who are not capable of committing a crime. Subdivision 5 of section 26 was not meant to cover insanity, which is covered elsewhere. People v. Methever, 132 Cal. 326, 64 P. 481. Also, it was not meant to cover that temporary interference with the functioning of the mental faculties which results from voluntary intoxication, which is covered and governed by section 22 of the Penal Code. In People v. Lim Dum Dong, 26 Cal.App.2d 135, 78 P.2d 1026, 1028, the court said: "Under the provisions of section 22 of the Penal Code the rule is well established in California that temporary aberration of the mind caused by voluntary intoxication induced by excessive use of liquor or narcotics is not a valid defense to a charge of crime. To relieve one of responsibility for the commission of an offense on the ground of voluntary intoxication from the effect of liquor or narcotics, it is necessary to prove that the brain has become permanently affected thereby. People v. Hower, 151 Cal. 638, 91 P. 507, 508; People v. Fellows, 122 Cal. 233, 54 P. 830; People v. Bremer, 24 Cal.App. 315, 141 P. 222; People v. Goodrum, 31 Cal.App. 430, 160 P. 690."

And, also:

"The court properly refused to give to the jury the defendant's proposed instruction as follows:

" 'You are instructed that if you find that defendant committed the act charged in the information, without being conscious thereof, then he was incapable of commiting a crime; and your verdict should be that defendant was insane at the time the offense was committed.'

"As it was said in the Hower Case, supra, the preceding proffered instruction omits the necessary element of consciousness of the nature of an act which is the result of voluntary intoxication or temporary mental derangement caused by an inordinate use of narcotics. The instruction should have indicated to the jury that the lack of consciousness of the nature of the act which would relieve the defendant from responsibility must have resulted from permanent insanity as distinguished from temporary insanity caused by the defendant's voluntary use of morphine or cocaine."

[5] The violation of section 288 of the Penal Code, as charged in count I of the information, involved a specific intent. In three instructions which were given the court fully and correctly instructed the jury as to the law in this respect, in one of which the provisions of section 22 of the Penal Code were substantially repeated. No error appears in this connection.

[6, 7] The final contention is that the evidence is legally insufficient to support the verdict and judgment upon count II of the information, charging a violation of section 286 of the Penal Code. Without reviewing the evidence it is sufficient here to say that this contention is based upon one portion of the testimony given by David and one portion of the testimony given by the physician who examined him shortly after the offense was committed. The arguments here made go only to the weight of the evidence and have no place here. No doubt they were presented to the jury and, if so, it is not surprising that the jury did not accept them as controlling. The evidence in this regard, in its entirety, is amply sufficient to support the verdict and judgment.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

32 Cal.App.2d 24

PEOPLE v. MIRANDA.

Cr. 2029.

District Court of Appeal, First District, Division 2, California.

March 30, 1939.

Criminal law ⇨1182

Where no opening appeal brief had been filed on a date long after District Court of Appeal, which had twice continued the cause at accused's request, had ordered counsel for accused to file opening brief, and examination of the record disclosed no prejudicial error, conviction was affirmed.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Enrique Miranda was convicted of violating statute relating to crimes against children, Pen.Code, § 288, and violating the statute relating to contributing to delinquency of a minor, St.1937, p. 1033, § 702, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant was charged by information with a violation of section 288 of the Penal Code and a violation of section 702 of the Welfare and Institutions Code, St.1937, p. 1033. He entered a plea of not guilty as to each count and was tried by a jury. The jury returned a verdict of guilty as to each count. Defendant appeals from the judgment of conviction and the order denying his motion for new trial.

The transcript was filed on July 6, 1938. The cause was placed on the calendar for September 12, 1938, and was continued at that time at the request of counsel for appellant. The cause was again on the calendar on October 10, 1938, and was again continued at the request of counsel for appellant. When the cause was called for the third time on December 12, 1938, counsel for appellant requested further time to file his opening brief. It was then ordered that counsel for appellant be granted fifteen days to file his opening brief, that respondent be granted fifteen days thereafter to file a reply brief and that the cause should then stand submitted. No further extension of time for filing appellant's opening brief has been requested or granted. No brief has been filed on behalf of appellant and the time for filing the same has long since expired. We believe this court would be justified under the circumstances in treating the appeal as abandoned by appellant and in dismissing the same. We have nevertheless examined the record and our examination discloses no prejudicial error therein.

The judgment and order denying the motion for new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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34 Cal.App.2d Supp. 733

SUNSET REALTY CO. v. DADMUN.
Appeal of WOODS.

Civ. A 4212.

Appellate Department, Superior Court, Los Angeles County, California.

March 31, 1939.

1. Garnishment ⇨209

The filing of third party claim is not authorized by statute when debt is subject of garnishment, whether by attachment or under writ of execution. Code Civ.Proc. § 689.

2. Sheriffs and constables ⇨90

One of main purposes of statute, providing for release of property levied on under execution, if plaintiff fails to give sheriff undertaking to indemnify third person filing claim thereto, and declaring sheriff not liable for damages to third person filing no claim, is to protect officer making levy from claims for damages by third parties. Code Civ.Proc. § 689.

3. Garnishment ⇨118

Plaintiff garnisheeing defendant's debtor, who failed to pay debt to officer levying writ, may press collection of debt without further proceedings, if garnisheed under attachment, or after following statute providing substitute for creditor's bill, if garnishment depends on levy of execution. Code Civ.Proc. §§ 544, 714 et seq.

4. Garnishment ⚷105

The right to collect garnisheed judgment debt passes to judgment creditor, not sheriff, and, when collected, it may immediately be credited on judgment.

5. Garnishment ⚷189

An officer levying execution neither owes duty nor has power to sell garnisheed debt or judgment therefor. Code Civ.Proc. § 716 et seq.

6. Judgment ⚷564(1)

A garnisheed debt merged into judgment retains its character as debt and is not to be regarded as judgment until latter is final.

7. Garnishment ⚷189

The statute requiring officer to execute writ of execution against judgment debtor's property by collecting or selling things in action does not authorize him to sell garnisheed debt. Code Civ.Proc. § 691.

8. Garnishment ⚷37, 38

A garnisheed "debt" is money owing by garnishee to defendant in main action, which may be paid over to sheriff levying execution on judgment therefor, while "credit" is something belonging to defendant, but in possession of and under control of garnishee, such as promissory note or other evidence of indebtedness, which may be delivered up or transferred to sheriff.

[Ed. Note.—For other definitions of "Credit" and "Debt," see Words & Phrases.]

◆

Appeal from Municipal Court of Los Angeles; Joseph Marchetti, Judge.

Action by the Sunset Realty Company against L. E. Dadmun, in which plaintiff filed a writ of attachment to garnishee any debt due defendant from Inez Watson and garnisheed a judgment for defendant against such debtor, after which Percival E. Woods filed a third party claim for moneys owing defendant by garnishee. From a judgment decreeing that title to garnisheed judgment was not vested in third party claimant, and an order denying the latter's motion to retax costs, he appeals.

Judgment reversed with directions, and appeal from order denying motion to retax costs dismissed.

P. E. Cavaney and L. E. Dadmun, both of Los Angeles, for appellant.

Goodman, Bachrack & Brownstone, of Los Angeles, for respondent.

BISHOP, Judge.

The defendant in the action which gives title to the proceeding under review, L. E. Dadmun, appears in two roles; he is a judgment debtor in the municipal court, and a judgment creditor, at least for the time being, in the superior court. The judgment in his favor is for $2892.75, costs and interest, the balance found to be due from Inez Watson, his judgment debtor, for the reasonable value of services rendered as her attorney. The judgment against L. E. Dadmun, as appears from the writ of execution involved in this proceeding, is $534.20. Before judgment was rendered against Inez Watson in the superior court, a writ of attachment from the municipal court was employed to garnishee for the plaintiff in our action any debt due and owing from Inez Watson to Dadmun. Thereafter the municipal court action and the superior court action each proceeded to judgment, and the plaintiff obtained a writ of execution upon its municipal court judgment and garnisheed the superior court judgment by the service of a notice upon the guardian of the property and person of Inez Watson, who had been adjudged an incompetent person as well as a debtor, which notice was to the effect that the marshal demanded all money or debts due or owing L. E. Dadmun as to the superior court judgment. At the time of the garnishment the superior court judgment had not become final, indeed an appeal from it is still pending.

Then a third party appeared, Percival E. Woods, who filed with the marshal a claim that prior to the attachment any moneys owing from Inez Watson to L. E. Dadmun had been assigned to him (Woods) and that a further confirming assignment had been given him by L. E. Dadmun after the superior court judgment was entered and before it was affected in any way by a writ of execution. Upon the petition of the plaintiff, a hearing was had upon this third party claim, as though authorized by section 689, Code of Civil Procedure, resulting in the judgment under review, in which it was decreed that when the writ was levied the title to the superior court judgment was not vested in the third party claimant.

[1] It is our conclusion that the judgment rendered in the third party claim proceeding must be reversed because section 689, Code of Civil Procedure, does not authorize the filing of a third party claim when a debt is the subject of a garnishment, whether by attachment or under a writ of execution. We have stated the problem as though we were concerned with a mere debt and not a debt reduced to judgment, with deliberation, for reasons which will appear. We are not passing upon either the validity or the priority of the claims of the parties.

[2] The answer to our problem, of course, depends in the last analysis upon the provisions of section 689 of the Code of Civil Procedure. Before turning to the provisions of that section, however, which are not couched in phrases so clear that no need for interpretation exists, it will be helpful to note its purpose. We need not here duplicate the sketch of the legislative history of section 689 which appears in First National Bank v. Kinslow, 1937, 8 Cal.2d 339, 343, 65 P.2d 796. As enacted and as amended, one of its main purposes was and is to give protection to the officer making the levy from claims for damages by third parties. Paden v. Goldbaum, 1894, 4 Cal.Unrep. 767, 37 P. 759; Brenot v. Robinson, 1895, 108 Cal. 143, 41 P. 37; Dubois v. Spinks, 1896, 114 Cal. 289, 46 P. 95; Kellogg v. Burr, 1899, 126 Cal. 38, 58 P. 306; Cory v. Cooper, 1931, 117 Cal. App. 495, 502, 4 P.2d 581; Rowland v. Bruton, 1932, 125 Cal.App. 697, 14 P.2d 116. It seems obvious to us that a marshal who has garnisheed an indebtedness, and nothing more, has no need of the protection afforded by section 689, certainly not unless and until the debt is paid to him as plaintiff's agent.

[3] If the debt is not paid to the levying officer, he has no further duty respecting it. The plaintiff, not the officer, is the one in a position to press the collection of the debt. This the plaintiff may do without further proceedings, if the debt has been garnisheed under attachment, section 544, Code of Civil Procedure; Finch v. Finch, 1909, 12 Cal.App. 274, 107 P. 594, 598; Marshall v. Wentz, 1915, 28 Cal.App. 540, 153 P. 244; Farmers' & Merchants' Bank v. Bank of Italy, 1932, 216 Cal. 452, 14 P.2d 527; after following the substitute for the creditor's bill found in section 714 et seq., Code of Civil Procedure, if the garnishment depends on the levy of a writ of execution. Herrlich v. Kaufmann, 1893, 99 Cal. 271, 33 P. 857, 37 Am.St.Rep. 50; Farmers' & Merchants' Bank v. Bank of Italy, supra.

[4, 5] When a load of hay is levied upon, in order that the purpose of the levy may be accomplished, it has to be sold, for the judgment creditor acquires no title to it. Moreover, a load of hay, as such, cannot be credited on a money judgment; it has to be converted into money before satisfaction can be measured. When a debt is garnisheed the right to collect it, as we have already noted, passes to the judgment creditor, not to the sheriff, and when collected it may at once be credited on the judgment. It would seem to follow that when a debt is the subject of garnishment there is no reason for the levying officer to proceed to sell the debt. We believe that the law, in harmony with reason, gives the levying officer neither the duty nor the power to sell a debt which has been garnisheed. As authority for this conclusion, we find a number of early supreme court cases, standing undisturbed and unchallenged, which stoutly hold that a judgment, when the subject of garnishment, may not be sold, the rationale of the decisions being that a judgment is after all but a debt, and a debt may not be sold on execution, but is collectible as provided by section 716 et seq., Code of Civil Procedure.

The first case we note is McBride v. Fallon, 1884, 65 Cal. 301, 4 P. 17, 18. This conclusion appears in the opinion: "* * a judgment cannot, in any case, be levied on and sold under execution * * *" In support of its decision, the supreme court pointed out that debts may be attached on execution in like manner as upon writs of attachment; that is, as prescribed by section 542, Code of Civil Procedure. The supreme court continued, 65 Cal. page 303, 4 P. page 18: "The fact that a debt is evidenced by a judgment does not, in our opinion, make it anything more or less than a debt, or more capable of manual delivery than it would be if not so evidenced. No provision is made for attaching or levying on *evidences* of debt. It is the debt itself which may be attached by writ of attachment, or 'on execution in like manner as upon writs of attachment.' This we think to be the meaning of the Code; and the mode prescribed by it is exclusive."

Another case recognizing that by garnishment of a "judgment" you lay hold on the debt it represents, but that there is no statutory provision to sell the judgment, because the statutory provisions respecting the garnishment of a debt do not authorize its sale, is Dore v. Dougherty, 1887, 72 Cal. 232, 13 P. 621, 1 Am.St.Rep. 48. Here we find Dore, a judgment debtor, paying the amount of his judgment, over $2100, into court and interpleading Dougherty, who claimed to be in the shoes of Dore's judgment creditor by virtue of an assignment of the judgment, and Miller, who claimed to be entitled to receive payment of the judgment by virtue of a garnishment of it and also by virtue of having purchased it when it was sold under execution. Miller, it appears, had a judgment against Dore's judgment creditor, and caused the judgment against Dore to be levied upon by the sheriff. The sheriff, we note for later purposes, left a copy of the writ with Dore, not with his judgment creditor, and a notice, all as required by section 542, Code of Civil Procedure, to make an effective garnishment upon the judgment and upon any other debts Dore might be owing his judgment creditor. The sheriff thereafter "sold" the judgment, Miller bidding it in for $20.

At the trial of the interpleader action, Miller endeavored, but was not permitted, to prove that the assignment to Dougherty was fraudulent, and the sum which represented the judgment was awarded to Dougherty. On appeal, the supreme court held that as a purchaser of the judgment Miller had no standing and could not attack the assignment, relying upon the case of McBride v. Fallon, supra, 65 Cal. 301, 4 P. 17, for its premise that a judgment which is garnisheed cannot thereafter be sold on execution. But the futility of having been a purchaser of the judgment at the execution sale did not end the case; the supreme court continuing said, 72 Cal. page 235, 13 P. page 622, 1 Am.St.Rep. 48: "Of course it is not denied that a judgment is property, or that it can be the subject of assignment. The ruling is based entirely upon the statute. And it seems to us that it necessarily follows that the debt was by the proceeding duly levied upon. Service of the writ and notice constituted what is usually called the process of garnishment. * * * This put Miller in the attitude of a creditor, and gave him the right to attack the assignment for fraud. * * *"

In Latham v. Blake, 1888, 77 Cal. 646, 18 P. 150, 20 P. 417, an attempted sale upon execution of a judgment was again held fruitless, the question being deemed concluded by McBride v. Fallon, supra. Referring to this case the supreme court said, 77 Cal. page 654, 18 P. page 152: "The decision does not expressly declare that the debt, of which the judgment is the evidence, may not be reached by execution, but plainly indicates that, if it can be so reached, it is only by the modes provided for reaching debts and credits, and other property not capable of manual delivery, which may be attached on execution in like manner as upon writs of attachment. Code Civil Proc. § 688. This character of property can only be attached as provided by subdivision 5 [now 6], § 542, Code Civil Proc.; that is, by leaving with the person owing such debts, etc., a copy of the writ, and a notice that the debts owing by him to the defendant are attached in pursuance of such writ."

In Hoxie v. Bryant, 1900, 131 Cal. 85, page 89, 63 P. 153, page 155, concluding that a promissory note could be sold on execution, the court had this to say: "The distinction between a judgment and a promissory note is plain. The judgment is a matter of record. It is the record evidence of the debt due by the judgment debtor. It is not capable of being taken out of the book where it is recorded and personally delivered. The sheriff cannot seize the judgment, take possession of it, and sell it."

We would have contented ourselves with merely citing these cases in support of the proposition which we are considering, that the marshal does not have the duty or the power to sell a debt which has been garnisheed, but for two fairly recent decisions, Meserve v. Superior Court, 1934, 2 Cal.App.2d 468, 38 P.2d 453, and Everts v. Will S. Fawcett Co., 1937, 24 Cal.App.2d 213, 74 P.2d 815. In the first of these it was decided that a defendant who had a judgment for costs on appeal, could levy upon and sell the interests of the plaintiff in the cause of action for breach of contract pending against the defendant. In the Everts case it was held that four pending causes of action for damages resulting from fraud were subject to levy and sale.

We are not shaken in our conclusion by either of these cases. In each, the debt, or cause of action, was not reached by garnishment, by service on the debtor of the judgment debtor, but the levy was claimed to have attached to the cause of action by service of notice upon the person who laid claim to the cause of action. In the Everts case the district court of appeal in its opinion lays stress on the distinction just made. In the Meserve case no mention is made of any of the supreme court cases we have cited in support of our thesis that a debt may not be levied upon and sold, possibly for the reason pointed out in the Everts case, where they are listed, that those cases are in point only where debts have been garnisheed, not where they have been seized from those to whom they are due. We are content to note that the debt involved in the proceeding before us was garnisheed; we need not speculate upon the authority for or effect of attaching a debt by serving notice on the creditor that the sum due him has been attached, for that procedure does not seem to have been followed here.

[6] We are not content to distinguish our case from the two just cited on the ground that they dealt with causes of action which had not yet been merged into a judgment, while the claim involved in our case had been, for the reason that for some purposes at least, until the judgment is final, the debt retains its character as a debt, and is not to be regarded as a judgment, Arp v. Blake, 1923, 63 Cal.App. 362, 218 P. 773; Pacific Gas & Electric Co. v. Nakano, Cal.Sup., 1939, 87 P.2d 700. In any event, as we have noted, the judgment is at best a new garb for the debt; it is the debt and not the garb in which we are interested.

[7, 8] It might be argued that a debt, being a chose in action, was authorized to be sold on execution by the mandate of section 691, Code of Civil Procedure: "The officer to whom the writ is directed, must execute the writ against the property of the judgment debtor, by * * * collecting or selling the things in action. * *" It is evident that this provision does not embrace all things in action, for the following reasons: The provision has been continuously in effect, since the days of the Practice Act; judgments are choses in action, Fore v. Manlove, 1861, 18 Cal. 436, 438; Haskins v. Jordan, 1898, 123 Cal. 157, 161, 55 P. 786; Anglo-California Trust Co. v. Oakland Rys., 1924, 193 Cal. 451, 469, 225 P. 452; and yet judgments, as we have seen, are not to be sold by the levying officer. In addition to cases already noted, see also Judnick v. Judnick, 1920, 47 Cal. App. 380, 382, 190 P. 480. Excluding debts which have been garnisheed from those things in action which the levying officer may sell does not rob "things in action" as used in section 691, of its function. Perhaps a clew to its meaning may be found in the cases holding that a garnishment of credits does not affect a debt. As stated in Gow v. Marshall, 1891, 90 Cal. 565, 568, 27 P. 422, 423: "A debt is money owing by the garnishee to the defendant which may be paid over to the sheriff, while credits are something belonging to the defendant, but in the possession and under the control of the garnishee, like promissory notes or other evidences of indebtedness of third parties, which may be delivered up or transferred to the sheriff." See also Clyne v. Easton, Eldridge & Co., 1905, 148 Cal. 287, 293, 83 P. 36, 113 Am.St.Rep. 253. Such things in action as come into the marshal's hands, it is his duty to collect or sell. Debts, which never get into his hands, he may not sell.

As we turn now to view the provisions of section 689 of the Code of Civil Procedure, we call attention to the case of First National Bank v. Kinslow, 1937, 8 Cal.2d 339, 65 P.2d 796, 799, in which our supreme court quoted the section at length, as it read after the 1933 amendments became effective, analyzed its provisions, and came to the conclusion that they did not authorize the filing of a third party claim when real estate was the subject of a levy, hence a judgment after a hearing on a third party claim was unauthorized and should be reversed. We shall have occasion to refer to this as the Kinslow case as we examine the provisions of the section, some of the terms of which have undergone some change, as will appear.

The opening words of the section are more limited than they were as considered in the Kinslow case, but still remain generic, not specific: "If personal property levied on is claimed by a third person as his property." In addition to requiring that the third party's claim shall set out his "right to the possession * * * of the property levied upon," the section now requires the third party to set forth the reasonable value of the property and the third party's title thereto. It is difficult to see how any one of these three matters becomes of moment in the situation created by the mere garnishment of a debt. Certainly the right to its possession is no more involved than is the right to the possession of real estate involved when a levy is made upon it, that is to say, not at all. See the Kinslow case. Perhaps it would be begging the question we are discussing to say that the reasonable value of, and title to, the debt are not brought into question. In any event, the contents required to be set forth in the claim which has to be filed with the levying officer are all matters which are of no interest to him where the only effect of his levy is to garnishee a debt.

In the Kinslow case, the expressions "taking or keeping of such property" and "holding * * * such property" were said to be "not pertinent to any acts of an officer levying execution upon real property. He neither takes, keeps, nor holds real property after a levy thereon." We now have not only these, but other expressions: "Seizing, taking, withholding, or sale of such property"; "the taking, keeping or sale of such property"; "such officer shall hold the property"; "right * * * to have said property taken, or held, by the officer." In this connection, we quote from Herrlich v. Kaufmann, supra, 99 Cal. 271, 274, 33 P. 857, 858, 37 Am.St.Rep. 50; because of the words we emphasize: "Formerly, assets of a judgment debtor, *which could not be effectively seized by the sheriff under an execution, such as a debt* owing to the defendant, could be reached, upon a proper showing, through a court of equity, by means of a creditor's bill or suit," and adopting the thought of the supreme court in the Kinslow case, we say: The expressions we have just quoted from section 689 are not pertinent to any acts of an officer garnisheeing a debt. He neither seizes, takes, holds, withholds, keeps or sells the debt. Nowhere in section 689, Code of Civil Procedure, do we find any language indicating that it had any reason to be or was intended to be applied when a debt had been subjected to garnishment.

So far as we are aware, the question we are deciding is one of first impression in this state. We find of significance, however, the silence of the supreme court in Bond v. Bulgheroni, 1932, 215 Cal. 7, 8 P.2d 130, where moneys in a bank had been attached and a third party claim to them filed with the sheriff. The judgment creditor brought a creditor's suit in equity, and the point in dispute was whether or not such a suit was open to him in view of the fact that he had not availed himself of his legal remedies. The particular legal remedy discussed was that prescribed by sections 714 to 722, inclusive, Code of Civil Procedure, and it was held that these granted inadequate relief because the bank deposit was claimed by a third party. It was not deemed worthy of discussion, seemingly, that the respective rights of the judgment creditor and the third party claimant to the debt which the bank apparently owed the judgment debtor, could be adjudicated in a hearing under section 689.

To avoid the possibility of a misunderstanding, let us say expressly that our conclusion that section 689 does not authorize the filing of a third party claim where a debt has been garnisheed, is not to be interpreted as a holding that when the debt has been paid to the levying officer the section does not become applicable. We have in mind Duncan v. Standard Accident Ins. Co., Cal.App., 1933, 27 P.2d 431, 433, in which a judgment was garnisheed and paid to the levying officer. It was first decided that one who claimed the judgment had been assigned to him could not rely upon his third party claim because section 689 was inapplicable to a garnishment proceeding even though the debt garnisheed had been paid to the levying officer. The supreme court, however, took the case over and held that it was error not to have permitted the appellant to prove his third party claim, 1934, 1 Cal.2d 385, 389, 35 P.2d 523.

We are thus led to the conclusion that the judgment appealed from should be, and so it is, reversed, with directions to the trial court to dismiss the third party hearing proceeding, appellant to have his costs on appeal. The appeal from the order denying the motion to retax costs is dismissed.

We concur: SHAW, P. J.; SCHAUER, J.

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